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LETTER FROM WASHINGTON

GOOD INSURANCE REGULATION TAKES TIME

By Robert H. Myers, Jr.

Ever since the passage of the McCarran-Ferguson Act in 1945, the issue of federal versus state regulation has been an ongoing focus of the insurance industry. The central question is, of course, will the insurance industry be better served by the current system of state regulation (as it continues to evolve) or by a change to federal regulation?

We are now in a vortex of competing regulatory regimes. As discussed previously in my Spring 2013 insurance newsletter article entitled "Does the FIO Matter?," state insurance regulation now is subject to the influence of "harmonizing" regulatory practices with the International Association of Insurance Supervisors ("IAIS") and the continuing oversight of the Federal Insurance Office ("FIO").

The issues are complicated by the truism that the industry is not, in fact, one industry. While the various formulations of insurance – life, health, property, casualty, surplus lines, etc. – are all "insurance," the regulatory demands created by the various segments of the industry are quite different.

What type of regulation is closer to the industry and more likely to decide regulatory problems in a manner that benefits both the insurer and the insured? Let's use one specific issue as a case study.

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HASSETT'S OBJECTIONS

SUPREME COURT ROUNDUP

By Lewis E. Hassett

After last year's decision on the constitutionality of the Patient Protection and Affordable Care Act, the Supreme Court's most recent term was mostly uneventful for the insurance industry. However, important decisions regarding arbitration and class actions will have an impact on the insurance industry, particularly in states that allow insurance disputes to be arbitrated. *See Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d. 490 (5th Cir. 2006) (based upon McCarran-Ferguson, state statute barring forced arbitration of insurance contract trumped Federal Arbitration Act). *McKnight v. Chicago Title Ins. Co.,* 358 F.3d 854 (11th Cir. 2004) (same).

In *Comcast v. Behrend,* No. 11-864 (March 27, 2013), the Supreme Court held that an individualized inquiry into damages precludes class certification. The Court of Appeals had held that it need not decide the viability of plaintiffs' damage model at the class certification stage because the question went to the merits. The Supreme Court reversed, holding that questions on the merits necessarily are intertwined with questions of class certification, but the viability of a class-wide measure of damages must be adjudicated at class certification.

The *Comcast* decision is favorable to businesses by requiring the measurability of damages on a class-wide basis to be decided at the class certification stage. Once the class is certified, few

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Inside this Issue

Announcements

Skip Myers' article, entitled "Federal Surplus Lines Reform Creates Uncertainty" appeared in the May 2013 edition of *Captive Review*.

On May 17, **Tony Roehl** spoke to the Atlanta Health Underwriters Association on exchanges, costs and navigators under the Patient Protection and Affordable Care Act ("PPACA").

Skip Myers was quoted by *The Risk Retention Reporter* in three articles appearing in its June edition related to: (1) the pursuit of legal fees now that the Alliance of Nonprofits for Insurance Risk Retention Group won a long legal battle with Nevada; (2) risk retention groups ("RRGs") use of fronting companies; and (3) the growing use of RRGs for medical malpractice insurance.

On June 3, **Joe Holahan** spoke at the Association of Insurance Compliance Professionals' Education Day in Baltimore.

On June 21, **Tony Roehl** spoke at the AICP Gulf States' Education Day on "Self Audits & Proactive Compliance Best Practices" and "The PPACA: Update & Health Exchanges."

BestWire and *PropertyCasualty360* quoted **Skip Myers** regarding a decision by the U.S. Ninth Circuit Court of Appeals upholding a lower court ruling that federal law pre-empts Nevada's state law requiring RRGs to be licensed before they can operate in the state. The ruling is being hailed as a victory for RRGs in that they may continue to provide commercial liability insurance (except workers compensation) without being licensed in each state.

On July 25, **Joe Holahan** facilitated an educational session at The Reinsurance Association of America's Re Contracts: The Art of Designing Reinsurance Contracts and Programs event in New York.

On July 26, **Chris Petersen** spoke at the Professional Insurance Marketing Association's mid-year meeting and trade show in Bermuda. He was on a panel that discussed the expanding role of federal regulators in the insurance arena.

Skip Myers spoke about hot topics in insurance regulation at the August 15 Vermont Captive Insurance Association conference in Burlington.

Representing a multi-county insurance pool, **Lew Hassett** and **Kelly Christian** successfully obtained the remand to state court of an action seeking a declaratory judgment as to insurance coverage. The plaintiff in the underlying civil rights/tort case in federal court had argued that the federal court had supplemental jurisdiction over the declaratory judgment action, since it involved whether the insurance pool would be liable for any judgment rendered in the federal case.

On September 12, **Chris Petersen** will facilitate a CEO panel in Washington, D.C. to examine the impact of the PPACA on dental insurance in the small group market.

On September 17, **Tony Roehl** will be on a panel discussing the PPACA's impact on technology companies at the Technology Executives Roundtable held in Atlanta.

On September 25, **Jim Maxson** will speak on a panel entitled "The Evolution Continues: New Applications of Life Settlements Benefits Consumers" at the Third Annual European Life Settlement Association ("ELSA") Investor Summit in London. Jim serves on the Executive Committee of ELSA.

On October 3, **Skip Myers** will discuss "Meeting with Regulators" at the National Risk Retention Association conference in Washington, D.C.

Chris Petersen will speak on October 7 at the Association of Insurance Compliance Professionals' annual meeting in Toronto. He is on a panel entitled "Supplemental Benefits/ Limited Benefit Plans: How Do They Fit Into Today's Market?"

Joe Holahan will speak on October 8 regarding "TRIA Captives: Structural Basics and Legal Considerations" at the Fall Education Seminar sponsored by the Captive Insurance Council of the District of Columbia.

On October 10, **Lew Hassett** will speak at the Reinsurance Association of America Re Claims: Reinsurance Claims and Loss Management event in New York on the topic of "Blaming Others: Seeking Reimbursement for Losses in the Reinsurance Context." **Joe Holahan** will also attend the conference and serve as a program facilitator during one of the educational sessions.

On November 19, **Skip Myers** will speak on regulatory issues affecting captives at the Bermuda Captive Conference in Hamilton, Bermuda.

LIFE INSURANCE-BACKED LENDING: IS IT BACK?

By James W. Maxson

For many investors in the life settlements asset class (the purchase of a life insurance policy in the secondary market as an investment), one of the primary concerns is access to leverage. Because life settlements are a negative carry asset (i.e. premium must be paid to keep the life insurance policy in force to maturity), the need for leverage is particularly acute. Logically, a life settlement, which has characteristics very similar to a zero coupon bond, should be an attractive asset for lenders. Life settlements are purchased for a fraction of their face value and, assuming reasonable loan-to-value ratios, a lender should be comfortable that its loan is fully secured. However, with certain notable exceptions, major financial institutions have been unwilling to make loans secured by life settlements. In those few instances in the past in which a significant line of credit was extended, the bank has often ended up foreclosing on the collateral and (reluctantly) owning a portfolio of life settlements. As a result, the ability of an owner of a portfolio of life settlements to obtain leverage using life insurance policies as security for the loan has been all but non-existent for the last several years.

Why have banks ended up foreclosing on these portfolios? There are several reasons, chief among them being that the life expectancies of the insured lives under many of the policies purchased with prior lines of credit secured by life settlements turned out to be grossly underestimated, or the policies were purchased from questionable finance programs, thus casting doubt on the value of life settlements as collateral for a loan.

It is now 2013, life expectancies have gone through several adjustments, and most of the policies that originated via questionable programs have either lapsed or are now at least half a decade old and unlikely to be challenged by an insurer. Is it time for financial institutions to start lending again using life settlements as collateral to secure the loan? The answer is yes, but carefully. While life settlements do not necessarily have inherent value, a properly and carefully originated portfolio of life settlements does have significant value and is an ideal asset for use as collateral to secure a loan. Indeed, it appears that some smaller, non-institutional lenders have recognized that life settlements can be excellent collateral for loans and have entered into revolving lines of credit secured by the purchased policies, albeit at interest rates that reflect a premium for the additional perceived risk. As lenders experience success with these programs, it is inevitable that major financial institutions will see the opportunity and create mainstream life insurance-backed lending programs which will drive down interest rates and give investors in the asset class the ability to leverage their assets. ❑

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DEBATE OVER TRIA REAUTHORIZATION BEGINS

By Joseph T. Holahan

The December 31, 2014, expiration date of the federal Terrorism Risk Insurance Program is still more than a year away, but as renewals affected by reauthorization draw closer, attention has begun to focus on whether Congress will reauthorize the program and, if so, when and on what terms.

The Terrorism Risk Insurance Program is often referred to as TRIA, after the law that originally authorized the program following the September 11, 2001, terrorist attacks. TRIA provides a federal "backstop"—essentially reinsurance—that allows U.S. insurers to limit their exposure to terrorism losses. In return for this benefit, TRIA requires U.S. insurers to offer terrorism coverage with commercial property and casualty insurance, although certain lines, such as commercial auto, are excluded from the law. TRIA also requires insurers to recoup, through assessments on insureds, a portion of federal outlays following a covered terrorism loss.

TRIA was conceived as a temporary measure designed to give insurance markets time to stabilize following 9/11. Yet the program has been extended by Congress twice at the urging of insurers and the business community at large when it appeared the expertise and capacity to underwrite catastrophic terrorism risks simply did not exist. At each extension, the amount of federal coverage under TRIA has been reduced.

In its current form, TRIA provides federal reinsurance for losses arising from acts of terrorism certified by the Secretary of the Treasury. Acts committed by both foreign and domestic terrorists are covered, but a terrorist act generally must cause damage in the U.S. or to a U.S. aircraft or vessel to be certified. In addition, to qualify for certification, a terrorist act must cause aggregate insured losses of at least $5 million and must not be committed in the course of a war declared by Congress. This last condition does not apply to workers' compensation.

Federal payments to insurers are available under TRIA only if aggregate insured losses resulting from a certified act of terrorism exceed $100 million. Once this threshold is met, all insured losses are compensable, including those below the $100 million threshold, subject to a deductible and coinsurance. The deductible for each insurer is equal to 20% of direct earned premiums for the previous year for lines of coverage subject to TRIA. The government covers 85% of insured losses above the deductible.

TRIA establishes a cap on the annual liability of the federal government and insurers. Under TRIA, neither the federal government nor private insurers that have paid losses at least up to their insurer deductible will be liable for any amount exceeding an annual cap of $100 billion in aggregate insured losses.

TRIA has provisions for mandatory and discretionary recoupment of amounts paid by the federal government under the program. The mandatory recoupment is designed to ensure that the marketplace retains at least $27.5 billion in insured losses during a program year.[1] The Secretary of the Treasury has discretion to recoup additional amounts through a premium surcharge on insureds, which insurers are required to collect and remit to the government.

In May, Fitch Ratings released a memo warning of reduced availability of terrorism insurance coverage in large urban areas and higher premiums if TRIA is not reauthorized. Fitch notes the effect of not reauthorizing TRIA would be felt particularly in the banking, commercial real estate and construction industries and cites a study by the Real Estate Roundtable showing that over $15 billion in real estate-related transactions were either stalled or canceled because of lack of terrorism insurance in the 14 months following the 9/11 attacks before TRIA was enacted.

Two bills have been introduced in Congress this year to extend TRIA. In February, Rep. Michael Grimm (R-NY) and others introduced H.R. 508, which would extend TRIA through December 31, 2019. In May, Rep. Bennie Thompson (D-MS) and others introduced H.R. 1945, which would extend TRIA for 10 years, designate the Department of Homeland Security as the lead agency for certifying acts of terrorism and instruct the Department of Homeland Security to share information with insureds about terrorist threats and best practices to foster resilience to terrorism.

The New York City Council recently held a hearing to examine the need for an extension. As of this writing, a resolution urging Congress to enact a long-term extension of TRIA is pending before the Council.

It is too early to predict with any certainty whether TRIA will be reauthorized, but there are good reasons why it should be. The program essentially has no cost to the government unless there is a certified act of terrorism with aggregate insured losses in excess of $100 million. Even then, all or a portion of federal outlays would be recovered through premium surcharges.

In addition, the insurance industry repeatedly has warned that it has no way to underwrite terrorism risks, which are unpredictable in the extreme. Without TRIA, the industry will be forced to reduce or eliminate coverage, especially in urban areas where there is a concentration of risk. This is precisely what happened following 9/11.

[1] In addition, the mandatory recoupment amount is increased by a 33% surcharge.

Moreover, as a practical matter, the federal government, and therefore the nation as a whole, is on the risk, so to speak, for very large terrorism losses. There is no question that uninsured losses and the systemic effects of a large attack would be addressed by federal action. By promoting greater coverage for terrorism risk with a mechanism to recoup federal outlays, TRIA establishes an orderly system to mitigate the effects of a large attack and helps avoid the dampening effect on economic activity that will occur if adequate coverage is not available. In fact, given the slow pace of the recovery from the Great Recession, the economic impact of not reauthorizing TRIA could become one of the most powerful arguments for extending it. ❑

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CONCLUSIVE PRESUMPTION OF WORTHLESSNESS OF DEBTS

By Anthony R. Boggs and Edgar B. Callaway


Section 166(a)(2) of the Internal Revenue Code of 1986, as amended, permits a corporation to take an income tax deduction for partially worthless debts up to the amount of the debt charged-off by the corporation as uncollectible on its books and records, provided that the Internal Revenue Service ("IRS") is satisfied that the debt is recoverable only in part.[1] Section 1.166-2 of the Treasury Regulations provides a conclusive presumption of partial worthlessness for debts charged-off by a regulated corporation if the charge-off: (A) either (i) is ordered by a federal authority or a state authority that applies standards equivalent to those of the federal authority, or (ii) is made in accordance with established policies of such authorities, and upon such authorities' first audit of the corporation subsequent to the charge-off, such authorities confirm in writing that the charge-off would have been subject to such specific orders if the audit had been made on the date of the charge-off; and (B) the amount so charged-off is claimed as a deduction by the corporation at the time of filing the return for the taxable year in which the charge-off occurs.[2] The conclusive presumption regulations are intended to ensure taxpayers are treated fairly and consistently when dealing with the IRS and another branch of the federal government with respect to worthless or partially worthless debt.[3]

Banks have long taken advantage of the conclusive presumption regulations when using Section 166(a)(2) to deduct debts that national bank examiners, under the authority of the Comptroller of the Currency, required to be charged-off.[4] Historically, it has been unclear whether insurance companies, regulated by state authorities, were entitled to use the conclusive presumption. Proponents argued that because state insurance regulators impose charge-off standards similar to federal bank regulators and possess similar authority to compel insurance companies to charge-off worthless debts, the conclusive presumption should apply to insurance companies. The IRS accepted a similar argument in holding that the conclusive presumption applies to loans classified as losses by Federal Deposit Insurance Corporation ("FDIC") bank examiners based on the IRS's determination that the national bank examiners and examiners from the FDIC follow similar guidelines and procedures in classifying bank loans and have similar authority to compel banks to charge-off worthless debt.[5]

State law requires insurance companies to file annual statements that comply with the accounting principles of the National Association of Insurance Commissioners ("NAIC").[6] In September 2009, the NAIC revised its Statement of Statutory Accounting Principles 43R (SSAP 43R). The revised SSAP 43R requires insurers to charge-off certain partially worthless debts and sets standards and procedures for charge-offs. In July 2012, the Commissioner of the Large Business & International ("LB&I") Division of the IRS released a directive that LB&I examiners should not challenge the Section 166(a)(2) partial worthlessness deductions of insurance companies if the amount of the deduction is equal to the credit-related impairment charge-offs made by the company under SSAP 43R and the other requirements of the directive are met.[7] The LB&I Commissioner explained that independently determining partial worthlessness for Section 166(a)(2) deductions imposes a significant burden on both insurance companies and the IRS. The directive does not mention the conclusive presumption regulations and thus, does not indicate whether the conclusive presumption applies to insurance companies.

In May 2013, the IRS issued a notice ("Notice") that it is reevaluating the conclusive presumption regulations generally and requesting public comment.[8] The Notice explains that the conclusive presumption provides administrative convenience;

[1] 26 U.S.C. § 166(a)(2).
[2] Treas. Reg. § 1.166-2(d).
[3] Rev. Rul. 80-180, 1980-2 C.B. 66.
[4] Rev. Rul. 66-335, 1966-2 C.B. 58.
[5] Rev. Rul. 79-214, 1979-2 C.B. 90.
[6] LB&I Directive, LB&I-4-0712-009 (July 30, 2012); e.g., Ga. Code Ann. § 33-3-21.3.
[7] LB&I Directive, LB&I-4-0712-009 (July 30, 2012).
[8] I.R.S. Notice 13-35, 2013-24 I.R.B. 1240.

however, the policy behind the presumption requires regulators to follow similar standards to identify debts to be charged-off as tax administrators use to permit a deduction for a bad debt. Given significant changes to the regulatory standards for charge-offs used by banks, the IRS questions whether the conclusive presumption continues to be appropriate.

The Notice further remarks that the Treasury Department and the IRS have received questions about which taxpayers may qualify as "other corporations" for purposes of the conclusive presumption regulations, particularly with respect to insurance companies and government-sponsored enterprises. The Notice requests public comments on a number of issues, including which corporations are regulated by a federal or state entity that reviews and makes determinations about worthlessness of debt assets in a manner consistent with the tax standards for worthlessness under Section 166, and which of these entities should be covered by the revised conclusive presumption rules. Thus, the Notice provides the opportunity to provide comments to the IRS regarding the revision and application of the revised conclusive presumption rules with respect to insurance companies. Comments must be submitted by October 8, 2013.

IRS Circular 230 Disclosure:

This article was not intended or written by the author to be used and it cannot be used by any taxpayer for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code. A taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor. ❑

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Edgar B. Callaway has just completed his second year at the University of Georgia School of Law, where he is ranked in the top 20% of his class and is an Editor of the Georgia Journal of International & Comparative Law. Edgar received his bachelor's degree, cum laude, from Vanderbilt University. Last summer, he was a judicial intern for The Honorable Clay D. Land in the District Court for the Middle District of Georgia.

LETTER FROM WASHINGTON

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The Captive and Special Purpose Vehicle Use Subgroup of the National Association of Insurance Commissioners ("NAIC") (herewith referred to as "Subgroup") has been studying the operation of captives and how captive regulation deviates from traditional regulation. The initial work of this Subgroup, and its charge from the NAIC, was to examine the use of captives and special purpose vehicles ("SPVs") by traditional life insurers as a repository for excess reserves required by "Regulation XXX." However, the Subgroup expanded its activity into the examination of other captive-related issues. After receiving comments from interested parties that the Subgroup had strayed beyond its initial charge and comments on the Subgroup's paper entitled "Captives and Special Purpose Vehicles," the Subgroup retrenched its activities to focus on the issue at hand (the ceding of redundant reserves to SPVs).

A stimulant to this process was the publication by the New York Department of Financial Services ("NYDFS") of its study of life insurance utilizing SPVs entitled "Shining a Light on Shadow Insurance: A Little Known Loophole That Puts Insurance Policyholders and Taxpayers at Greater Risk." The study referenced practices that can undermine the financial stability of this type of reinsurance but did so in a manner that was more inflammatory than scholarly. Terminology such as "shadow insurance," "loophole," "hollow assets" and "shell game" caught the attention of the media. The publication of the study was followed quickly by a brisk retort in the form of a press release from the President of the NAIC that simply stated the NAIC was studying these issues and, in effect, had them under control.

Finally, the Financial Condition (E) Committee was requested to delay the adoption of the Subgroup's white paper by the Delaware Insurance Department due to the potentially negative impact of the ceding of redundant reserves to SPVs (due to their potential to raise prices on consumers of insurance) and the E Committee's proposal to review specific transactions which, in the view of the Department, put the NAIC in the role of a domestic state regulator.

While this example of the insurance regulatory process seems to be somewhat unscripted, it shows the process is capable of responding to new information and thereby avoiding hastily conceived actions detrimental to the industry. The NAIC process is commonly criticized as too lengthy and haphazard. However, the great benefit of this process is that no action takes place before the opportunity for public input. Moreover, interested parties can become educated as to the regulatory direction before it is adopted and can act accordingly.

Compare this with a federal system which would bind the industry and all states to a single common standard after either the passage of a law by Congress or a rulemaking by a federal regulatory agency. In that circumstance, the opportunity for public input would be more formal, more compressed and likely less effective. ❑

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HASSETT'S OBJECTIONS

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businesses have the fortitude to continue litigating rather than settling.

In *Standard Fire Ins. Co. v. Knowles,* No. 11-1450 (March 19, 2013), the plaintiff brought a putative class action in state court and expressly stated that class damages would not exceed $5 million. The purpose of that admission was to avoid removal to federal court under the Class Action Fairness Act. The Supreme Court rejected such attempts to manipulate federal jurisdiction. The Court reasoned that, while it was fine for the named plaintiff to limit his own recovery, he could not do so on behalf of a class. This is an important decision because class action plaintiffs' counsel often will waive rights and remedies to avoid federal jurisdiction.

In *Genesis Healthcare Corp. v. Symczyk,* No. 11-1059 (April 16, 2013), the plaintiff brought a collective action under the Fair Labor Standards Act. The employer extended an offer of judgment equal to the named plaintiff's damages and argued that her claim became moot as a result of the offer. The Supreme Court agreed, holding that because the named plaintiff was made whole, the case could not proceed.

In reality, this decision may have little impact outside the labor area. While class actions and collective actions are distinguishable, many rules applying to the latter have been applied to the former. However, the Supreme Court noted the distinction between class actions and collective actions. Subsequent cases have confirmed that an offer of judgment "pickoff" strategy does not apply to class actions. *See Craftwood II, Inc. v. Tomy Int'l, Inc.,* No. SA-CV-12-1710-DOC (C.D. Cal. July 15, 2013); *Canada v. Meracord, LLC,* No. C12-5657-BHS (W.D. Wash. June 6, 2013).

Turning to the Supreme Court's arbitration decisions, in *American Express Co. v. Italian Colors Restaurant,* No. 12-133 (June 20, 2013), the Court held that a class action waiver in an arbitration clause could not be rendered unenforceable under state law just because the cost of vindicating an individual claim in arbitration outweighed the potential recovery. This is a major decision in favor of arbitration. Notwithstanding the Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion,* 131 S.Ct. 1740 (2011) that class action waivers were enforceable, some courts continued to invalidate them as unconscionable because the cost of pursuing an individual claim outweighed the benefit.

Oxford Health Plans, LLC v. Sutter, No. 12-135 (June 10, 2013), was the most pro-arbitration/anti-business decision in recent memory. This case was discussed in my column in the Fall 2012 edition of this newsletter. *See* "It's Baaaack!! Imaginary Consent to Class Arbitrations." In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.,* 559 U.S. 662, 130 S.Ct. 1758 (2010), the Court held that class arbitration could not be mandated absent an express agreement to do so. If the contract was silent as to class arbitration, the Court could not direct it.

My "Imaginary Consent to Class Arbitrations" article noted that some lower courts had upheld arbitrator decisions requiring class arbitrations under quite flimsy language. *See Jock v. Sterling Jewelers, Inc.,* 646 F.3d 113 (2nd Cir. 2011); *Sutter v. Oxford Health Plans, LLC*, 675 F.3d 215 (3rd Cir. 2012); *Fantastic Sam's Franchise Corp. v. FSRO Ass'n Ltd,.* 683 F.3d 18 (1st Cir. 2012); *Contra Reid v. Florida Metro. Univ., Inc.,* 681 F.3d 630 (5th Cir. 2012). For example, the arbitration clause at issue in *Oxford Health* stated as follows:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

Oxford Health, 675 F.3d at 223.

As is evident, nothing in that arbitration clause refers to class arbitration. Instead, the arbitrator inferred an intent to allow a class arbitration because, otherwise, a class proceeding could not be brought in any forum. Of course, avoiding a class adjudication in any forum was part of the business' objectives in choosing arbitration.

The Supreme Court granted certiorari in the *Oxford Health* case and recently held that a court cannot overrule an arbitrator's decision that the parties intended to allow class arbitration. The parties had agreed that the arbitrator would decide all such issues and, while the Court expressly disavowed any endorsement of the arbitrator's decision on the merits, it ruled that the parties were bound.

The *Oxford Health* decision illustrates the old adage of "be careful what you wish for." A theoretically pro-arbitration Supreme Court has rendered arbitration a potential trap for businesses. Arbitrators carry the same preconceptions as jurors or judges. That is the reason we have appellate courts, but arbitration precludes any appellate review.

Expect to see arbitration clauses that allow courts to determine class arbitrability. A remaining question is whether an arbitration clause can allow the arbitrator to determine arbitrability but restrict questions of class arbitrability to a court. ❑

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