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BRIEFING

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Eleventh Circuit Holds That If Parties Wish To Allow Additional Grounds For Judicial Review Of Arbitral Award Beyond Those Provided In FAA, They Must Expressly Designate State Statutory Or Common Law Alternatives To FAA In Their Arbitration Agreement

SUMMARY: Generally, where the Federal Arbitration Act (9 U.S.C. § 1 *et seq.* ("FAA")) applies, a court may vacate an arbitration award only if at least one of four statutory grounds under 9 U.S.C. § 10(a) is satisfied, *i.e.*, where 1) the award was procured by corruption, fraud, or undue means; 2) where there was evident partiality or corruption by any of the arbitrators; 3) where the arbitrators were guilty of misconduct or misbehavior; or 4) where the arbitrators exceeded their powers or imperfectly executed them. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008). However, where an arbitration agreement provides that review of an arbitral award may take place under state statutory or common law, the Supreme Court held in *Hall Street* that the grounds for vacating an award may be expanded beyond those set forth in 9 U.S.C. § 10(a).

These were the issues addressed by the U.S. Court of Appeals for the Eleventh Circuit in *Campbell's Foliage, Inc. v. Federal Crop Insurance Corporation*, 2014 U.S. App. LEXIS 6132 (11th Cir. Apr. 3, 2014). In that case, Campbell's Foliage, a nursery, purchased Multiple Peril Crop Insurance ("MPCI") from Rural Community Insurance Company ("RCIC") to insure its crops against loss caused by excess moisture. The risk was underwritten by the Federal Crop Insurance Corporation ("FCIC") and managed by Risk Management Agency ("RMA"). After an "adverse weather event," Campbell's Foliage made a claim under its policy with RCIC. RCIC and RMA denied the claim because they concluded the policy was void.

Campbell's Foliage sued in federal court for breach of contract and a declaratory judgment. RCIC moved to compel arbitration pursuant to the arbitration clause of the MPCI policy. The district judge found that the clause fell within the FAA and granted RCIC's motion. The arbitrator determined that Campbell's Foliage had no coverage under the MPCI policy and ruled in favor of FCIC and RCIC.

Campbell's Foliage filed a motion in federal court seeking to vacate the arbitration award. Campbell's Foliage conceded that none of the statutory grounds under 9 U.S.C. § 10(a) were applicable, but contended that the MPCI policy's arbitration clause expanded the scope of judicial review beyond the grounds set forth in 9 U.S.C. § 10(a). The clause at issue stated:

> Any decision rendered in arbitration is binding on you and us unless judicial review is sought in accordance with section 20(b)(3). Notwithstanding any provision in the rules of [the American Arbitration Association], you and we have the right to judicial review of any decision rendered in the arbitration.

Campbell's Foliage argued this language meant that the arbitration was non-binding and that the court was authorized to review the entire arbitration award and all factual and legal determinations made by the arbitrator, essentially on a *de novo* basis. The district court denied Campbell's Foliage's motion

CONTINUED ON PAGE 2

Inside this Briefing

Arizona

Delaware

Illinois

Michigan

New Jersey

Pennsylvania

Washington, DC

West Virginia

Eleventh Circuit Holds That If Parties Wish To Allow Additional Grounds For Judicial Review Of Arbitral Award Beyond Those Provided In FAA, They Must Expressly Designate State Statutory Or Common Law Alternatives To FAA In Their Arbitration Agreement

CONTINUED FROM PAGE 1

to vacate, holding that the four statutory grounds in 9 U.S.C. § 10(a) are the only bases on which an arbitration award may be vacated. Relying on *Hall Street*, the court concluded that the phrase "judicial review" in the MPCI policy's arbitration clause meant the kind of limited review contemplated by 9 U.S.C. § 10(a). Since Campbell's Foliage had not raised any of the FAA's four statutory grounds for vacatur, the court found it was not entitled to relief.

Campell's Foliage appealed to the Eleventh Circuit, arguing the district court erred in holding that the four statutory grounds were the only bases on which the court could vacate the arbitration award. The appellate court first considered whether the dispute resolution mechanism in the MPCI policy constituted "FAA arbitration." In concluding that it did, the court relied on the fact that the arbitration clause called for the appointment of an independent adjudicator who was to consider evidence and argument and to apply substantive legal standards before rendering a decision awarding relief to resolve the rights and duties of the parties.

The court next addressed Campbell's Foliage's claim that the MPCI policy's arbitration clause empowered the court to reconsider and vacate the arbitral award. The Eleventh Circuit said that the Supreme Court held in *Hall Street* that 9 U.S.C. § 10(a) provided the FAA's exclusive grounds for vacatur and that parties may not supplement the statutory grounds by contract. The court noted that the Supreme Court had qualified its decision by saying section 10 did not exclude more "searching review" based on authority outside the FAA. The court quoted from the Supreme Court's decision as follows: "The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable." Nonetheless, the Eleventh Circuit noted that it had previously held the "manifest disregard of law" and "incorrect legal conclusion" grounds were no longer valid bases to vacate arbitral awards following *Hall Street*.

Campbell's Foliage contended that the arbitration clause of the MPCI policy provided for non-binding arbitration, which it asserted allowed more expansive judicial review of arbitration awards than was permitted under the FAA. The Eleventh Circuit rejected that position since the clause provided that "[a]ny decision rendered in arbitration is binding . . . unless judicial review is sought." The court held this language called for binding arbitration, subject to judicial review, which meant the arbitration agreed to by the parties was within the scope of the FAA.

Campbell's Foliage also argued that because the FCIC drafted the arbitration clause pursuant to the Federal Crop Insurance Act, the clause constituted "outside authority providing for more searching review." The Eleventh Circuit disagreed, holding that the MPCI policy "is a contract, and the Supreme Court did not mean a contract could provide an independent basis for the enforcement of an arbitration award." Rather, the court said, "[p]arties that want their arbitration agreements enforced by an authority that allows for more expansive judicial review must specifically designate such state statutory or common law alternatives to the FAA in their arbitration agreements." Because the FCIC did not designate state or common law as "the controlling law for enforcing arbitration awards," the "FAA alone applies to enforce the arbitration agreement" in the MPCI policy. Further, "[b]ecause Campbell's Foliage admits it did not move for vacatur based on any of the grounds listed in [9 U.S.C. § 10(a), the trial court] did not err by denying the motion to vacate the arbitration award[.]"

IMPORT OF DECISION: The general rule is that an arbitral award subject to the FAA may only be vacated on the grounds set forth in 9 U.S.C. § 10(a). Arbitration clauses occasionally, however, include language purporting to broaden the bases for judicial review. In *Hall Street*, the Supreme Court held that parties cannot by contract expand the grounds for vacating an arbitration award beyond those specified in the FAA, although the Court carved out an exception to this rule. The Court held that since the FAA is not the only basis on which parties may seek judicial review of arbitral awards, they may provide in their contracts for enforcement of awards under "state statutory or common law" where review of a different scope may be available. But to avail themselves of these alternatives, parties must expressly state in their contract that arbitral awards may be enforced under state statutory or common law, which authority should be specifically mentioned in the arbitration clause.

Declaratory Judgment Action Cannot Be Filed By Party Seeking Relief That Is Contrary To Its Economic Interests

SUMMARY: It seems axiomatic that a plaintiff would not file a lawsuit seeking a declaratory judgment that would be detrimental to its own financial interests. However, the plaintiff did just that in *Meisner Law Group, P.C. v. Krispin*, 2014 Mich. App. LEXIS 977 (May 27, 2014), a recent case decided by the Michigan Court of Appeals. In this case, a plaintiff law firm sued a former client and its officer after it was fired as counsel for the client. The law firm then filed a separate declaratory judgment action, seeking a declaration that the former client and officer were *not* entitled to insurance coverage for the claims asserted in the law firm's first lawsuit. Finding that the plaintiff did not allege an "actual controversy" as required for a valid declaratory judgment claim (and apparently unmoved by the law firm's retaliatory motive), the court dismissed the second lawsuit.

The Meisner firm was retained by Island Lake North Bay Association ("North Bay"), a condominium association, to represent it in a construction defect lawsuit against the condominium developer. Midway through the litigation against the developer, North Bay fired Meisner as its counsel. Meisner then brought a lawsuit (the "First Lawsuit") against North Bay and one of its officers, Krispin, alleging it was wrongfully terminated and that Krispin defamed Meisner and tortiously interfered with its relationship with North Bay. Upon being sued, North Bay tendered the First Lawsuit to Travelers, its commercial general liability insurer. Travelers agreed to defend both North Bay and Krispin under a reservation of rights.

After Travelers assumed the defense of North Bay and Krispin, Meisner filed a separate declaratory judgment action against Travelers, North Bay and Krispin (the "Second Lawsuit"). In the Second Lawsuit, Meisner asserted that its allegations in the First Lawsuit "are expressly excluded from coverage" under the Travelers' policy and requested a declaratory judgment from the court holding that Travelers had no duty to defend or indemnify North Bay or Krispin in the First Lawsuit.

Travelers moved to dismiss the Second Lawsuit, arguing that it did not allege an actual case or controversy, and instead was "a stratagem to extract further retribution . . . by attempting to ensure that Krispin and [North Bay] will be punished by having to pay their own defense costs and any judgment rendered against them . . . o*ut of their own pockets*." (Original emphasis.) The trial court agreed and dismissed the Second Lawsuit.

On appeal, the parties addressed whether Meisner's claims in the Second Lawsuit asserted valid grounds for a declaratory judgment. The Court of Appeals noted that declaratory judgments may only be entered by a court where an "actual controversy" is alleged, and that an "actual controversy" exists where a judgment is needed to guide the plaintiff's future conduct in order to "preserve" or "protect" its rights. Noting that the complaint in the Second Lawsuit expressly requested a declaration that Travelers had no obligation to provide a defense or indemnity to North Bay and Krispin, the Court of Appeals held that a "casual reading of the allegations" failed to identify an actual controversy.

According to the court:

> Meisner did not allege that it had a potential future right to seek payment under the policy that Travelers issued to North Bay and Krispin. Rather, it alleged that Travelers had *no obligation* to defend North Bay or Krispin and had *no obligation* to pay any judgment that Meisner might secure against them. . . . Meisner effectively pleaded that it had *no right* to seek enforcement of the policy. Once Meisner conceded that it has and will have no right to seek enforcement of the policy, it necessarily conceded that it had no standing to seek a declaration of rights concerning that policy.

(Original emphasis.)

The court further found that Meisner could not force Travelers to cease providing a defense or indemnity to North Bay and Krispin under the policy because, even if the court granted the declaratory relief sought by Meisner, Travelers could still "gratuitously" provide coverage to North Bay and Krispin. The court said: "Accordingly, one can only assume that Meisner has sought a declaration contrary to its own interests in order to cause Travelers – for whatever reason – to abandon its insured."

One issue not addressed by the Court of Appeals was whether Meisner could have validly asserted its claim for declaratory relief had it sought a judgment in favor of coverage for the First Lawsuit. Most likely, Meisner would not have been able to do so, as in Michigan, plaintiffs like Meisner typically do not have the ability to directly sue the defendant's liability insurer unless and until the plaintiff obtains a judgment against the defendant.

IMPORT OF DECISION: *Meisner* presents an unusual situation, where the plaintiff sought a declaratory judgment seeking relief that was contrary to its economic interests. If the court had granted the relief sought by Meisner, there would have been no indemnity coverage available under the Traveler's liability policy to satisfy any judgment Meisner might have obtained in the First Lawsuit. Further, the relief Meisner sought in the Second Lawsuit would have required North Bay and Krispin to pay their own defense costs in the First Lawsuit, thus potentially negatively impacting their ability to satisfy any subsequent judgment in Meisner's favor. Thus, while the Court of Appeals based its decision on Meisner's failure to allege an "actual controversy" under Michigan law, the decision also reflects an apparent desire by the court to discourage lawsuits, like Meisner's, that have a vindictive and retaliatory purpose.

Captive Industry Speaks Out On NAIC Committee's Proposed Definition Of "Multi-State Reinsurer"

On March 24, 2014 the NAIC's Financial Regulation Standards and Accreditation (F) Committee ("F Committee") released for comment proposed revisions to the definition of "multi-state reinsurer" contained in the preambles to Part A and Part B of the NAIC standards for state accreditation. Part A addresses laws and regulations governing "traditional insurers" and is designed to ensure that the accrediting jurisdiction has sufficient authority to effectively regulate a domestic multi-state insurance company. Part B is focused on regulations and regulatory practices and provides a base-line to supplement and implement a jurisdiction's financial solvency laws.

The revisions came about in response to comments made by John Torti, Insurance Commissioner for the State of Rhode Island, who expressed concern about the regulation of captive insurance companies involved in reinsuring life insurance and annuity business involving excess reserves (the so-called XXX and AXXX transactions). Torti's concern was that traditional multi-state insurers were avoiding scrutiny of certain transactions by ceding them to captives.

The proposed revisions would expose many captive arrangements to the full accreditation process that has to this point only applied to insurance companies. The revisions would both add a definition of multi-state insurer that would encompass many traditional non-life captive arrangements and strike language that would exempt these same types of arrangements from accreditation requirements.

The proposed definition states: "A multi-state reinsurer is an insurer assuming business that is directly written in more than one state and/or in any state other than its state of domicile. This includes but is not limited to captive insurers, special purpose vehicles and other entities assuming business." The proposal includes the following exception: "Captive insurers owned by non-insurance entities for the management of their own risk will continue to be exempted from both the Part A and Part B accreditation requirements."

F Committee received 34 comments which are overwhelmingly against the proposed changes. Nine different insurance departments (AZ, DE, DC, HI, NV, NC, UT, VT and WA) submitted comments, with eight of them against the proposed revisions. Only Washington State's insurance department supported the proposals. The captive industry was consistent in its objections. Two life insurance companies supported the revisions while one such company objected.

Most of the comments said the exception (quoted above) is unclear as to its exact scope and too narrow since it only exempts 100% pure captives. Also, it can be read as only applying to a captive owned by Company A that only insures/reinsures Company A's own risk and not risks from any other entity whether affiliated or not.

In its comments, the Captive Insurance Companies Association ("CICA") recommended that the proposed changes to the definition of "multi-state reinsurer" not be adopted because they would impose an unreasonable and unneeded regulatory burden on the captive industry. The CICA said the definition previously excluded "insurers that are licensed, accredited or operating in only their state of domicile but assuming business from insurers writing that business that is directly written in a different state." The CICA said the proposal would eliminate that exclusion and would define "multi-state reinsurers" to include insurers (and captives) assuming business that is directly written in more than one state.

Noting that the changes were designed to address the use of captives as reinsurance mechanisms by life and annuity insurers regarding excess reserves, the CICA said the proposed definition, which would be applicable not only to life captives but also to captives writing property and casualty risks, would sweep in numerous alternative risk structures that have nothing to do with life insurance.

The CICA also objected to the fact that the proposal would impose NAIC accreditation standards on most captive reinsurers, which are not necessary. The CICA asserted that captives, which reinsure risks written by their parents or affiliates, should not have to meet financial tests relating to non-life business designed to protect insureds who are members of the general public. This would impose an unnecessary financial burden that would greatly increase their costs of operation. Thus, the CICA said, the language should be revised to exclude non-life captives. The CICA also objected to the proposal to empower states other than the state of a captive's domicile to regulate the captive even though the captive only transacts insurance business in its own domicile.

Overall, the comments express four main concerns: 1) the revised definition is overly broad and leaves key terms undefined such that it would apply to many captives beyond those involved in XXX and AXXX transactions and would be subject to inconsistent interpretation and implementation; 2) the changes would require states allowing captives to substantially change and overhaul their policies through both legislative and regulatory processes, a lengthy and unpredictable process;

3) the perceived problem could be better addressed through existing regulations (*e.g.* credit for reinsurance requirements) or changes that are contemplated in other areas such as risk based capital; and 4) treating captives as subject to the accreditation standards of traditional insurers would drive captives off-shore. Other concerns include unrealistic time-frames for compliance and failure to follow proper procedures for adopting the changes. Many also said there is already adequate oversight of captives and no reason to include all captives in an effort to improve oversight of life insurance captives.

F Committee was supposed to consider the proposed definition of "multi-state reinsurer" at the NAIC's August meeting, but did not do so. Some regulators commented at the meeting that there is no intent to regulate captives other than those writing XXX and AXXX business. The "multi-state reinsurer" subject will be on F Committee's agenda at the NAIC's fall meeting in November. At the August meeting, the NAIC's Executive Committee did adopt the NAIC task force's report that included the "XXX/AXXX Reinsurance Framework," which addresses reserve funding.

How the NAIC handles the "multi-state reinsurer" issue moving forward bears watching because the proposed revisions as written would dramatically impact the captive industry. Given the importance of the captive industry and the strong opposition to the proposal from the leading captive jurisdictions as well as the industry itself, it would be surprising if the proposal is not revised to address what appear to be unintended consequences on traditional non-life insurance company-owned captives. Conceivably, the proposal may be abandoned all together in favor of instituting some of the different approaches suggested for addressing XXX and AXXX transactions.

Arbitrators, Not Court, Should Decide Whether Cut-Through Claim Asserted Following Commutation Agreement Should Be Arbitrated

SUMMARY: In *Trenwick America Reinsurance Corporation v. CX Reinsurance Company Limited*, 2014 U.S. Dist. LEXIS 70823 (D. Conn. May 23, 2014), a Connecticut federal trial court held that arbitrators must decide whether claims asserted by a third-party beneficiary under a cut-through clause of a reinsurance agreement containing an arbitration provision are to be arbitrated when the parties to the reinsurance agreement had subsequently entered into a commutation agreement.

Commercial Casualty Insurance Company of Georgia ("CCIC"), as reinsured, and Trenwick America Reinsurance Corporation, as reinsurer, entered into a reinsurance agreement which contained a cut-through clause providing that in the case of CCIC's insolvency, any amounts owed by Trenwick to CCIC would be payable directly to CX Reinsurance Company. CCIC became insolvent and entered liquidation. Thereafter, Trenwick and the estate of CCIC entered into a commutation agreement under which all reinsurance obligations between Trenwick and CCIC were commuted and extinguished.

Before the commutation agreement was executed, CX invoked the cut-through clause of the reinsurance agreement and billed Trenwick for a claim that had not been settled until after CCIC had gone into liquidation. After Trenwick failed to pay the claim, CX sent Trenwick a demand for arbitration. Trenwick instituted legal proceedings seeking to enjoin the arbitration. CX moved to compel arbitration.

In considering whether CX's cut-through claim should be arbitrated, the court looked first at the cut-through provision in the reinsurance agreement which provided that Trenwick's obligation to CX was subject to "all terms, conditions, retentions and limits of liability" under the reinsurance agreement, which contained an arbitration clause. Trenwick had contended in a prior lawsuit against a different cut-through holder that it was not required to arbitrate a cut-through dispute on the grounds that the holder was not a party to the reinsurance agreement, but the court rejected that position. Based on that ruling, Trenwick conceded in this case that it would have been obligated to arbitrate cut-through disputes with CX had the reinsurance agreement not been commuted. But, Trenwick said, the reinsurance agreement's arbitration clause ceased to exist after the commutation agreement was entered into terminating the reinsurance agreement.

Trenwick relied on language in the commutation agreement that provided it constituted the "entire [a]greement," and superseded all prior agreements, between the parties concerning the subject matter of the commutation. Trenwick asserted that CX no longer had a right to arbitrate its cut-through claim because the reinsurance agreement (which contained the arbitration provision on which CX relied) had been extinguished by the commutation agreement.

CX countered that the commutation agreement provided it superseded prior agreements "between the [p]arties" to the commutation agreement (which did not include CX) and only with respect to the "subject matter" of the agreement, which CX argued was the commutation and not the obligations under the reinsurance agreement. Thus, CX contended that Trenwick's cut-

CONTINUED ON PAGE 6

Arbitrators, Not Court, Should Decide Whether Cut-Through Claim Asserted Following Commutation Agreement Should Be Arbitrated

CONTINUED FROM PAGE 5

through obligations to CX survived the termination of the reinsurance agreement because nothing in the commutation agreement purported to extinguish CX's cut-through rights. CX also asserted that, since it was not a party to the commutation agreement, that agreement could not have affected its cut-through rights.

The cut-through provision of the reinsurance agreement provided that it was "subject to termination in the event of cancellation or termination" of the reinsurance agreement and that upon the occurrence of either such event, CX was to be notified by Trenwick not less than 30 days before the effective date of cancellation or termination. The provision also stated that cancellation or termination did not affect Trenwick's obligation to pay amounts due CX under the cut-through clause, except that "[c]ommutation of the [reinsurance agreement] . . . shall relieve [Trenwick] . . . of all liability, known or unknown, under" the reinsurance agreement. Trenwick relied on this provision in contending that it was relieved of all cut-through liability to CX due to the commutation.

CX responded that the reinsurance agreement did not provide Trenwick with a unilateral right to terminate the cut-through provision and that cancellation or termination of the reinsurance agreement did not affect Trenwick's cut-through obligations to CX. Also, CX said, commutation would relieve Trenwick of liability only if the commutation was "in accordance with the terms" of the reinsurance agreement. CX asserted the commutation was not in accordance with the reinsurance agreement because: (1) only CCIC and Trenwick had the option to commute; (2) CX was not given the required 30 days' notice of termination; and (3) CX billed the cut-through claim to Trenwick before the commutation agreement was executed.

Acknowledging that the parties disputed how the reinsurance agreement should be interpreted with respect to CX's cut-through claim, the court next addressed whether the dispute was required to be arbitrated. The court cited authority that under a broad arbitration clause, such as the one in the reinsurance agreement, an arbitrator must resolve whether claims under a contract with an arbitration clause are to be arbitrated when the contract has been terminated.

Trenwick argued CX had the right to *litigate* its cut-through claim in court, but contended its right to *arbitrate* had been extinguished. Trenwick sought to distinguish the authority cited by the court, arguing the commutation agreement was not a "termination" of the reinsurance contract, but rather an "extinguishment" of the contract such that it could no longer form the basis for CX's demand for arbitration.

The court held that since CX was not a party to the commutation agreement, its effect on CX's rights must be determined by interpreting the original reinsurance agreement. Regardless of the arguments Trenwick made that the arbitration clause was no longer operable, that issue required interpretation of the reinsurance agreement, which was properly to be decided by an arbitrator. Thus, the court granted CX's motion to compel arbitration.

IMPORT OF DECISION: This case illustrates the importance of following any applicable provisions in the reinsurance agreement affecting termination and carefully drafting the terms of a commutation agreement. If parties intend such an agreement to extinguish any cut-through rights provided in a reinsurance agreement, language must be included in the commutation agreement to ensure that those rights have been effectively terminated and that the entity holding the rights is bound by such termination. Parties should also expressly provide in their commutation agreement whether or not disputes are to be arbitrated. If they intend disputes to be subject to arbitration, the commutation agreement should either state that the arbitration clause of the reinsurance agreement is to govern disputes or the commutation agreement, itself, should contain its own arbitration provision. If parties do not wish commutation disputes to be arbitrated, they should include express language in their agreement so stating and should also state that any arbitration clause in the reinsurance agreement being commuted does not apply to such disputes.

Colorado, Maryland, And Vermont Adopt Amendments To Credit For Reinsurance Rules

Colorado, Maryland, and Vermont recently revised their credit for reinsurance rules based on amendments to the National Association of Insurance Commissioners' ("NAIC") Credit for Reinsurance Model Law, adopted by the NAIC in 2011. Vermont's law became effective on May 9, 2014. Maryland's new regulations went into effect on August 17, 2014. Colorado's law will become effective on January 1, 2015. (The NAIC amendments do not automatically become law in the various states. Rather, each state must enact legislation or promulgate regulations making the amendments part of that state's law.)

Prior to the adoption of the amendments to the NAIC Credit for Reinsurance Model Law, most states required unauthorized reinsurers to collateralize 100% of their liabilities to cedents in order for their cedents to be able to take credit for the reinsurance. In revising its Model Law,

the NAIC sought to modernize reinsurance regulation in the United States to address whether the 100% collateralization requirement is necessary in view of the fact that some unauthorized reinsurers have strong financial balance sheets and may be domiciled in jurisdictions that rigorously test insurers' financial solvency.

The Colorado, Maryland, and Vermont revisions allow a cedent to take credit for reinsurance ceded to a "certified reinsurer." To be "certified," an unauthorized reinsurer must meet certain eligibility requirements in the cedent's and the reinsurer's domiciliary jurisdictions. Certified reinsurers are assigned financial ratings. Depending on the rating given to a reinsurer, the reinsurer may be permitted to post reduced or no collateral in order for its cedent to receive credit for reinsurance.

Claimant Barred From Asserting Claims For Additional Injuries After Release Executed And Settlement Proceeds Paid

SUMMARY: In *Hicks v. Sparks*, 2014 Del. LEXIS 142 (Mar. 25, 2014), an injured claimant accepted $4000 in settlement of a negligence claim arising from an automobile accident and executed a release. Later, she alleged she had further injuries and sought additional compensation. The Delaware Supreme Court upheld the release and denied her claim that there had been a mutual mistake of fact concerning the extent of her injuries at the time the release was signed.

Patricia Hicks, 72, was a passenger in a car operated by her husband that was rear-ended by Debra Sparks in March 2011. She went to the emergency room after the accident and followed up with her family physician a few days later complaining of neck pain and headaches. She received medical treatment and physical therapy for approximately 15 visits.

By April 2011, Hicks had stopped physical therapy. She presented her claim to Sparks' insurance carrier, Progressive Northern Insurance Company. Although she was still having some problems, she said she was happy with her progress and was ready to negotiate a settlement. Progressive offered her $2000 for the full and final resolution of the claim, which Hicks refused.

In May 2011, Hicks told Progressive she was still having headaches. She said she had spoken to an attorney and demanded $7000. Progressive countered with an offer of $2500. Hicks said she wanted more time to consider the offer. In June 2011 Hicks demanded $5000 and said she had spoken to two attorneys who had advised her to wait to settle for at least a year after the incident to be sure her injuries had resolved. Progressive offered $3000.

In October 2011, Hicks reiterated her $5000 demand. Progressive offered $4000 which Hicks and her husband accepted. They received a settlement check in that amount and executed a full and final release ("Release").

After signing the Release, and about a year after the accident, Hicks began to experience pain in both her arms and tingling and numbness in her hands. An MRI revealed a cervical disc herniation. Hicks underwent surgery to repair it.

In 2013 Hicks filed suit in Delaware state court alleging that Sparks' negligence caused her injuries. The court granted Sparks' motion for summary judgment. Hicks appealed to the Delaware Supreme Court where she argued the trial court erred in granting summary judgment because her post-Release injuries were materially different from those covered by the Release. Hicks asserted summary judgment was improper because material issues of fact existed regarding whether there was a mistake of fact and whether she assumed the risk of the mistake. Accordingly, she said, the Release should be rescinded.

The Supreme Court affirmed the trial court's decision, holding that Hicks failed to show there was a mutual mistake of fact at the time of the Release. The court also said Hicks assumed the risk of mistake.

The court began its discussion by explaining the usefulness of releases to litigation, noting that Delaware courts generally uphold releases unless they are the product of fraud, duress, coercion, or mutual mistake of fact. The court said that to establish mutual mistake, a plaintiff must show: 1) both parties were mistaken as to a basic assumption; 2) the mistake materially affected the agreed-upon exchange of performances; and 3) the party adversely affected did not assume the risk of the mistake. The court explained that a release is voidable if a mutual mistake existed at the time of its signing, but only if the mutual mistake was related to a past or present fact material to the release and not to an opinion of future conditions.

The court held that mutuality of mistake in the insurance context can exist only where neither the claimant nor the carrier is aware of the existence of personal injuries. A release will bar suit for a plaintiff's subsequently discovered injuries unless the injuries are materially different from the parties' expectations at the time the release was signed. Mutual mistake will invalidate the release where both parties are mistaken as to the presence or extent of the plaintiff's injuries at the time they executed the release. But if the plaintiff knew that an *indicia* of injuries existed when she signed the release, the release will preclude a finding of mutual mistake and will bar suit even if the exact degree of the injury is unknown at the time the release is signed.

Additionally, mutual mistake does not exist if the adversely affected party assumed the risk of mistake. A

CONTINUED ON PAGE 8

Claimant Barred From Asserting Claims For Additional Injuries After Release Executed And Settlement Proceeds Paid

CONTINUED FROM PAGE 7

party assumes the risk of mistake where he consciously performs under a contract aware of his limited knowledge regarding the facts as to which the mistake relates.

Hicks contended that her injuries were materially different from those the parties believed she had sustained at the time the Release was signed. She asserted that she and Progressive were aware she had suffered a cervical sprain requiring treatment, but that surgery for a herniated disk is materially different from the minor head and neck injuries contemplated at the time of the Release. She said the herniated disk was a new, undiscovered injury for which she did not assume the risk of mistake.

The court held that Hicks failed to demonstrate that a mutual mistake of fact by both parties existed at the time the Release was signed. Hicks admitted she told Progressive when she signed the Release that she had not fully recovered and continued to experience headaches and neck pain. The court said that although Hicks may have been mistaken as to the future effect of her injury, both parties were aware she injured her neck. Hicks had ample opportunity to consult additional doctors and obtain further diagnoses to discover the herniated disk. The court held that her later diagnosis was not a materially different fact but an injury of which Hicks and Progressive had some awareness. Thus, there was no mutual mistake.

The court also held that Hicks assumed the risk of mistake. The Release she signed contained language acknowledging the possibility of permanent injury. Hicks signed the clear and unambiguous Release in exchange for settlement compensation. As such, she assumed the risk of mistake when she executed the Release without obtaining a more thorough medical exam to fully discover the extent of her injuries related to her neck pain. Hicks assumed the risk that her injuries were more serious than she believed and that her symptoms could worsen and require further treatment. Because she assumed this risk, she was precluded from arguing that a mutual mistake existed at the time the Release was signed.

IMPORT OF DECISION: It is critical to insurance companies that releases signed by claimants who receive settlement proceeds be upheld and enforced. Otherwise, carriers could be exposed to further liability for possibly fraudulent claims after having paid settlements in good faith. As to non-fraudulent claims, the evidence regarding whether a claimant has suffered further injuries is largely within his knowledge and control. A plaintiff and his doctor know best whether he has recovered or reached maximum medical improvement. An insurance carrier is at a distinct disadvantage in attempting to evaluate claims of "new injuries." If a claimant agrees to a settlement and signs a release, it is not unfair to hold him to the terms of a release. The *Hicks* decision correctly enforces these principles.

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