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LETTER FROM WASHINGTON

ARE WE STUMBLING INTO "NATIONAL" BUT NOT "FEDERAL" REGULATION?

By Robert H. Myers, Jr.

Congress, apparently under the impression that it is reforming healthcare, has undertaken the reform of health insurance regulation with a vengeance. The more logical repository for "insurance reform" – financial services oversight and reform – has taken a back seat in Congress to "healthcare" reform.

In both of these debates, the demand for national action involving insurance has accelerated. The mandate for uniformity of laws and regulations among the states is implicit. Of course, this produces a massive collision with our state based regulatory system, which enables, and even fosters, differences among the states in the laws and regulations affecting insurance and their implementation by state regulators.

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HASSETT'S OBJECTIONS

MCCARRAN-FERGUSON VERSUS NEW YORK CONVENTION

By Lewis E. Hassett

The McCarran-Ferguson Act allows the states generally to regulate the business of insurance. 15 U.S.C. § 1011 *et seq.* Under McCarran-Ferguson's reverse pre-emption framework, a federal statute yields to a conflicting state statute where the state statute regulates the business of insurance and the federal statute does not "specifically relate to the business of insurance." 15 U.S.C. § 1210(b). *Accord: U.S. Dept. of Treasury v. Fabe,* 508 U.S. 491, 507 (1993) (state insurer insolvency law according enhanced priority to policyholder claims held to trump federal statute according priority to federal tax claims).

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PLAYER'S POINT

AMEND GRAMM-LEACH-BLILEY?

By Thomas A. Player

Some members of Congress are discussing amendments to the Gramm-Leach-Bliley Act of 1999 ("GLBA"), while others are taking steps to limit public company reporting requirements in Sarbanes-Oxley.

To understand the history of GLBA, one must understand the commercial landscape of the early 1900's. It was a wide open economy. Banks were fueling the economy with loans which were themselves fueled by securities trading by banks. Sound familiar?

Then came the Great Depression of 1929 and the ruin of banking. In 1933, Congress stepped in to remedy the abuses of the earlier decade and passed the Glass-Steagall Act, which separated commercial banking from securities trading and investment banking. Later in 1956, the Bank Holding Company Act separated banking and insurance.

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Inside this issue

Announcements

Morris, Manning & Martin is dedicated to taking steps to reduce our carbon footprint. Accordingly, please let us know if you no longer wish to receive our paper newsletter. We will ensure that you continue to receive the paperless e-newsletter. Please contact Carly Hartwick at chartwick@mmmlaw.com or 404.504.5471 to opt out of the paper newsletter.

Lew Hassett's article "*Wasa v. Lexington*: The Imaginary Reinsurance Cover," was published in the September 28, 2009, issue of *Insurance Law360*. The article previously appeared in the fall 2009 issue of the *MMM Insurance and Reinsurance Review*.

Skip Myers has been appointed to the editorial board of *Captive Review.*

Stacey Kalberman has joined the Government Affairs Committee of the National Risk Retention Association.

Chris Petersen will be testifying on behalf of Delta Dental Plans Association at the National Association of Insurance Commissioners' hearing on Health Care Reform Update, which is scheduled for December 4, 2009. His testimony will focus on issues facing insurers under the proposed federal health care reform legislation. Mr. Petersen will also be addressing steps that the NAIC and state policy makers should be taking to prepare for the possibility of reform legislation being adopted at the federal level.

Lew Hassett's and **Brian Levy's** article entitled "Insurers' Bad Faith Refusals: Refusal to Settle Prior to Entry of an Excess Judgment" appeared in the September 2009 issue of the *Insurance Coverage Law Bulletin*.

Skip Myers spoke on emerging legislative risks for captives at the World Captive Forum on November 10 in Bonita Springs, FL.

Jim Maxson and **Tony Roehl** presented a seminar entitled "COLI, BOLI, STOLI: The Good, The Bad, The Ugly" at the Association of Insurance Compliance Professionals' annual conference. Please contact either of them if you would like a copy of the presentation or to discuss the topic.

Skip Myers has been appointed to the Best Practices Working Group of the Captive Insurance Companies Association.

Lew Hassett and **Tom Player** attended the winter meeting of ARIAS-US on November 12th and 13th in New York City.

SURPLUS LINES REFORM LIKELY TO PASS THIS CONGRESS

By Stacey Kalberman

H.R. 2571, the Nonadmitted and Reinsurance Reform Act of 2009 (the "Act"), passed the House without amendment on September 9, 2009. H.R. 2571 is not the first surplus lines reform bill to see the light of the House floor. A similar version of the Act passed the House in both 2006 and 2007. While referred to the Senate in both 2006 and 2007, these bills never made it out of the Senate Banking Committee.

The outcome this Congress should be different. On November 10, 2009, the Chairman of the Senate Banking Committee, Chris Dodd, introduced the Act in its entirety into the Senate Bill entitled the Restoring Financial Stability Act of 2009. Placement in the Senate Banking Bill substantially increases the chances for passage of the Act in this Session and possibly without amendment.

The purpose of the Act is to streamline the payment of state surplus lines taxes and form filings, which is complicated by state premium allocation issues and a morass of individual state form and filing requirements. HR 2571 attempts to untangle the state regulatory web by prohibiting all states other than the home state of the insured from requiring the payment of the surplus lines premium tax or from regulating the placement of the surplus lines risk.

The Act addresses the problem of multi-state tax collection and allocation by permitting the broker to file the entire surplus lines premium tax with the insured's home state and prohibiting other states from requiring collection of their allocated portion directly from the broker. The Act specifies that the states themselves should establish and adopt uniform requirements for the reporting, payment and allocation of surplus lines taxes. One method to achieve this goal would be through the adoption of an interstate compact which would adopt "nationwide uniform requirements". In this manner, the legislation lifts the burden of state tax allocation from the broker and places it on the states, which then must seek collection of their tax through a state compact or clearinghouse.

The Act also resolves the difficulty of brokers attempting to comply with multi-state regulation of the sale of surplus lines insurance. Section 201 of the Act prohibits any state other than the insured's home state from regulating the placement of non-admitted insurance, thus resolving the issue of filing broker affidavits and reports to multiple jurisdictions. Additionally, only the insured's home state may require licensing of the surplus lines broker. The Act enforces these provisions by pre-emption of state laws which assert jurisdiction over non-domiciled risks.

The Act also provides a punitive measure for those states which refuse to participate in the national uniform licensing scheme or the NAIC's National Insurance Producer Database (NIPR).

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States which have not yet passed legislation to participate in the NIPR within two years following the passage of the Act will be prohibited from collecting licensing fees for the licensing of surplus lines producers.

With the expected passage of the Act this Session, the NAIC Surplus Lines Tax Working Group is attempting to establish a multi-state reporting form in order to comply with the intentions of the Act and provide a method for allocation of the premium tax to the various states. The multi-state form, however, has been viewed by several industry groups at too cumbersome due to its attempt to squeeze all state requirements onto one reporting form. The National Association of Professional Surplus Lines Offices, Ltd. and several of the State Stamping Offices continue to request a solution through SLIMPACT, the Surplus Lines Insurance Multi-State Compliance Compact. SLIMPACT is an agreement (or compact) drafted by various state regulators, legislators, stamping offices, brokers and trade associations to set uniform standards among the compacting states for the collection and allocation of taxes as well as standardization of regulatory requirements. It would have to be adopted by passing legislation in each participating state. ❑

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BECOMING AN ADDITIONAL INSURED NOW MAY BE EASIER

By Jessica F. Pardi

On July 6, 2009, an Atlanta jury awarded Regency Savings Bank (n/k/a Park National Bank) $1,106,740, including $400,000 in attorneys' fees and costs, as an additional insured on a policy issued by Pacific Insurance Company. *See Regency Savings Bank v. Pacific Ins. Co.*, Fulton Cty. Sup. Ct. no. 2006-CV-123845. This award, if upheld on appeal, may have far-reaching effects on who is an "additional insured" and the proof necessary to obtain coverage as an "additional insured."

In April of 2000, Princewill Properties, Inc. purchased an apartment complex with proceeds of a mortgage loan from Southern Pacific Bank. In February of 2003, Regency acquired the mortgage from Southern Pacific. Under the terms of Regency's security agreement with Princewill, Princewill was required to maintain insurance on the apartment complex at all times.

The requisite insurance included fire coverage. Princewill obtained such insurance from Pacific Insurance Company (the "Pacific Policy") through Jenkins, Skipworth & Associates Insurance Agency. When Princewill obtained the Pacific Policy, Regency sent a facsimile to JS&A requesting evidence that Regency was an additional insured on the policy. JS&A issued a certificate showing Regency as an additional insured *but did not send a request to Pacific to add Regency to the Pacific Policy*.

Before an agency sends a certificate of coverage to a mortgagee, such as Regency, it is supposed to send a written request to the insurer (or a wholesale broker through which the coverage is placed) and receive written confirmation from the insurer (Pacific) that the mortgagee has been added as an additional insured. JS&A did not make the request, and Regency was not added to the Pacific Policy.

Princewill ultimately defaulted on its mortgage, and Regency foreclosed on the apartment complex and assumed all of Princewill's rights to the property including rights under the Pacific Policy.

The apartment complex was damaged by fire after Regency assumed the mortgage and while the Pacific Policy was in effect. The repair costs were estimated by a Pacific employee to be $690,108.66, and Regency demanded payment of the claim. Pacific denied the claim in part because it had no record of Regency as an additional insured and therefore argued Regency was not entitled to coverage.

Regency did not - and indeed could not - argue it had been added to the Pacific Policy, but instead Regency argued it was covered because it contended no mortgage company has ever been denied being added to a policy. Regency's argument was supported by expert testimony regarding the common industry practice of adding a mortgagee to an insurance policy.

Following a three-day trial, a jury ordered Pacific to pay Regency $881,740 and JS&A to pay Regency $225,000. This total verdict of $1,106,740 included $400,000 in attorneys' fees. This ruling begs the question of whether other entities commonly added to insurance policies can now claim automatic coverage whether formally added or not. According to news reports, Pacific intends to appeal, but JS&A does not.❑

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EIGHTH CIRCUIT COURT OF APPEALS UPHOLDS SUMMARY JUDGMENT IN FAVOR OF INSURER REGARDING LONG TERM CARE INSURANCE RATE INCREASES

By J. Ben Vitale

In *Rakes v. Life Investors Insurance Company of America*, Case No. 08-2626 (8th Cir. September 18, 2009), the United States Court of Appeals for the Eighth Circuit affirmed an order granting summary judgment in favor of Life Investors Insurance Company of America ("Life Investors") on claims of fraud and tortious breach of the implied covenant of good faith and fair dealing.

Robert Rakes and Robert Hollander, the named plaintiffs in a purported class action lawsuit against Life Investors, purchased long term care ("LTC") insurance from Life Investors in 1994 and 2001, respectively. On the first page of the policies, in boldface, capital letters, Life Investors disclosed that it had a limited right to change premium rates. That is, Life Investors could change premiums only for the block of insureds, not for individual policyholders. Although both Plaintiffs testified that they believed that their premium rates would not increase, both were aware that the rates could increase.

The policies were priced in the 1990s with the actuarial assumption that the projected lapse rate would be a certain percentage in the first policy year and a different, lower percentage thereafter. Because LTC insurance was a relatively new product, the pricing of LTC policies was subject to "considerable uncertainty." Nevertheless, representatives of Life Investors testified that they intended that the policies would be level premium policies. However, by the early 2000s, Life Investors realized that the actual lapse rate was lower than expected. As a result, Life Investors increased the rates and informed its policyholders that further premium increases were likely.

The Plaintiffs filed suit alleging (1) that Life Investors had used inflated lapse rates purposefully to underprice LTC insurance products and gain market share with the intent to raise premiums in the future; (2) that, at the time the insureds bought their policies, Life Investors failed to disclose the alleged plan to increase premiums; (3) that the policies "guaranteed renewable" language was an affirmative representation that the LTC policies would be affordable for life and was thus untrue and misleading because the rate hikes caused the policies to become unaffordable; and, (4) that Life Investors further misled them by using false reasons to justify the rate increases in the materials that accompanied the notification of the rate hike.

The complaint alleged four counts: actual fraud, constructive fraud, tortious breach of implied covenant of good faith and fair dealing (bad faith), and punitive damages. The district court granted Life Investors' motion to dismiss the punitive damages count and that ruling was not at issue on appeal. The Plaintiffs sought to represent all individuals who bought certain LTC insurance policies from Life Investors "and whose premiums on those policies were increased at any time after 2000."

Before the motion for class certification was due and after conducting extensive discovery, Life Investors moved for summary judgment, arguing that the fraud claims were barred because potential rate hikes were disclosed and the complaint failed to state a claim for the tort of bad faith. The district court granted Life Investors' motion, ruling that Life Investors' "numerous disclosures of its right to raise premiums negates any alleged misrepresentation or Plaintiffs' reasonable reliance on a belief their rates would not increase." *Rakes v. Life Investors Ins. Co. of Am.*, 622 F.Supp.2d 755, 767 (N.D.Iowa 2008). Because the Plaintiffs had not made a claim for benefits under their policies, the district court dismissed their bad faith claim, and the Court of Appeals affirmed, on the grounds that, under Iowa law, "the tort of bad faith arises in situations where the insurer has denied benefits or has refused to settle a third-party's claims against the insured within the policy limits."

On appeal, the Plaintiffs argued that their knowledge that Life Investors might raise premiums does not preclude their fraud claim because (1) Life Investors planned to raise premium rates when it sold the LTC insurance policies, yet it did not disclose the planned rate hike; (2) at some point, Life Investors realized that its actuarial assumptions were wrong, yet it did not disclose that information, causing the insureds unwittingly to renew their policies; and (3) Life Investors lied about its reasons for instituting the rate hikes when it stated that the claims significantly exceeded anticipated levels and that limited actuarial and claims experience failed to provide an accurate forecast.

The Court of Appeals held that the "guaranteed renewable" language did not guarantee the Plaintiffs a level premium for life; they were guaranteed only the right to renew their LTC policies. Because Life Investors disclosed their right to change premium rates, the Court found no genuine issue of material fact as to whether the policies guaranteed renewable language constituted a fraudulent representation.

Further, despite conducting substantial discovery, the Court held that the Plaintiffs failed to support their assertion that Life Investors fraudulently omitted that it had initially underpriced its LTC policies, intending to seek a series of premium increases. Rather, where the Plaintiffs did provide citations, the documents and testimony supported Life Investors' position that it priced the policies using appropriate lapse rates. Although Life Investors later realized that its lapse rate assumptions were wrong, the Plaintiffs cited to no law that requiring an insurer to disclose its actuarial assumptions to its policyholders.

Finally, although Life Investors allegedly misrepresented that the rate hikes were due to increased claims, the Plaintiffs failed to explain how this misrepresentation was material or how they relied upon it. Moreover, Life Investors did disclose that additional future

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rate increases were likely, a representation that would be material to the insured's decision whether to renew his policy. Therefore, the Court of Appeals held that the alleged misrepresentations in the documents accompanying the notification of the rate hike were not actionable and, thus, summary judgment in favor of Life Investors was appropriate. ❑

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PLAYER'S POINT

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This separation continued until 1999 when Congress, believing that "leveling the playing field" would give U.S. financial institutions parity with European institutions in broadening the delivery of financial services, repealed Glass-Steagall and much of the Bank Holding Company Act.

Less publicized but adding fuel to the already hot deregulation fire was the enactment of the Commodity Futures Modernization Act of 2000 which effectively blocked all regulatory oversight of over-the-counter derivatives.

Former New York Insurance Commissioner Eric Dinallo said in a recent New York Times interview, "Congress needs to undo the damage from two pieces of legislation: the Gramm-Leach-Bliley Act of 1999…and the Commodity Futures Modernization Act of 2000…"

As mentioned, members of Congress are busy examining improvements to our financial oversight and reporting regimes. The recent actions of the House Financial Services Committee in amending the application of Section 404 of Sarbanes-Oxley to reduce reporting burdens on business is a step in the right direction, but also critical is the need for addressing fundamental changes to GLBA. To address only changes to Sarbanes-Oxley without an overhaul of GLBA would be tantamount to rearranging the deck chairs on the Titanic.

While it is too soon to gauge the extent of the impact and the fixes from the Financial Meltdown of 2008, it is not too early to fully understand commercial banking needs to be protected from itself.

There are those who call for a repeal of GLBA and a reimplementation of Glass-Steagall. Perhaps something less drastic, such as a limitation of banking resources committed toward securities trading might be a better solution.

It is certain, however, that regulation of derivatives must occur and will occur.

The point I intended to make in the September issue was that insurance regulation was not the problem in the Meltdown of 2008.

As for allowing insurance and banking affiliations, it is neither a problem nor a panacea. The bounty Citigroup sought by the expansion of banking powers in GLBA has just not paid off. But, neither have those additional powers allowing banking to expand into insurance been a problem.

The investment laws as applied to insurance companies have always been tight and continue to be monitored closely. While the financial services house needs to be put back in order, the room labeled "insurance" only needs the furniture rearranged.

The House and the Senate are now considering legislation that would establish an office within the Treasury Department to monitor the insurance industry, coordinate federal efforts and policy relating to international insurance issues and make recommendations to Congress for modernizing insurance regulation. Such an office could be a useful adjunct to the state-based regulatory system we now have. ❑

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LETTER FROM WASHINGTON

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While Congress would like to establish uniform rules for the regulation of insurance, there is a firm understanding that the federal government does not have the manpower (or willpower) to regulate the insurance industry. As a result, the existing insurance regulatory structure (state insurance departments and the NAIC) are being conscripted (and/or even volunteering) to fill the void.

Prior to the crash of 2008 and the continuing financial troubles, the debate over insurance reform was between federal regulation and state regulation. Federal chartering and regulation of insurers was the focus of the debate. The principal concern was "dual regulation," i.e., regulation by both the state and the federal government at the same time.

The demand for national action on insurance reform has refocused the debate. Current proposals and legislation before Congress are moving from the federal/state dichotomy to insurance regulation mandated by the federal government but implemented by the states. This is really a new variant on the old theme.

The result is likely to be some sort of "hybrid" regulation that roughly follows the model of the Terrorism Risk Insurance Act ("TRIA"). TRIA was passed by Congress in 2002 to provide reinsurance capacity for the terrorism risk market. TRIA is a federal law that preempts conflicting states laws and mandates that qualifying property casualty insurance companies offer terrorism risk coverage. Rulemaking and oversight by the U.S. Department of the Treasury is specifically authorized, and the federal Administrative Procedure Act applies.

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This federal/state insurance legislation has worked well (although, thankfully, there has been no incident of terrorism to test the system). The demand for national action has produced other examples of this "hybrid" form of regulation. Congress is now considering:

NARAB II. The National Association of Registered Agents and Brokers Act of 2009 (NARAB II) (H.R. 2554) passed the House of Representatives. If enacted into law, this Act would result in the creation of a commission that would establish criteria for membership by insurance agents. An agent who gained membership would be able to do business in any state so long as he or she paid the appropriate fees. In other words, the time consuming and expensive process of multi-state licensing would be preempted. The Commissioners of NARAB II would be state regulators and industry representatives appointed by the President and the Federal Administrative Procedure Act would apply.

Surplus Lines and Reinsurance. The Nonadmitted and Reinsurance Reform Act of 2009 (H.R. 2571) passed the House earlier this session. It has been incorporated into the Restoring American Financial Stability Act of 2009 sponsored by the Chairman of the Senate Banking Committee, Senator Chris Dodd, under Subtitle B – State Based Insurance Reform. "Lead state" regulation is the concept behind this bill. Specifically, this legislation would facilitate the multi-state placement of surplus lines coverage by establishing that only the home state of the primary risk would be entitled to demand premium tax and that any other states in which risk is located would have to look to the primary state to obtain their proportionate share of the tax. It is envisioned that these states would create an interstate compact for this purpose. Similarly, in the area of reinsurance, only the state of domicile of the reinsurer would have the ability to financially regulate the reinsurer. This would preempt non-domiciliary states from imposing "commercial domicile" or other requirements.

Health Insurance. Several of the proposed federal bills have created a substantial role for the NAIC to perform its current rulemaking function regarding the development of health insurance model laws and regulations. However, those NAIC-generated models would have the effect of federal law and would be, by one mechanism or another, imposed upon the states. This story continues to evolve as we go to press.

Reinsurance. The NAIC itself has taken steps towards promoting the "hybrid" model. The NAIC's Reinsurance Regulatory Modernization Act would require federal legislation which would authorize the President to appoint a board of state insurance commissioners and federal regulators. The board would have the authority to certify and regulate states which would seek to qualify either as a "home state" or a "port-of-entry" state. This status would enable these states to regulate reinsurance on a national basis. "Inconsistent" state law would be federally preempted. The board would have authority to enter into agreements with non-US jurisdictions (which is an authority reserved to the federal government). Federal law would apply and judicial review would occur in a federal court, although an appeal would have to be made first to the board.

National Rulemaking. The NAIC is also deliberating the "National Insurance Supervisory Commission" ("NISC"), which also would require an act of Congress. The NISC would have the authority to develop model laws on specified areas of insurance. These laws, once adopted by the NISC would create national uniformity because each state member of the NISC would be bound by such laws. States that elected not to become members of the NISC also could be bound by such laws if a new federal regulatory authority – the Office of National Insurance within the Treasury – ruled that inconsistent state laws should be preempted.

Are we stumbling into national regulation? The financial crisis and the pent up demand for national uniformity is creating a new regulatory paradigm – federally mandated uniformity implemented by the states. Is this a better model than state versus federal regulation? Will the commissions created by legislation work more efficiently than the current system and still be politically accountable? Is this just a stepping stone to federal regulation? There are a lot of questions that need to be answered. ❑

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HASSETT'S OBJECTIONS

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Some states have laws barring the enforcement of arbitration clauses in insurance contracts. *See e.g.* Off. Code Ga. Ann. § 9-9-2(c); Kan. Stat. Ann. § 5-401(c); La. Rev. Stat. Ann. § 22:868. The majority of courts have held that, while the Federal Arbitration Act mandates the enforcement of arbitration clauses in agreements affecting interstate commerce, state laws precluding the enforcement of arbitration clauses in insurance contracts trump the mandate of the Federal Arbitration Act. *See American Banker's Ins. Co. of Florida v. Inman*, 436 F.3d 490 (5th Cir. 2006); *McDermott Int'l, Inc. v. Lloyd's Underwriters of London*, 120 F.3d 583, 586 (5th Cir. 1997); *McKnight v. Chicago Title Ins. Co.*, 358 F.3d, 854, 857 (11th Cir. 2004); *Standard Sec. Life Ins. Co. of NY v. West*, 267 F.3d 821 (8th Cir. 2001). Accordingly, it is reasonably well-settled that an arbitration clause in an insurance contract between citizens of the United States is unenforceable where contrary to a state law applicable specifically to insurance.

A lingering question has been whether an arbitration clause in a contract involving international commerce can be pre-empted by a contrary state law barring the forced arbitration of insurance disputes. Unlike arbitration clauses affecting interstate commerce within the United States, which are governed by the Federal Arbitration Act, agreements to arbitrate in the international context are governed by a treaty; to wit, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, sometimes called the "New York Convention,"

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(the "Arbitration Convention") and its implementing legislation (the "Arbitration Convention Act"). June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3; 9 U.S.C. §§ 201-208. While the Federal Arbitration Act appears in Chapter 1 of Title 9 of the United States Code, the Arbitration Convention Act appears in Chapter 2 of that title.

The United States Court of Appeals for the Fifth Circuit recently addressed the issue *en banc*, holding that the Arbitration Convention trumps the McCarran-Ferguson reverse pre-emption and upholding the enforcement of an arbitration clause in a reinsurance contract with Lloyd's. *See Safety National Cas. Corp. v. Certain Underwriters at Lloyd's, London*, Case No. 06-30262 (5th Cir. November 9, 2009). The *en banc* decision before eighteen judges on the Court was joined by fourteen of the judges, with a concurrence by a fifteenth judge, and with three judges dissenting.

The facts of the case are rather simple. The Louisiana Safety Association of Timbermen—Self Insurer's Fund ("LSAT") issued worker's compensation insurance for its members. Certain Lloyd's syndicates provided excess insurance to LSAT via a reinsurance agreement with an arbitration clause. Safety National Casualty Corporation ("Safety National") subsequently acquired certain losses and reserves from LSAT under a loss portfolio transfer agreement. The dispute centered upon whether Lloyd's was required to continue the reinsurance following the transfer to Safety National. Because the reinsurance agreements with Lloyd's included an arbitration clause, arbitrability became a threshold issue.

While the decision has substantial practical business impact, it turned on the esoterica of treaty jurisprudence. In a nutshell, a treaty can be deemed "self-executing" or not self-executing. If the latter, the treaty is not enforceable in American courts until implemented by an act of Congress. In *Safety National*, Lloyd's argued that the Arbitration Convention was self-executing or, alternatively, that even if not self-executing, the Convention Act served to implement a treaty which is antithetical to the McCarran-Ferguson pre-emption. The majority of the court adopted the latter reasoning.

The leading recent Supreme Court decision on determining whether a treaty is self-executing is *Medellin v. Texas*, 128 S.Ct. 1346 (2008), which held that the Vienna Convention on Consular Relations and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention was self-executing. The *Medellin* case was in the news last year. The defendant was convicted of a horrific murder and sentenced to death. After his conviction, the defendant filed a state habeas proceeding, arguing that he had not been accorded his right to a consular visit under the Vienna Convention and that, therefore, his conviction should be set aside. The Texas courts rejected his argument, but the International Court of Justice held that the United States had violated the Vienna Convention and that the United States was obligated to review and reconsider the sentence without regard to state procedural requirements. The United States Supreme Court affirmed the conviction holding that, because the Vienna Convention had not been implemented through legislation, it was not binding on Texas.

Interestingly, in his opinion for the majority in *Medellin*, Chief Justice Roberts cited the Arbitration Convention as an example of a treaty that required congressional legislation to implement. *Id.* at 1366. The Fifth Circuit considered that language to be *dicta* and chose not to follow it. *Safety National*, Slip. Op. at 12-13.

In my view, the majority in *Safety National* is correct. The Arbitration Convention should be enforced without regard to the niceties of state insurance laws, McCarran-Ferguson notwithstanding. The whole point of the Arbitration Convention is to shield foreign companies from the vagaries of local courts and juries. American companies would expect signatories to the Arbitration Convention to respect it, notwithstanding the provincial views of a particular province, county or canton.

The Fifth Circuit's decision in *Safety National* conflicts with the Second Circuit's decision in *Stevens v. American International Insurance Co.*, 66 F.3d 41 (2nd Cir. 1995), where the court held that the Arbitration Convention was not self-executing and that, therefore, an insolvent insurer could enjoy the shield of a state law protecting it from the enforcement of arbitration clauses. Given the conflict in the circuits, *Safety National* may seek review by the Supreme Court. ❑

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