FDCC REINSURANCE, EXCESS AND SURPLUS LINES SECTION
FEBRUARY 2012 Pre-meeting Update

DO YOU ENJOY THE FDCC AND THE MEETINGS?

If so, why don't you invite others to be a part of it? Our Section must propose two new members for admission each year. Please review your contacts and consider who you would recommend. You can send me the name(s) or you can send the name(s) directly to Gale White and MaryNell: Gale White (whiteg@whiteandwilliams.com) and MaryNell (marynell@thefederation.com). The following information should be included:

Name
Membership Category
Affiliation (law firm or company)
Address
Email address
Proposer (if known)

They make it easy once you have identified a potential candidate – the Federation takes over once you have supplied a name and contact information.

DO YOU USE APPS? DO YOU KNOW WHAT AN APP IS? COME TO THE WINTER MEETING AND LEARN

At the last meeting we found out that the FDCC is rolling out a new smart phone app, which also works on a lap top, that gives you complete conference information wirelessly: www.thefederation.mobi. At the upcoming Winter meeting, come and learn how to use it.

There is also a plenary session that includes the topic: "TECHNOLOGY FOR LAWYERS - BEST iPAD APPS".

Learn how your iPad and smart phone can make you a more productive and effective lawyer. The panelists will explain the benefits and capabilities of their favorite legal applications. (If you don't know what an "application" is, you *really* need to come to this program.) Bring your smart phone or iPad and be prepared to use it!

2012 Winter Meeting at Waldorf Astoria Arizona Biltmore in Phoenix

http://www.thefederation.org/process.cfm?PageID=4&TopLevel=6&calendarDate=2012_03&Day=03&EventID=129

As you are probably aware by now our meeting in Phoenix has a major baseball theme. Hopefully you have registered and have your rooms reserved. I hear the weather is great.

Reminder Regarding our Section Meeting:

We are co-sponsoring a meeting with the Insurance Coverage, Appellate Law, and the Extra Contractual Sections. The combined meeting and CLE presentation is scheduled for **Thursday, March 8th at 7:30 a.m. – 8:45 a.m.** We will have a short business meeting at 8:45 a.m.

Meeting Topic and Speakers:

Multiple Claimants and Insufficient Limits -
Can Insurers Lessen their Exposure to Bad Faith Claims?

When multiple claimants are vying for insufficient policy limits, an insurer's bad faith exposure is magnified. If a settlement of some, but not all, claims exhausts the available policy limits, the insured is exposed to ongoing litigation without defense coverage. If the insurer conditions settlement on resolving all existing and potential claims, the insurer may face bad faith failure to settle claims from the plaintiff(s) unwilling to await a global resolution or dissatisfied with their share of the policy proceeds.

Judicial approaches to this situation vary, with some courts permitting insurers to proceed on a "first come, first serve" basis and others favoring a "first to settle" or "first to judgment" approach. In some jurisdictions, insurers can interplead the policy limits and call upon the court to assist in resolving the competing claims. In other jurisdictions, legislation has been proposed to offer insurers some protection against bad faith claims arising out of the multiple claimants/insufficient limits scenario. Our distinguished panel will explore the real world conundrums insurers face in this situation and share their views regarding effective ways to minimize extra contractual liability exposures.

Hypothetical cases will be posed and discussed to draw out several different suggested frameworks for guiding a carrier through the maze of choices presented by the "multiple claimant – insufficient limits" situation.

Moderator: Barbara A. O'Donnell – Zelle McDonough & Cohen LLP, Boston, MA

Panelists: John W. Weihmuller – Butler Pappas, LLP, Tampa, FL
Paul C. Garrison, Corporate Counsel–Infinity Insurance, Birmingham, AL
Philip D. Priore – McCormick & Priore, PC, Philadelphia, PA
John Briggs, Claims Counsel – Scottsdale Insurance, Scottsdale, AZ

Miscellaneous

If any of you are interested in reporting new reinsurance cases or any other insurance topic that is relevant to our Section, please let me know. The hot cases are listed on the FDCC website daily, but many times there are no Reinsurance-related cases or issues. I would like to receive information from you to include in an email to Section members to keep everyone apprised of cases that affect us and our practices.

Case Law

I give my heartfelt thanks to Mike Aylward who has again provided us with the following new case information:

A recurring issue for "excess" insurers who write policies over self-insured retentions is whether the insured must actually pay its SIR to trigger the carrier's obligations or can satisfy its obligations from other sources, such as other insurance policies. As may be seen, the answer to this question depends a great deal on the language in the excess policy.

In the most recent decision to address this issue, a federal district court in San Francisco has ruled that where a hotel was entitled to insurance coverage as an additional insured under a policy issued to a restaurant inside the hotel, funds contributed by the restaurant's insurer towards the settlement of a wrongful death claim against the hotel and the restaurant satisfied a $250,000 self-insured retention in the hotel's own policy with Federal. Notwithstanding language in the Federal policy stating that the insured itself was responsible to pay all self-insured retention expenses," the U.S. District Court ruled in *National Fire Ins. Co. of Hartford v. Federal Ins. Co.*, 2012 U.S. Dist. LEXIS 641 (N.D. Cal. January 4, 2012) that the language in question was distinguishable from that considered by the Court of Appeal in 2010 in *Forecast Homes* that unambiguously stated that "payment by others, including without limitation additional insureds or insurers, do not serve to satisfy the self-insured retention."

There have also been a flurry of recent interesting reinsurance decisions.

--Statute of Limitations

Ou sont les neiges d'antan? So mused the California Court of Appeal in a wry overview of the deteriorating relations between cedents and reinsurers. In affirming the trial court's dismissal on the basis that suit was not filed within the four-year limitations period for contract claims under Section 337 of the Code of Civil Procedure, the First District ruled in *Transport Ins. Co. v. TIG Ins. Co*., A122573 (Cal. App. January 13, 2012) that although reinsurers are entitled to a reasonable period of time to evaluate and respond to ceded claims, the statute of limitations is not tolled until the cedent's claims is actually denied. The Court of Appeal held that the trial court had not erred in instructing the jury that a suit for breach of reinsurance contract accrued "either when the reinsurer definitively denied the claim or when a reasonable period passed after the submission of the final proofs of loss" noting that in any event Transport had proposed the same standard in the proceedings below and thus was barred from disputing it under the "invited error" doctrine. Nor were its reinsurers equitably estopped to raise the statute of limitations owing to the fact that they continued to receive and process claims information concerning the underlying Aerojet pollution claims without raising issues concerning the running time period. The court also took note of the fact that Transport was aware that the statute of limitations might be an issue and had received a draft complaint against its reinsurers yet failed to file it for years.

--Follow the Fortunes

In a pair of recent rulings from the Appellate Division of the New York Supreme Court, the First Department reached different conclusions with respect to whether reinsurers were obligated to follow the fortunes of settling insurers. In a lengthy opinion, the First Department ruled that various reinsurers must "follow the fortunes" of USF&G and reimburse it for $420 million out of a total of $975 million that the cedent paid to insured Western MacArthur to resolve asbestos liabilities. In *USF&G v. American Re-Insurance Company*, 2012 NY slip op 00421 (1st Dept. January 24, 2012), the Appellate Division of the New York Supreme Court ruled that the Supreme Court had not erred in agreeing with USF&G that the treaty year under which these claims had been ceded had only a $100,000 retention, not the $3 million retention that applied to later years.

Further, the court refused to find that USF&G had settled to avoid a likely bad faith award against it. In light of the "follow the fortunes" doctrine, the First Department declared that the reinsurers had no right to second-guess USF&G's decision to settle, much less its decision to assign the entire loss to a single policy instead of spreading it among its thirteen years of coverage. As to the latter point, the court noted that applying thirteen retentions would have deprived USF&G of any reinsurance for this settlement and that the decision to select the 1959 policy, whether or not beneficial to the cedent's reinsurance rights, was not only permitted under California's "all sums" law and benefitted the underlying claimants, since the 1959 policy was the only one that was triggered by all their claims and had a higher policy limit that some of the other years. Writing in dissent, Judge Abdus-Salaam argued that there were disputed issues of fact with respect to whether the settlement was for bad faith, noting that Western MacArthur had not only made such claims in the original coverage litigation (USF&G had first denied that it ever insured Western MacArthur and then asserted that any policies would necessarily have contained aggregates when, in fact, copies that unserenditipously turned up in an archive that USF&G had donated to a Baltimore museum proved the opposite) but that the Bankruptcy Court, in approving the settlement, had assigned value to these claims.

In contrast to its ruling in USF&G, the First Department refused to hold that the reinsurers of AIG were bound to follow the fortunes of National Union in paying $150 million to Monsanto to resolve numerous underlying toxic tort and environmental claims. In *American Home Assurance Co. v. Everest Re*, 2011 NY slip op. 09537 (App. Div. December 27, 2011), the Appellate Division ruled that although there was no evidence at all that National Union had acted other than in good faith in negotiating the Monsanto settlement, a disputed issue of fact did arise in light of the fact that only a few months after the settlement was reached, the Delaware Superior Court ruled in *Monsanto v. Aetna*, 1993 WL 563253 (1993), aff'd 653 A.2d 305 (Del. Super. 1994) that such claims were subject to the "sudden and accidental"-type pollution exclusion.

--Bias and Motions to Vacate Awards

The U.S. Court of Appeals has also undertaken an interesting analysis of the obligations of arbitrators to disclose their interests and whether their failure to disclose may support a finding of "evident partiality" that may warrant setting aside a panel's award. In *Scandinavia Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co*., No. 10-0910 (2nd Cir. February 3, 2012), the Second Circuit ruled that a New York District Court (Schiendlin, J.) erred in vacating the award of a reinsurance arbitration panel based upon her finding that two of the panel members had exhibited evident partiality. In reinstating the award, the Second Circuit found that the failure of the two arbitrators to disclose their concurrent service as arbitrators in another arguably similar arbitration proceeding did not support the District Court's finding of "evident partiality" within the meaning of the FAA. Rather, the court found that evident partiality may be found only where "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." In this case, the court found that the arbitrators' overlapping service in two similar proceedings did not suggest, in and of itself, that they were predisposed to rule in any particular way. The court declined to find that the mere fact that the umpire (Dassenko) and St. Paul's party appointed arbitrator (Gentile) were serving together in a separate matter suggested in any manner that they were predisposed to favor St. Paul as the undisclosed matter here was overlapping arbitral service not a material relationship with a party. Nor were the similarities between the two proceedings, both as regards common issues and witnesses, sufficient to suggest that the arbitrator presiding in both was biased in favor of or against any party. The Second Circuit concluded that, "We do not think it appropriate to vacate an award solely because an arbitrator fails to consistently live up to his or her announced standards for disclosure, or to conform in every instance to the parties' respective expectations regarding disclosure." The court declared that such a standard would inject an element of subjectivity into the analysis of evident partiality that might result in different results in different cases depending on the particular standards of individual arbitrators.

Section Chairs

If you have any questions about the Section or the FDCC, please feel free to contact me or one of your Vice Chairs:

- Chair Meloney Perry, Meckler Bulger Tilson Marick & Pearson LLP Dallas TX
- Vice Chair Russell Allison, Carr Allison Birmingham AL
- Vice Chair Michael Aylward, Morrison Mahoney & Miller, LLP Boston MA
- Vice Chair Charles Henderson, Henderson Consulting and Risk Management Newtown Square PA
- Vice Chair Milton Thurm, McIntosh,Sawran, Peltz & Cartaya,P.A. West Palm Beach FL

For our detailed contact information and a list of our entire Section Members click on this link, which is on the FDCC website:
http://www.thefederation.org/process.cfm?pageID=6&groupID=256

I hope to see y'all in Phoenix.

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