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LETTER FROM WASHINGTON

WHY CONGRESS NEEDS TO AMEND THE LIABILITY RISK RETENTION ACT

By Robert H. Myers, Jr.

Under the Liability Risk Retention Act (the "LRRA"), 15 U.S.C. § 3901, *et seq.,* to do business in a non-domiciliary state, a risk retention group is required only to submit to that non-domiciliary state a filing containing the information delineated in Section 3902(d) of the LRRA. The LRRA expressly preempts any other non-domiciliary state regulation unless it falls within one of the specified exceptions to preemption under Section 3902(a)(1). The exceptions to preemption relate primarily to unfair trade practices, premium taxes, registration of an agent, injunctions from a court of competent jurisdiction, and notice to policyholders that the RRG may not be subject to all insurance laws of the state and is not a member of the state guaranty fund. *Id.* at § 3902(a)(1).

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PLAYER'S POINT

TRIA: DON'T CHANGE IT; CLONE IT.

By Thomas A. Player

The Terrorism Risk Insurance Act (TRIA) is a federal law enacted on November 26, 2002, just after 9/11. TRIA created a federal "backstop" for insurance claims related to acts of terrorism.

In early February, President Obama unveiled his 2011 budget plan, which, among other provisions, would reduce the federal backstop for those providing terrorism risk insurance. The President's proposal would remove coverage for domestically inspired acts of terrorism, increase private insurer deductibles and co-payments, increase the "trigger" amount of aggregate insured losses that must occur before federal compensation becomes available, and allow the program to expire at the end of 2014 as planned under current law.

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HASSETT'S OBJECTIONS

"PRETTY SOON YOU'RE TALKING REAL MONEY" FEDERAL COURT SHIFTS COST OF E-DISCOVERY

By Lewis E. Hassett

The general rule in federal litigation is that the losing party bears the other side's "costs." 28 U.S.C. § 1920. A defendant who perceives some liability, albeit less than the plaintiff's demand, can shift these costs via an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure. Generally, Rule 68 allows a defendant to make a settlement offer, which remains open for 14 days. If the plaintiff does not accept the offer and recovers less at trial, the plaintiff is assessed the defendant's "costs."

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Inside this issue

Announcements

Jessica Pardi has succeeded **Lew Hassett** as editor-in-chief of this newsletter. The Insurance, Reinsurance and Managed Healthcare Department wholeheartedly thanks Lew for his many years of editing.

Jim Maxson's article, "FINRA Issues New Guidance on Variable Life Settlement Transactions," was recognized by the *National Law Journal* as being one of its most read articles in 2009.

Lew Hassett has been named in the March 2010 *Super Lawyers - Corporate Counsel Edition* for excellence in business litigation. Selection to Super Lawyers involves peer nominations and evaluations combined with third party research. Each candidate is evaluated on numerous indicators of professional achievement. The process results in the selection of five percent of attorneys nationwide.

Joe Holahan's article, "Business Associate Agreements under HITECH," appeared in the January 14, 2010, edition of *Insurance Law360*.

On January 14, 2010, **Jim Maxson** was a panelist in the Life Insurance Settlement Association's webinar on Annual Reporting for Providers.

Ben Vitale has been named a 2010 "Rising Star" in business litigation by *Super Lawyers*. The "Rising Star" designation recognizes outstanding young attorneys in various practice areas. Ben is an associate in the insurance litigation practice.

Skip Myers will again teach the ICCIE course on risk retention groups and their regulation. If interested, you can register at www.iccie.org.

Jim Maxson was quoted in the January 2010 *Investment News* story discussing the increase in private placement of life settlement investments through broker-dealers.

Skip Myers was a panelist on the role of credit rating agencies in the insurance business at the Captive Insurance Companies Association conference in Orlando on March 9.

Chris Petersen will speak at the National Association of Health Underwriters 80th Annual Convention July 28, 2010 in Chicago, Illinois. Mr. Petersen will discuss on state and federal health insurance reform initiatives.

Jim Maxson was asked by the National Underwriter to participate in its "Ask the Expert" column in the February edition of *Settlement Watch*.

Skip Myers published an article in the January issue of *Captive Review* on the potential impact of federal regulation on insurance.

Lew Hassett and **Jim Maxson**, working with Jimmy Walter of Capell & Howard in Montgomery, Alabama, successfully obtained the dismissal of a Georgia life settlement broker from litigation in

PRIVACY RIGHTS OF INSUREDS IN BANKRUPTCY: A DIFFICULT BALANCE

By James W. Maxson

As the secondary market for life insurance, usually referred to as "life settlements", has expanded rapidly, so have the number of difficult questions to be addressed. One of the most persistent and important issues is that of the privacy of the insured. The information most critical to valuing a life insurance policy in the secondary market is the insured's life expectancy, which can be assessed accurately only by review of the insured's medical records. In most life settlement transactions, which are extensively regulated in forty of the fifty states, consent of the insured is a prerequisite before their medical information can be obtained.

What, then, if the insured person refuses to give this consent? In most situations, this terminates the transaction. If the insured refuses to consent to the release of his or her medical records, then it is impossible to accurately value the policy. However, an insured's right to privacy does not, in every case, trump the need for their medical information. In *Adam Aircraft Industries, Inc. v. George F. Adam, Jr.,* 2009 Bankr. LEXIS 4137 (June 22, 2009), the court faced this precise question and incorrectly, in my opinion, decided the insured's right to privacy outweighed the debtor's need for the insured's medical information.

Mr. Adam, the debtor's founder, left the failing company shortly before it filed for Chapter 7. After his departure, but before the bankruptcy filing, the company transferred the ownership of three life insurance policies worth a combined $10,000,000 to Mr. Adam for unknown, and possibly no, consideration. Because the transfers occurred within two years of the bankruptcy filing, the trustee-in-bankruptcy sought to void the transfers. In order to determine the policies' true values (which Mr. Adam claimed were worthless), the trustee issued discovery requests seeking current information about Mr. Adam's health and physical condition.

Mr. Adam filed a motion for protective order seeking to avoid responding to the discovery requests related to his health citing HIPAA and other privacy concerns. The court agreed, holding that "[u]nder the circumstances of this case . . . the duty of the Trustee to collect and preserve potential assets of the estate does not trump a non-debtor's right to privacy in his medical records and health information."

In its analysis, the court correctly stated that it must balance Mr. Adam's right to privacy versus the trustee's need for information to maximize the value of the debtor's estate. However, its statement that Mr. Adam's "medical condition is only one factor the Trustee, or life settlement company, may use to determine the value of the term life insurance policies" evidences its lack of comprehension of how life insurance policies are valued. While an insured's medical condition is not the only factor used to value a policy, it is far and away the most determinative.

In my view, under the specific circumstances of this case, the court's decision to grant the protective order was incorrect. A trustee's duty is to increase the value of the debtor's estate for the benefits of its creditors. The policies transferred to Mr. Adam just a few months before

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the filing of the bankruptcy might have added significant value to the debtor's estate. These were company-owned policies, and Mr. Adam would have been required to undergo a physical examination and disclose his medical information as a step in their issuance. Having thus consented to the dissemination of his medical information in connection with obtaining the policies, there is no consistent, logical basis for the court's holding that granting the protective order would "protect Adam from annoyance, embarrassment, oppression, or undue burden or expense . . . ." Ultimately, it appears the court imposed its own view based on the nature of the transaction, rather than simply following the law and allowing the trustee to carry out his duties to the fullest extent possible. ❑

James W. Maxson is Of Counsel in the firm's Insurance and Reinsurance Practice and co-chair's the firm's Life Settlement Practice. Mr. Maxson concentrates his practice in corporate and regulatory matters for the life settlement industry, as well as focusing on mergers and acquisitions and securities transactions. Jim received his bachelor's degree from Denison University and law degree from the Ohio State University School of Law.

NON-SIGNATORY CAN ENFORCE ARBITRATION CLAUSE BASED UPON ESTOPPEL

By Cindy Chang

A New Jersey appellate court recently held, based upon a theory of estoppel, that a non-signatory parent company had standing to enforce an arbitration clause signed by its subsidiary when the parties' actions are "substantially interconnected," the claims against both parties are identical, and the claims against the parties are inextricably intertwined with the agreement mandating arbitration. *EPIX Holdings Corp. v. Marsh & McLennan Co., Inc.,* 982 A.2d 1194, 1203 (N.J. Super. Ct. App. Div. 2009).

EPIX Holdings Corporation is a professional employer organization that contracts with small businesses to provide services and benefits, including workers' compensation insurance coverage. Marsh & McLennan Companies, Inc. served as EPIX's exclusive broker-agent and advisor to secure workers' compensation coverage for its employees and customers.

For 2000 and 2001, EPIX's primary workers' compensation insurance provider was Hartford Underwriters Insurance Company. EPIX alleged that in June 2002, Hartford gave notice fewer than 90 days before the expiration of EPIX's policies that Hartford was not renewing the policies. Thereafter, Marsh placed EPIX's policies with National Union Fire Insurance Company of Pittsburgh, PA, an AIG subsidiary.

Subsequently, another AIG subsidiary, AIG Risk Management, Inc., issued a binder letter, and EPIX began paying premium on the policy effective September 1, 2002. A second binder letter was issued the following year for the 2003-2004 policy. Neither Marsh nor EPIX signed

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Announcements

Barbour County, Alabama, on the grounds that the life settlement broker's contacts with Alabama policy holders were insufficient to satisfy Due Process. *See In re: Jeanie S. Tillis and Lowell A. Tillis v. WM Page & Associates, Inc. d/b/a The Lifeline Program, et al.,* Supreme Court of Alabama Case No. 1081719. While the trial court had found jurisdiction, the Supreme Court of Alabama reversed on a writ of mandamus.

Jim Maxson's article titled "Insurable Interest Amendment to Uniform Trust Code: A Win For Everyone" was published in the February edition of the *Life Settlement Review.*

Lew Hassett and **Ben Vitale**, representing a managed care plan, settled favorably a variety of contract and tort claims brought by a disabled former policyholder. The policyholder claimed he was wrongfully terminated and the termination had exacerbated pre-existing health problems. The terms of the settlement are confidential.

Jim Maxson served as one of two panelists on the Life Insurance Settlement Association's February 16, 2010, webinar addressing annual reporting.

Chris Petersen will speak at Delta Dental Plans Association Tactical Skills Conference on May 6, 2010. Mr. Petersen will be participating on a panel that will examine health care reform, its business implications and its impact on future strategies.

An article written by **Joe Holahan** and **Skip Myers** titled "Does Terrorism Insurance Have a Future?" will appear in the April edition of *Captive Insurance Company Reports.*

Chris Petersen testified on behalf of Delta Dental Plans Association at the National Association of Insurance Commissioners' December 4, 2009 hearing "Healthcare Reform Update." Chris testified regarding implementation issues facing insurers under the proposed federal healthcare reform legislation. Chris also addressed steps the NAIC and state policy makers should be taking to prepare for the possibility of reform legislation being adopted at the federal level.

Jim Maxson was quoted by the National Underwriter in its February edition of *Settlement Watch* for a story discussing state-mandated disclosure to alternatives for lapsing life insurance policies.

On February 9, 2010, **Jessica Pardi** gave a presentation on "Follow the Settlements" at the Reinsurance Outlook 2010 Conference in New York City.

Lew Hassett will be speaking at the Reinsurance Association of America's program, "Demystifying Reinsurance: A Basics of Reinsurance Course," in Chicago on May 10th through 12th. Lew will address the ramifications of the recent decision of the House of Lords in Wasa v. Lexington. To register, please go to www.reinsurance.org or call Ann Marie Mwombela at 202-783-8385.

the binder letter which expressly required EPIX to execute and return the Payment Agreement and Schedule.

National Union executed the Payment Agreement "on behalf of itself and its affiliates." The Payment Agreement provided the terms and conditions of EPIX's payment obligations to National Union. It also provided that any disputes, other than those about payment due, "arising out of th[e] Agreement must be submitted to arbitration." The arbitration clause further provided that the arbitration must be governed by "the United States Arbitration Act" and arbitrators would have "exclusive jurisdiction over the entire matter in dispute, including any question as to arbitrability."

In August 2008, EPIX sued AIG, National Union, Hartford and Marsh for various claims arising under the New Jersey Anti-Trust Act and related common law contract, negligence, and fraud claims. EPIX claimed the defendants engaged in an elaborate bid rigging conspiracy that enabled AIG and National Union to charge "inflated premiums" and impose "onerous terms" with "inadequate coverage."

AIG moved to compel arbitration pursuant to the Payment Agreement between EPIX and National Union. The trial court denied AIG's motion holding that AIG lacked standing to enforce the arbitration clause because it was not party to the Payment Agreement. The court also found that EPIX's dispute did not fall within the scope of the arbitration clause.

On appeal, citing *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902, 556 U.S. ___ (2009), the appellate court held that because arbitration agreements are analyzed under "traditional principles of state laws," such principles "allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel'." *EPIX*, 982 A.2d at 1200. New Jersey state law recognizes non-signatory standing to compel arbitration on the basis of equitable estoppel. *Id.*

Although the estoppel analysis is fact dependent, the court held that a proper analysis for compelling arbitration focuses on the connection between the claim, the arbitration agreement, and the parties. *Id.* In *EPIX*, all the factors favoring estoppel are present: AIG's interests are clearly aligned with its wholly-owned subsidiary National Union, there is an identity of claims against AIG and National Union, and, most importantly, EPIX's claims are inextricably intertwined with the Payment Agreement. *Id.* at 1203. Accordingly, the court held that although it is not a signatory to the arbitration agreement, AIG has standing to compel arbitration of EPIX's claims on the basis of estoppel. *Id.*; *see also PRM Energy Sys. V. Primenergy, L.L.C.*, No. 08-1987, 2010 U.S. App. LEXIS 395, at *6-15 (8th Cir. 2010) (holding non-party signatory could enforce arbitration clause on a "concerted-misconduct theory of alternative estoppel").

Moreover, the court rejected EPIX's argument that its claims did not fall within the scope of the arbitration clause. The court held that the claims "not only 'arise out of,' but are undeniably intertwined with the contract between EPIX and National Union" because EPIX's claimed injury resulted from its entry into the Payment Agreement. *EPIX*, 982 A.2d at 1207. The court further held that the New Jersey Antitrust Act did not preclude arbitration of claims under the statute. *Id.* at 1209-10.

Therefore, based on the ruling in *EPIX*, where state laws permit non-signatories to enforce a contract on the basis of estoppel, a non-signatory may rely upon equitable estoppel to enforce an arbitration agreement for claims that are within the scope of the arbitration clause. ❑

Cindy Chang is an Associate in the firm's Insurance and Reinsurance Practice. Her practice includes an array of insurance and reinsurance dispute,regulatory, and corporate matters. Ms. Chang received her bachelor's degree from Washington University and her law degree from Washington University School of Law.

LETTER FROM WASHINGTON

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Despite these LRRA provisions, many states currently impose a variety of informational response and approval requirements on non-domiciliary RRGs. For instance, the California Department of Insurance requires foreign RRGs to (1) wait 60 days after delivery of its registration filing before it may commence operation in the state, (2) file a recurring annual registration renewal, (3) pay registration and renewal fees, (4) submit additional information for the Department's "approval," and (5) make changes to documents filed and approved in the RRG's domiciliary state before the Department will "approve" the RRG's registration in California.

These practices violate the LRRA. Two federal court decisions expressly concur with this position: *Attorney's Liability Assurance Society, Inc. v. Fitzgerald*, 175 F.Supp. 2d 619 (W.D. Mich. 2001) and *National Risk Retention Association v. Brown*, 927 F.Supp. 195 (M.D. La. 1996).

In *Fitzgerald*, the court rejected a non-domiciliary state's attempt to regulate foreign RRGs. First, the court found the state improperly concluded that the foreign RRGs did not qualify as RRGs under the LRRA. *Fitzgerald*, 175 F.Supp. 2d at 629-34. Secondly, the court found the LRRA preempted a regulatory fee which the non-domiciliary state attempted to assess against foreign RRGs. *Id.* at 636.

In *Brown*, a non-domiciliary state attempted to impose requirements not specified in Section 3902(d) of the LRRA as conditions for foreign RRG registration. The conditions included a required minimum capital and surplus of $5 million, posting of funds or a bond of $100,000 with the commissioner, and an annual submission of a plan of operation along with a $1,000 examination fee. The court held the non-domiciliary state exceeded its authority over foreign RRGs:

> The burden imposed by the application process for a non resident risk-retention group is broader than is allowed by the LRRA. Section 3902(d) sets out the documents which are to be submitted to the insurance commissioner in the state in which it intends to do business but is not chartered . . . . risk retention groups are exempted from any further requirements under Section 3902(a)(1).

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Brown, 927 F.Supp. at 201. Accordingly, unless a specific regulatory power has been conferred upon a non-domiciliary state under the LRRA, Section 3902 prohibits the non-domiciliary state from directly or indirectly regulating the RRG. Interestingly, the NAIC's Risk Retention and Purchasing Handbook expressly supports these conclusions.

Impact on RRGs

The financial impact of improper state regulatory practices on RRGs has been substantial. According to a recent survey by *The Risk Retention Reporter*, for an RRG operating in all states, the annual cost for registration fees is approximately $9,300, and annual renewal, filing, and/or other fees are approximately $8,150. "Impact on Risk Retention Groups of State Encroachment of Liability Risk Retention Act Preemptions," *The Risk Retention Reporter*, Jan. 2009, at 8. Moreover, states that impose approval and requirements beyond the scope of the LRRA force RRGs to incur significant compliance and legal costs to satisfy individual state regulators' demands.

The results of the *Risk Retention Reporter*'s survey, which received responses from captive managers representing 118 RRGs, demonstrate the prevalence of state regulatory violations of the LRRA. Sixty-one percent of respondents reported that states had "overreached" by attempting to directly or indirectly regulate the operation of a foreign RRG. The responses indicated that 39 states engage in some form of overreaching.

Lack of an Adequate Remedy

RRGs, through the National Risk Retention Association, and the captive industry generally, have worked well with the NAIC's Risk Retention Group Task Force and Risk Retention (C) Working Group. However, when requested to include compliance with the federal law in the accreditation standards by non-domiciliary states, the Task Force declined because the NAIC's accreditation program is limited to imposing reasonable rules upon the states of domicile for the purpose of fostering good solvency regulation. This underlines the problem that the NAIC, as currently structured, has no regulatory authority or enforcement capability over non-domiciliary states.

In some cases, non-domiciliary states will respond to a well-documented protest regarding improper laws or regulations. However, if an impasse is reached, the only recourse under the LRRA for an RRG is to seek an injunction in court. This has proven to be inadequate because (1) a decision in one federal court is not binding in another federal district court (unless in the same federal circuit on the same facts); and (2) the cost of litigation is such a deterrent that most RRGs acquiesce to demands by non-domiciliary states even though those demands are clearly not contemplated by the LRRA.

Proposed Solution

Federal law should be amended to grant federal oversight and rulemaking authority to an office within the Treasury. This would create an impartial arbiter which would have the authority to bind the states and the industry to avoid the problems referenced above. The Federal Administrative Procedure Act would apply to ensure due process, and an appeal could be taken to the federal courts.

The LRRA is one of the few federal statutes that is not subject to direct federal oversight. While the structure of the LRRA assumes the state of domicile is the "lead state" and will be able to provide the adequate regulatory oversight, the state of domicile has no authority under the Constitution over a non-domiciliary state.

Rulemaking authority and oversight by the Treasury would be fair to all parties (state regulators and the industry). All would have the opportunity to participate in any decision making. Moreover, the oversight and rulemaking authority can be modeled after the same authority granted to the Treasury under the Terrorism Risk Insurance Act, which has worked very well with the cooperation of the states and the NAIC.

Conclusion

Legislation embodying federal oversight and rulemaking is currently being drafted. It should be introduced soon.❑

Robert "Skip" Myers is Co-Chairman of the firm's Insurance and Reinsurance Practice and focuses in the areas of insurance regulation, antitrust, and trade association law. He serves as outside general counsel to the National Risk Retention Association. Skip received his bachelor's degree from Princeton University and his law degree from the University of Virginia.

HASSETT'S OBJECTIONS

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However, Rule 68 has been an inadequate incentive to encourage settlements, mainly because of the federal definition of recoverable "costs." Generally, recoverable costs include filing and service fees, court reporter fees, printing costs, exemplification and copying costs, and witness fees. *Parkes v. Hall*, 906 F.2d 658, 659-60 (11th Cir. 1990) (generally limiting costs subject to the cost-shifting provisions of Rule 68 to those enumerated in 28 U.S.C. § 1920). Attorneys' fees are not included as "costs," unless the substantive law at issue in the litigation defines "costs" to include attorneys' fees. *Marek v. Chesny*, 473 U.S. 1, 9 (1985) (awarding attorneys' fees under Rule 68 in civil rights litigation because 28 U.S.C. § 1988 allowed attorneys' fees as costs). Another significant item, expert witness fees, generally are not recoverable as costs. *Crawford Fitting Co. v. J.T. Gibbons, Inc.* 482 U.S. 437 (1987). As a result, costs assessed in most cases total less than $20,000.

Some states have put more bite into their analogs to Rule 68 by allowing an offer of judgment to shift attorneys' fees, as well as costs. *See e.g.* Ga. Code Ann. § 9-11-68; Fla. Stat. § 768.79. Those attorneys' fees shifting laws, generally passed as part of tort reform, have been under assault on constitutional grounds. *See Smith v. Baptiste*, Case No. S09A1543 (Ga. Supr. Ct.) (pending); *State Farm Mut. Auto Ins. Co. v. Nichols*, 932 So. 2d 1067 (Fla. 2006) (fee-shifting statute held constitutional).

While Rule 68 remains limited to costs, the electronic age may increase the magnitude of assessable costs to a level that litigants must consider. The costs of responding to e-discovery can run into the hundreds of thousands, depending upon the volume of electronic documents; the number of servers, workstations and laptops; the accessibility and format of electronic information; and the potential need to restore and search backup tapes.

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The federal courts have split on whether the expense of e-discovery is a recoverable cost. A federal court in Georgia recently addressed the question and found e-discovery expenses to constitute taxable costs. *CBT Flint Partners, LLC v. Return Path, Inc.*, No. 1:07-cv-1822-TWT, slip op. at 11-12 (N.D. Ga. Dec. 30, 2009). That case involved allegations of patent infringement, which subsequently were rejected on summary judgment. The defendant then submitted a bill of costs, which included approximately $250,000 in charges from the defendant's e-discovery vendor. That vendor was retained "to collect, search, identify and help produce electronic documents from [the defendant's] network files and hard drives in response to [the plaintiff's] discovery requests." *Id.* at 10. Following the entry of summary judgment in its favor, the defendant sought an award of its e-discovery expenses as costs.

In its analysis, the court first noted that other courts have split on whether such expenses are taxable as costs. *Compare Bus. Sys. Eng'g, Inc. v. Int'l Bus. Mach. Corp.*, 249 F.R.D. 313, 315 (N.D. Ill. 2008) (taxing costs for making documents electronically searchable); *Lockheed Martin Idaho Tech. Co. v. Lockheed Martin Advanced Envtl. Sys., Inc.*, No. CV-98-316-E-BLW, 2006 WL 2095876, at *2 (D. Idaho July 27, 2006) (awarding costs incurred in creating litigation database due to "extreme complexity of the case"); *with, Computer Cach Coherency Corp. v. Intel Corp.*, No. C-05-01766 RMW, 2009 WL 5114002, at *3 (N.D. Cal. Dec. 18, 2009) (taxing "costs incident to modern electronic document production" such as Bates-numbering and scanning but refusing to award costs for optical character recognition and metadata extraction); *Kellogg Brown & Root Int'l, Inc. v. Altanmia Commercial Mktg. Co. W.L.L.*, No. H-07-2684, 2009 WL 1457632, at *5 (S.D. Tex. May 26, 2009) (denying award of costs for processing tapes to locate, retrieve, and store information, which court found was akin to the work of an attorney or paralegal in segregating responsive documents); *Fells v. Va. Dep't of Transp.*, 605 F. Supp. 2d. 740, 743-44 (E.D. Va. 2009) (same); *Klayman v. Freedom's Watch, Inc.*, No. 07-22433-CIV, 2008 WL 5111293, at *2 (S.D. Fla. Dec. 4, 2008) (same); *Windy City Innovations, LLC v. Amer. Online, Inc.*, No. 04 C 4240, 2006 WL 2224057, at *3 (N.D. Ill. July 31, 2006) (same). The cases allowing taxation generally find that e-discovery costs constitute the "modern day equivalent of 'exemplification and copies'." *CBT Flint Partners, LLC*, slip op. at 11. Other cases have found that assembling records for production ordinarily is a task done by attorneys and paralegals and is not recoverable.

The court then concluded that e-discovery costs are more akin to copies than attorney services. "The services provided are not the types of services that attorneys or paralegals are trained for or are capable of providing. The services are highly technical. They are the 21st century equivalent of making copies." *Id.*

While the analogy to making copies may under-appreciate the knowledge and skill necessary to extract data from hard drives, the conclusion that attorneys and paralegals do not have those skills is spot on. "The [vendor's] services are certainly necessary in the electronic age. The enormous burden and expense of electronic discovery are well known. Taxation of these costs will encourage litigants to exercise restraint in burdening the opposing party with the huge costs of unlimited demands for electronic discovery." *Id.* at 12.

Amen. The high cost of electronic discovery is not limited to IP litigation. Such costs in many insurance related cases, particularly class actions, can run into six figures. While courts can shift the cost of electronic discovery during the discovery period, the specter of bearing the entire cost at the end of the case now is a factor parties must consider. ❑

Lew Hassett is Co-Chairman of the firm's Insurance and Reinsurance Practice. His practice concentrates in the areas of complex civil litigation, including insurance and reinsurance matters, business torts and insurer insolvencies. Lew received his bachelor's degree from the University of Miami and his law degree from the University of Virginia.

PLAYER'S POINT

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The following chart (see page 7) will quickly bring you up to date on the legislative history of TRIA.

In some ways, TRIA is the perfect government program. Why? Set out below are the reasons it is an attractive and effective use of federal funding. Also discussed are the implications of the changes to TRIA proposed in the Administration's Budget Plan.

Finally, under the rubric of "What is good for the goose is good for the gander," I thought it entertaining to speculate on how the TRIA model might be applied to the banking industry.

First, why does TRIA work?

TRIA costs nothing until there is horrific loss.

TRIA is a backstop and is triggered after insured losses of $100 million. It is designed to jump start the private market for terrorism insurance, and that is what it has done. Until there is an Act of Terrorism (as defined in TRIA) and until the losses mount to $100 million, no federal funding is used.

Impact of the Proposed Amendments

None. The President claims his reductions will save $249 million. Welcome to Washington Budget Land. Any such savings are realized only on paper. The budget "cost" of TRIA is based on the estimated probability of various loss scenarios over the life of the program. As mentioned above, absent a catastrophic loss, TRIA requires no federal outlays.

TRIA piggy-backs existing industry administrative framework of direct insurance policies and reinsurance.

There is no new division of Homeland Insurance Security or Bureau of Terrorism Risk Finance charged with implementing TRIA. The Secretary of the Treasury, through its Terrorism Risk Insurance Program office, has administered TRIA on a budget basis using the administrative framework of the insurance industry.

Impact of the Proposed Amendments

None. The insurance industry would continue to administer TRIA.

TRIA provides incentives and confidence which allow the existing non-government terrorism insurance market to develop.

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The Evolution of TRIA

	TRIA (2002)	TRIREA (2005)	TRIPRA (2007)
Duration	3 years (expired 12/31/2005)	2-year extension (expired 12/31/2007)	7-year extension (expires 12/31/2014)
Covered Lines	Most commercial P&C, including WC and surety, but excludes crop, private mortgage, medical malpractice, financial guarantee, reinsurance or flood under NFIP	Same as TRIA but also excludes commercial auto, professional liability (except D&O), surety, burglary & theft, and farm owners multi-peril	Same as TRIREA
Act of Terrorism	Foreign only $5M	Foreign only $5M	Foreign or domestic $5M
Program Trigger	None	2006: $50M 2007: $100M	$100M
Deductible (% prior year DEP)	15% in final year	2006: 17.5% 2007: 20%	20%
Coinsurance	10%	2006: 10% 2007: 15%	15%
Recoupment	Mandatory = $15B aggregate insurer retention; 3% surcharge	Mandatory = $25B (2006), $27.5B (2007) aggregate insurer retention; 3% surcharge	Mandatory = 133% ($27.5B aggregate insurer retention); Accelerated schedule; 3% max. eliminated

Certainly the market for Terrorism Insurance is better and more robust today than immediately following 9/11. It is understandable that the Obama Administration is seeking expense savings, and this is one easy target. The question is at what level of reduced government support does the mechanism fail to support the private market and cause private coverage to disappear? One successful terrorist attack will no doubt engender much the same fear as followed 9/11. In early February, CIA Director Leon Panetta told Congress we could expect an Al-Qaeda attempted attack within six months.

Impact of the Proposed Amendments

Commentators have said the amendments likely will undermine the private market confidence and cause private terrorism coverage to dry up.

TRIA has a simple dollar threshold which promises fast determination of applicability.

It is quite difficult to determine quickly whether an act of terrorism is motivated by foreign or domestic ideology. We need only to think back to the recent loss of life at Fort Hood by Major Nidal Malik Hasan. Would you call this a foreign or a domestic Act of Terrorism? Was Major Hasan motivated by a foreign person or interest? It would be difficult to come to a quick resolution. It is the reliability and responsiveness of a program such as the TRIA backstop that encourages private sector participation.

Impact of the Proposed Amendments

Most believe the amended plan would undermine reliability of reimbursement and negatively impact private terrorism insurers.

TRIA establishes in advance a framework for federal government payout of a loss that the federal government would otherwise payout in a politically charged and inconsistent manner.

This is truly a no-brainer. One needs only look to Katrina or Haiti. Should there occur an Act of Terrorism that causes substantial loss, historically, the federal government and our political process have quickly responded to that loss. The rationale for "making things right" is even greater than in a natural disaster because there is an obligation for our government to protect us from such acts, motivated either domestically or by foreign operatives. Why not keep in place a well planned method of reimbursing loss, measuring reimbursement and adjusting future premiums.

Impact of the Proposed Amendments

The amendments would reduce the magnitude and usefulness of the federal backstop and would invite a political solution during a chaotic time of national loss because TRIA may have been eroded to the point of ineffectiveness.

TRIA's application to the U.S. Banking System

Perhaps we can take a page from TRIA and apply it to banking. The suggestion of risk sharing has already been made by others, including Sheila Bair, the thoughtful Chairwoman of the Federal Deposit Insurance Corporation. We should learn from our recent past and charge a risk premium for risky business. It has been suggested that the structure of risk premiums for a bank's risk profile would attach to its FDIC insurance, with the federal government providing a back-stop (a la TRIA) for losses in excess of FDIC insurance recoveries. Federal government payouts above the FDIC pool of funds would, over the long term, be assessed against all participants in the financial services sector. This would not substitute for many of the rule revisions contemplated by Congress to rebuild fire walls between commercial banking and investment banking, but it would be a good start. ❑

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