MReBA Cover Notes --

A Publication of the Massachusetts Reinsurance Bar Association

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In This Issue

MReBA's Fifth Annual Symposium
October 3, 2013
Harvard Club of Boston

As the President of the Massachusetts Reinsurance Bar Association ("MReBA"), I am delighted to have the opportunity to extend a warm invitation for you to attend our ***Fifth Annual Symposium***. We will once again be convening at the Harvard Club of Boston in historic Back Bay on ***October 3rd*** for what will surely be another outstanding day of education, networking and camaraderie.

This year's program, ***The Future is Now: Reinsurance in the Age of Superstorms, Cyber Loss and Other Emerging Risks***, surely promises to be our most exciting conference yet. A series of panels composed of top-flight insurance professionals, executives, attorneys and arbitrators will be exploring the world of emerging risks for everything from climate change to cyber liability and how these new and evolving risks are impacting the world of reinsurance markets, underwriting and claims. As always, our interactive workshop presenting a real-world scenario will allow everyone to participate in a dynamic way.

We are particularly delighted to be welcoming to MReBA The Honorable Nancy Gertner (Ret) as our Keynote Speaker. (A brief biography of Judge Gertner's many accomplishments is in this issue). Judge Gertner will share her insights into the reinsurance industry from her unique viewpoint as a former judge and current arbitrator.

Whether you are an underwriting or claims professional, in-house or outside counsel, arbitrator or umpire, our program is certain to offer a stimulating and informative look at how emerging risks are transforming the reinsurance market. Registration is now open and you can find a link to do so here and at our home page, MReBA.org. Click here to view the Symposium agenda.

MReBA
Massachusetts Reinsurance Bar Association

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MReBA Calendar

MReBA Meeting:

November 13
at 12:30 p.m.
Mintz Levin
One Financial Center
Boston, MA

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I look forward to welcoming you to the Harvard Club on October 3rd!

John T. Harding

President, MReBA
Partner, Morrison Mahoney LLP

Symposium Keynote Speaker - Hon. Nancy Gertner (Ret.)

Judge Nancy Gertner is a graduate of Barnard College and Yale Law School where she was an editor on The Yale Law Journal. She received her M.A. in Political Science at Yale University. She has been an instructor at Yale Law School, teaching sentencing and comparative sentencing institutions, since 1998. She was appointed to the bench in 1994 by President Clinton. In 2008 she received the Thurgood Marshall Award from the American Bar Association, Section of Individual Rights and Responsibilities, only the second woman to receive it (Justice Ginsburg was the first). She became a Leadership Council Member of the International Center for Research on Women the same year. In 2010 she received the Morton A. Brody Distinguished Judicial Service Award. In 2011 she received the Massachusetts Bar Association's Hennessey award for judicial excellence, and an honorary Doctor of Laws degree from Brandeis University. In 2012 she received the Arabella Babb Mansfield award from the National Association of Women Lawyers, and the Leila J. Robinson Award of the Women's Bar Association of Massachusetts. She has been profiled on a number of occasions in the Boston Globe, the ABA Journal, Boston Magazine, and The Wall Street Journal. She has written and spoken widely on various legal issues and has appeared as a keynote speaker, panelist or lecturer concerning civil rights, civil liberties, employment, criminal justice and procedural issues, throughout the U.S., Europe and Asia. Her autobiography, In Defense of Women: Memoirs of an Unrepentant Advocate, was released on April 26, 2011. Her book, The Law of Juries, co-authored with attorney Judith Mizner, was published in 1997 and updated in 2010. She has published articles, and chapters on sentencing, discrimination, and forensic evidence, women's rights, and the jury system. In September of 2011, Judge Gertner retired the federal bench and become part of the aculty of the Harvard Law School teaching a number of subjects including criminal law, criminal procedure, forensic science and sentencing, as well as continuing to teach and write about women's issues around the world.

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New York Court Orders Trial On Late Notice: *ICSOP v. Argonaut*

By John T. Harding
Morrison Mahoney LLP

In a case that illustrates how the worlds of direct claims and reinsurance can overlap and collide, a federal court in New York recently concluded that a reinsurer was entitled to present its case at trial on whether it was prejudiced by the ceding company's admittedly late note, and would also be permitted to take discovery on whether it should be excused from having to prove prejudice because the ceding company's late notice was in "bad faith." *Insurance Company of the State of Pennsylvania v. Argonaut Ins. Co.*, 2013 WL 4005109 (S.D.N.Y. Aug. 6, 2013).

The reinsurance dispute arose out of the long-standing war going on in California regarding coverage for the asbestos liabilities of Kaiser Cement and Gypsum Company-a war that resulted earlier this year in a decision on allocation and stacking that seemed to cut back on the expansive pronouncement by the California Supreme Court just last year in the State of California case. *Kaiser Cement and Gypsum Corp. v. ICSOP*, 155 Cal. Rptr. 3d 283 (Cal. App. 2d Dist. 2013)(holding that the primary policies issued by Truck Insurance Exchange could not be stacked and that only a single limit of liability applied to each "occurrence").

To read this article in full, please click here .

Back to Top

Massachusetts High Court Rules That Federal Arbitration Act Applies to Contracts Involving Interstate Commerce

By Alexander Henlin
Edwards Wildman Palmer LLP

In a decision that has implications for reinsurance, the Massachusetts Supreme Judicial Court last week decided that the Federal Arbitration Act preempts the Massachusetts Arbitration Act where the relevant contract involves interstate commerce. The decision is *McInnes v. LPL Financial, LLC, et al.*, No. SJC-11356 (Aug. 12, 2013), and is available at the court's website.

The facts of the case are fairly straightforward. In September 2011, the plaintiff sued LPL Financial and its agent in the Massachusetts Superior Court for fraud, intentional misrepresentation, breach of fiduciary duty, violations of the Massachusetts Uniform Securities Act, violations of the Massachusetts Consumer Protection Act ("Chapter 93A"), and intentional infliction of emotional distress. The suit arose out of financial advice given to the plaintiff, in which she alleged that she was induced to purchase a variable universal life insurance policy with a face value of $2 million, for which she paid premiums totalling over $330,000 from July 1998 through July 2006. At all relevant times, the plaintiff had a fixed annual income of approximately $30,000. Unbeknownst to the plaintiff, in 2000, LPL's agent had established an irrevocable trust in the plaintiff's name, and identified himself as both the owner and the trustee of the life insurance policy.

To read this article in full, please click here.

Back to Top

Connecticut Court Upholds Right of Assuming Party To Compel Arbitration

By Michael Aylward
Morrison Mahoney LLP

A federal district court in Connecticut has ruled that a party to a reinsurance assumption agreement has the right to compel arbitration of its dispute pursuant to a cut through clause with the reinsurer even though the assumption agreement itself did not contain an arbitration clause. In *Trenwick American Reinsurance Corp. v. Unionamerica Ins. Co.*, 2013 U.S. Dist. LEXIS 97518 (D. Conn. July 12, 2013), Judge Arterton emphasized the fact that the assumption agreements were physically attached to and referenced within the terms of the facultative reinsurance agreements. Further, the court held that a signatory to an agreement containing an arbitration clause is estopped from avoiding arbitration with the non-signatory when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed. Finally, the court refused to allow the reinsurer to carve out a statute of limitations defense independently of the arbitration proceedings.

This dispute arose out of a Casualty Excess of Loss Reinsurance Agreement that was entered into in 1998 between Chartwell and the Commercial Casualty Insurance Company of Georgia ("CCIC") whereby Chartwell agreed to reinsure certain policies issued by CCIC. These agreements were renewed in 1999 and again in 2000 by which time Trenwick had entered the picture as Chartwell's successor. Each of these agreements contained a clause stating that, "Any dispute between the Company and any Reinsurer arising out of or in connection with this Agreement, including its formation or actual validity, will be submitted to the decision of a board of arbitration."

To read this article in full, please click here.

Back to Top

Case Note: Eastern District of Pennsylvania Grants Partial Summary Judgment in Favor of Reinsurer on Statute of Limitations Grounds

By Rachel M. Davison
Morrison Mahoney LLP

A recent decision coming from the U.S. District Court for the Eastern District of Pennsylvania highlights the importance of a ceding company being diligent and timely in the submission of claims to its reinsurer. In *OneBeacon Insurance Company v. Aviva Insurance Limited*, No. 10-7498 (E.D. Pa. May 17, 2013)(DuBois, J.), the court granted partial summary judgment in favor of the reinsurer and concluded that certain ceded claims were time-barred.

This case involves a dispute between a ceding company and its reinsurer about approximately $13 million in ceded claims and arises from an *unwritten* reinsurance agreement that the parties had operated under since 1997. Because the reinsurance agreement was unwritten, for purposes of the litigation, the parties stipulated to various terms, including a follow-the-

fortunes clause and an errors and omissions clause. The errors and omissions clause protected the ceding company by not relieving the reinsurer of liability because of an error or accidental omission of the ceding company in reporting any claim, provided that the error or omission was rectified as soon as commercially reasonable after discovery. In addition, the parties stipulated that the reinsurer did not precondition payment on any documentation requirements other than the submission of bordereaux which were validated by the reinsurer.

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Back to Top

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Please keep your contact information up-to-date at http://www.mreba.org/members/index.php including any job or e-mail changes. If you have any questions, you can contact Seth Jackson at sjackson@zelle.com.

Back to Top

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