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FEATURED ARTICLE

Points of Principle

In June 2012, as part of a combined session between the United Nations Rio +20 Conference and the International Insurance Society’s annual seminar, the UNEP Financial Initiative Principles for Sustainable Insurance were launched in Rio de Janeiro, Brazil.

Click here to read the rest of this article.
US Bank National Association bought twelve life insurance policies from PHL Variable Insurance Co. and later sued it, alleging that PHL breached the policies by inappropriately raising rates. During the course of its lawsuit, US Bank subpoenaed documents from reinsurers that were not parties to the lawsuit. Both PHL and the reinsurers asked the court to quash the subpoenas. In deciding to uphold the subpoenas, the court found that PHL did not have standing to challenge the validity of them, and the scope of the subpoenas was relevant and not burdensome for the reinsurers to comply with. Notably, the court also decided to shift the costs of producing the documents from the reinsurers to US Bank.

The court ruled that PHL did not have standing to challenge the validity of the subpoenas, which were directed at the reinsurers, because it could not show that it had some right or privilege personal to it. In particular, the court found that PHL did not have a proprietary interest in the internal communications of the reinsurers and commented that “a party’s general desire to thwart disclosure of information by a non-party is simply not an interest sufficient to create standing.”

The reinsurers also wanted to quash the subpoenas directed at them on the grounds that they sought irrelevant information and compliance with them would have been burdensome. Although both of these grounds may be used to challenge a subpoena, the court ruled that neither applied in this case. With respect to relevance, the court found that the information sought by US Bank, which included communications by PHL with the reinsurers about the cost of insurance increases generally, had some possible relevancy.

The court found the reinsurers’ burdensome argument more compelling. For example, it noted that the insurers’ databases had limited search capabilities, which would cause them to incur significant costs in identifying the requested documents. Because the amount in controversy was in the multiple millions of dollars, US Bank and PHL had considerable resources, and discovery was necessary to illuminate the critical issues involving the basis for PHL’s increase in the cost of insurance, the court sought to find a way to lessen the burden on the reinsurers.

Accordingly, the court decided to shift the cost of complying with the subpoena from the reinsurers to US Bank, the party seeking the documents. In making this decision, the court found that the reinsurers did not have an interest in the outcome of the case, US Bank was in a better position to bear the costs, and the litigation was not of public importance.

IMPACT – REINSURANCE: Parties seeking documents and other materials through discovery should be aware that they may have to bear the costs associated with identifying and collecting the documents if it is burdensome for the document custodian. Reinsurers, often the subject of non-party subpoenas in insurance coverage disputes should rely on this case to seek the cost of responding to such subpoenas.

In 2002, Arrowood Indemnity Company and Arrowood Surplus Lines Insurance Company (collectively, Arrowood) entered into a reinsurance treaty with Assurecare Corporation. Under this treaty, the Assurecare was responsible for the first $250,000 of Arrowood’s “net liability” as well as a percentage share of “loss adjustment expenses.”

During the treaty’s effective period, Arrowood issued a liability insurance policy to FHC Enterprises, Inc., which insured Greenwood Terrace Nursing and Rehabilitation Center (Greenwood Terrace). Greenwood Terrace was sued in 2002 for the wrongful death of one of its residents. The case settled, and Arrowood paid $1 million of the $1.75 million settlement. Arrowood billed Assurecare for its portion of the settlement claim, and Assurecare paid the bill.

Shortly after the settlement of the resident lawsuit, Greenwood Terrace filed its own suit against Arrowood, alleging Arrowood should have paid a larger portion of the settlement amount. That suit also settled. Arrowood billed Assurecare for its share of the Greenwood Terrace settlement. Assurecare refused to pay, claiming that this settlement was outside the scope of its obligations.

Arrowood filed a complaint against Assurecare in the United States District Court for the Northern District of Illinois, alleging breach of contract and seeking a declaratory judgment for
renewed collateralization. Assurecare counterclaimed, alleging breach of contract as well as claims of conversion and negligence. The district court reviewed and granted Arrowood’s motion for summary judgment.

Key to the district court’s decision was the follow-the-fortunes provision of the treaty, which, under the follow-the-fortunes doctrine, obligates the reinsurer to “recover settlements made by the reinsured, as long as they are not fraudulent, collusive or made in bad faith.” Because there was no evidence that Arrowood entered into the settlement with Greenwood Terrace in bad faith, Assurecare was obligated to pay its contractual share of the settlement.

Assurecare argued that the Greenwood Terrace claim fell outside the scope of the policy, and therefore was not covered by the reinsurance treaty. The district court rejected this argument and determined that the settlement was a compromise of claims related to the underlying policy.

The court ordered Assurecare to pay Arrowood the $230,527.75 balance due under the treaty.

**IMPACT – REINSURANCE:** This case reiterates the follow-the-fortunes doctrine as applied to payments made by a cedant in a settlement with its insured.

**NORTHERN DISTRICT OF IOWA**

**Insurer’s Affiliates Dismissed in Suit by Insured**


In June 2011, Phyllis Schultz sued Ability Insurance Company after she was denied benefits she claimed were owed to her under a long-term care policy issued by Ability. Schultz later filed an amended complaint, adding four additional Ability affiliates, including reinsurance companies, as defendants (the affiliates). In May 2012, the affiliates filed a motion for judgment on the pleadings. Schultz filed her response to this motion as well as a motion to amend her complaint (for a second time). These motions were the focus of the court’s review.

First, the court addressed Schultz’s motion to amend, and determined that she did not demonstrate good cause for amending her pleadings a second time seven months after the deadline to do so had expired. Additionally, the court noted that amending the pleadings would cause undue delay and unfair prejudice to the defendants. Schultz sought to amend her pleadings to incorporate information concerning the relationship among Ability and its affiliates. The court stated that most of the information that had been recently obtained could have been acquired through discovery much earlier in the process.

Next, the court examined the affiliates’ motion for judgment on the pleadings and granted the motion because Schultz failed to make a “prima facie showing” that the affiliates were subject to jurisdiction in the forum state. Schultz failed to demonstrate that any of the Affiliates had contacts in Iowa. She also failed to make a showing that any of the affiliates were “alter egos” or agents of Ability.

The court dismissed the affiliates and left Ability as the sole defendant in the action.

**IMPACT – REINSURANCE:** Insurers often have subsidiaries and other affiliated entities. This case reinforces the proposition that only the contracting insurer is a proper party in a breach of contract action by an insured.

**DISTRICT OF SOUTH CAROLINA**

**Court Denies Motion for Temporary Restraining Order Where Alleged Breach of Agency Agreement Was Unsubstantiated**


On October 25, 2012, the District Court of South Carolina denied Companion Property and Casualty Insurance Co.’s (Companion) motion for a temporary restraining order against Robert B. Moreno, d/b/a RMIS Insurance Services (RMIS). Companion and RMIS previously executed an agency agreement under which RMIS issued automobile policies. Companion asked the court to suspend RMIS’s authority to issue new policies under it. The court found that Companion did not establish any of the four elements necessary to obtain the temporary restraining order.

First, the court found that Companion failed to show it would likely succeed on the merits of its case, which required it to show a breach of the agreement between it and RMIS. The court rejected Companion’s arguments in this regard. In particular, it found insufficient Companion’s bare assertions that RMIS violated the accounting and reporting requirements of the agreement and noted that Companion failed to substantiate its allegations. It also found Companion failed to show that: (1) RMIS engaged in unapproved advertising where RMIS provided proof that it informed Companion of its efforts, which Companion did not object to; and (2) RMIS sold policies in excess of maximum premium limits set forth in the parties’ reinsurance agreement where RMIS provided proof that the agreed-up limits were increased in an amended reinsurance agreement.
Second, the court found that Companion failed to show it would be irreparably harmed by RMIS selling new policies. It rejected Companion’s allegations of speculative financial harm, observing that it did not identify the nature of those losses. Moreover, it found that any financial harm that Companion may incur was not irreparable because money damages were available.

Third, the court found that the “balance of the equities”— that is, fairness — favored RMIS because Companion failed to show RMIS breached the agreement. Finally, the court found that the public interest favored RMIS because Companion’s customers had an interest in Companion’s business being transferred, without disruption, to another agent after the agreement expired.

**IMPACT – REINSURANCE:** This case illustrates the importance of providing specific evidence substantiating the need for a temporary restraining order.

## STATE COURTS

### APPELLATE COURT OF CONNECTICUT

**Court Construes Commutation Agreement To Include All Reinsurance Obligations**

**TRENWICK AMERICA REINSURANCE CORP. V. W.R. BERKLEY CORP.**

(AC 33388, April 17, 2012)

Trenwick America Reinsurance Corporation (Trenwick or reinsurer), the plaintiff in this case, is a reinsurance company. The defendant, W. R. Berkley Corporation (W.R. Berkley or company), is a holding company. W.R. Berkley and its subsidiaries entered into reinsurance agreements with Trenwick at various times. One such agreement between Trenwick and a W. R. Berkley subsidiary was known as Special Casualty and Accident Reinsurance Facility (SCARF II), which the parties entered into on June 10, 1999. Under SCARF II, Trenwick accepted a portion of overall losses in exchange for a corresponding share of premiums.

On or about September 3, 2004, Trenwick and W.R. Berkley entered into a commutation and release agreement (commutation agreement). The commutation agreement purported to settle and terminate comprehensively both parties’ obligations under “reinsurance agreements,” which was defined in the commutation agreement as “agreements pursuant to which the reinsurer reinsured certain liabilities of the company and/or the company reinsured certain liabilities of the reinsurer [along with] all other agreements entered into in connection or relating to such agreements ....”

For some time after the commutation agreement was executed, the parties continued to perform under SCARF II, with Trenwick making loss payments to and receiving premium payments from W. R. Berkley. In January 2008, Trenwick concluded that the commutation agreement applied to the obligations under SCARF II. Trenwick thereafter stopped making payments and sought return of the amount it had paid to W. R. Berkley after executing the commutation agreement.

Trenwick then brought an action against W. R. Berkley, seeking a declaratory judgment that the commutation agreement discharged its obligations under SCARF II, as well as the return of the amount paid under it after September 3, 2004. W. R. Berkley asserted that there was mutual mistake between the parties, and SCARF II was meant to be excluded from the commutation agreement despite its broad definition of “reinsurance agreements.”

The trial court found, and the appellate court agreed, that there was ample evidence of the parties’ intention to include SCARF II, including the sophistication and experience of the parties and their personnel; the high degree to which the commutation agreement was negotiated, reviewed, and revised; the multiple statements in the commutation agreement that it fully and finally terminated all of the parties’ reinsurance relationships; and the lack of any evidence in the record to contradict the common-sense meaning for the inclusive language in the commutation agreement. In addition, the appellate court upheld the trial court’s conclusion that Trenwick was not entitled to repayment, because both parties had been carrying out their obligations and receiving the benefits they bargained for under SCARF II.

**IMPACT – REINSURANCE:** If parties intend to exclude particular reinsurance obligations from a commutation agreement, they should set forth such exclusions specifically. This case illustrates that courts are highly unlikely to read exceptions into broad definitions where the commutation agreement is unambiguous.

### EUROPEAN COURTS

**English Court of Appeal Denies Cedent’s Request to Stay Proceedings on Basis of Concurrent Proceedings pending in Philippines**

**AMLIN CORPORATE MEMBER LIMITED AND OTHERS –V- ORIENTAL ASSURANCE CORPORATION [2012] EWCA CIV 1341**

This matter concerns a dispute between London reinsurers and their Philippine reinsured, and whether the Philippine reinsured could stay proceedings commenced in the UK by its reinsurers pending the outcome of related proceedings in the Philippines.
Background

The dispute arose from the sinking of a ferry, the Princess of the Stars, in the Philippines on June 21, 2008. The loss occurred because the master of the ship sailed into the midst of typhoon Frank, despite public storm warnings having been issued by the Philippine authorities the previous day. This catastrophe caused the loss of more than 500 lives.

Numerous proceedings were commenced in the Philippines by cargo owners and relatives against the vessel's shipowner, Sulpicio Lines Inc. (Sulpicio), and Sulpicio's cargo liability insurers, Oriental Assurance Corporation (Oriental). Oriental was reinsured under a facultative reinsurance agreement by London reinsurers in respect of the policy covering Sulpicio (the original policy).

The original policy covered Sulpicio for the period 31 December 2007 to 31 December 2008. Oriental was reinsured for the same period and the reinsurance contained a follow the settlement and a Typhoon Warranty clause. The reinsurance also contained an exclusive English law and jurisdiction clause. The original policy also contained a Typhoon Warranty on similar terms to that of the reinsurance.

The Proceedings in England

The reinsurers commenced proceedings in England against Oriental on 22 November 2010, seeking declarations that the reinsurers were not liable because there was a breach of the Typhoon Warranty in the reinsurance contract and because Oriental was not liable to Sulpicio by virtue of the breach of a similar warranty. Oriental applied for the action to be stayed claiming that the English court should await the outcome of the various proceedings in the Philippines before deciding on reinsurers' liability under the reinsurance contract.

The court in the first instance held that the kind of stay applied for by Oriental should only be granted in rare and compelling circumstances. The arguments raised by Oriental that the reinsurers would be bound by any factual findings by the Philippine court pursuant to the follow the settlement and that, due to the back-to-back nature of the reinsurance, the parties expected that claims under the reinsurance would be resolved once direct claims under the original policy were determined, were rejected by the English court. As such, there were no compelling and rare circumstances in this case. Oriental appealed the decision.

The Court of Appeal decision

Oriental appealed on the following grounds:

1. in normal reinsurance cases with “follow the settlement” provisions, reinsurers should wait for the reinsured to settle a claim before addressing the question of their own liability and, as such, reinsurance was an exception to the normal rule that a stay must be granted in rare and compelling circumstances;
2. the first instance court gave too much weight to the English jurisdiction clause; and
3. there were risks of inconsistent verdicts.

The Court of Appeal held that it was important to point out that the follow the settlement provision in reinsurance contracts was of no application if the loss fell outside the terms of the reinsurance. In this case, reinsurers' liability was dependent on the breach of warranty, and not on differing court decisions. Further, The Court of Appeal held that reinsurance did not constitute any general exception to the normal rule that a stay of proceedings could only be granted in rare and compelling circumstances. Otherwise, a stay would be normal in reinsurance cases and that could not be right.

The presence of an exclusive jurisdiction clause conferring jurisdiction on the English courts was just one of the relevant circumstances to bear in mind when a judge exercised his or her discretion in granting a stay of proceedings.

Lastly, Oriental failed to show that there were rare and compelling reasons. The possibility of inconsistent verdicts was not, in the eyes of the judge in the first instance, sufficient to amount to rare and compelling circumstances and the Court of Appeal was not prepared to depart from the assessment of an experienced commercial court judge.

According to the judge in the first instance, the only evidence which could cause concerns was the fact that the master of the ferry told his employers that he intended to adopt a route which avoided the typhoon but for some reason he did not adhere to his intentions, with disastrous consequences. However, if there was such evidence, it would have surfaced in the judicial affidavits of Sulpicio’s witnesses and cross examination, which took place from March 2012 onwards, and which would have been before the current English proceedings came to trial. Therefore, the risk of differing verdicts was a modest one.

In light of the above, the Court of Appeal dismissed Oriental’s appeal. Having said that, the decision was reached reluctantly by the Court of Appeal. The judges were conscious that, in effect, the London reinsurers were forcing Oriental to put forward a case publicly, in London, which was the exact opposite of what Oriental was pleading in the Philippines (i.e. to succeed in London, Oriental needed to argue that the master did not breach the Typhoon Warranty in order to be covered by the reinsurance, however, their case in the Philippines is that Sulpicio did indeed breach the warranty).
1. was present in the foreign country at the time of proceedings;
2. was the claimant or counterclaimed in the proceedings in the foreign court;
3. submitted to the jurisdiction of that court by voluntarily appearing in the proceedings; or
4. had agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court of that country.

On the other hand, judgments in personam from certain countries, like Australia or Commonwealth countries, are recognised and enforceable in the UK under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (the 1933 act).

This issue of enforcement of foreign judgment can become tricky when it is not absolutely clear whether the foreign judgment is in personam or not, for instance in insolvency cases.

The recent conjoined UK Supreme Court cases of Rubin and another v. Eurofinance SA and others and New Cap Reinsurance Corporation v. A E Grant [2012] UKSC 46 clarify whether foreign insolvency judgments can be enforced in the UK.

**Background Facts:**

**The Rubin Case**

Eurofinance SA, through a trust called The Consumers Trust (TCT), held monies for beneficiaries of a sales promotion scheme in which merchants issued cashable vouchers to customers who purchased certain products. Unfortunately the scheme folded in 2005, with the trustees holding nearly US $10 million in bank accounts in the US and Canada.

Avoidance proceedings in insolvency (i.e. adversary proceedings to recover moneys which have been transferred to persons not being the insolvent entity within a certain time frame prior the commencement of the bankruptcy proceedings) were commenced in the US Federal Bankruptcy Court for the Southern District of New York (the US Bankruptcy Court) in 2007. A default and summary judgment was entered against Eurofinance SA and others in the adversary proceedings by the US Bankruptcy Court on 22 July 2008.

It is common ground that the judgment debtors were not present during the US proceedings. Eurofinance SA and others were served personally with the complaint which commenced the adversary proceedings but did not defend or participate in any of the proceedings, although it appears that Eurofinance SA filed a notice of appearance in the main Chapter 11 proceedings.

The receivers of TCT then commenced proceedings in the UK to enforce the judgment at common law. The Court of Appeal held that the judgment was enforceable.

**The New Cap Re Case**

New Cap Re reinsured a Lloyd's syndicate for losses occurring on risks attaching during the 1997 and 1998 years of accounts. Both entities entered into a commutation agreement to commute the reinsurances. New Cap Re made payments in late 1998 and early 1999 under the commutation. In September 1999, the directors of New Cap Re resolved to wound up the company. As with the Rubin case, avoidance proceedings in insolvency were commenced in April 1999 in Australia in respect of moneys paid to the Lloyd's syndicate under the commutation agreement.
The New South Wales Supreme Court, Equity Division issued a default judgment, which was entered on 11 September 2009 against the Lloyd’s syndicate with respect to unfair preferences under Australian law. Both parties to the current proceedings agreed that the judgment debtors were not resident when the adversary proceedings were taking place. Having said that, there was an issue as to whether the Lloyd’s syndicate submitted to the jurisdiction of the Australian court.

Proceedings to enforce the judgment under the 1933 Act, alternatively pursuant to section 426 of the Insolvency Act 1986, were commenced shortly after the judgment in default was handed down. The Court of Appeal, bound by the decision in Rubin (see above), held that the judgment was enforceable.

The parties appealed both decisions.

The Issues

To reach its decision, the Supreme Court addressed the following issues:

1) Do the rules at common law and the 1933 Act apply to avoidance proceedings in insolvency? If not, which rules apply?

Initially the Court of Appeal decided that, although the judgment in Rubin was in personam, the rules at common law did not apply to avoidance proceedings because such proceedings were governed by special rules.

The Supreme Court’s view was that there could be no doubt both the Rubin and the New Cap Re judgments were in personam judgments. Indeed, the US Bankruptcy Court gave judgment “to the plaintiffs … against the defendants…” and the Australian courts ordered that “the defendants … pay to the first plaintiffs”.

However, the Supreme Court held that it was not for the court to create new laws allowing an English court to establish a formulation of a rule for the identification of those courts which are to be regarded as courts of competent jurisdiction, as such recognition was already embedded in well settled law. This was a matter for the legislature to do so. Further, the introduction of judge-made law extending the court’s powers of recognition of foreign court would be detrimental to UK businesses without any corresponding benefits.

Therefore, the rules at common law, with respect to the Rubin case, applied even though their scope was limited. The reason why such rules had limited scope was because there was no expectation of reciprocity on the part of foreign countries and, therefore, there was no need to allow enforcement of foreign judgments in the UK when UK judgments would not be enforced in that foreign jurisdiction.

2) With respect to the Rubin case, can the judgment be enforced through the UNCITRAL Model Law?

2) With respect to the Rubin case, can the judgment be enforced through the UNCITRAL Model Law?

To answer this question the Supreme Court had to establish whether the Model Law granted relief recognising and enforcing the Rubin judgment. The Model Law does not mention anything about enforcement of foreign judgments against third parties. As such, it would be wrong to argue that the Model Law applied by implication to recognition and enforcements of foreign judgments in insolvency matters. Therefore, the Rubin judgment could not be enforced through the Model Law.

3) With respect to the New Cap Re case, can the judgment be enforced through section 426 of the insolvency Act 1986?

As with its decision concerning Model Law, the Supreme Court said that section 426 of the Insolvency Act was not concerned with the recognition and enforcement of foreign judgments and, as such, could not be relied on. Further, case law on the interpretation of that section did not concern enforcement of foreign orders but rather the making of the court’s own order in aid of foreign liquidation.

4) Are the judgments enforceable by virtue of the submission by the judgment debtors to the jurisdiction of the foreign courts?

The key issue here was to establish whether the judgment debtors submitted to the jurisdiction of the relevant foreign courts when proceedings were ongoing there. Under English law, whether a party submitted to a foreign court’s jurisdiction will depend on whether that party took “some step which [was] only necessary or useful if” an objection to jurisdiction “has been actually waived, or if the objection has never been entertained at all”.

With respect to the New Cap Re case, the Lloyd’s syndicate submitted proofs of debt back in August 1999 and attended or participated in creditor’s meetings. Further, the Lloyd’s syndicate voted at a meeting of creditors in favour of a scheme of arrangement. Although it was clear from the facts that the Lloyd’s syndicate did not take any steps to be regarded as having
submitted to the jurisdiction of the Australian court in the avoidance proceedings, the steps taken by the Lloyd’s syndicate with respect to the liquidation proceedings were sufficient to establish that it had submitted to the Australian court responsible for the supervision of those proceedings.

As a result, it was held that the Lloyd’s syndicate had submitted to the jurisdiction of the Australian Court and the Australian judgment was enforceable. Indeed, it would have been unfair had the Lloyd’s syndicate had the benefit of the insolvency proceeding without the burden of the orders made in that proceeding.

With respect to the Rubin case, frustratingly the parties did not argue in front of the Supreme Court whether Eurofinance SA had submitted to the US Bankruptcy Court or not. Having said that, the Supreme Court said that “it would certainly have been arguable that Eurofinance SA had submitted to the jurisdiction of the United States District Court.” The reasons were as follows:

1. it was Eurofinance SA which sought the appointments of the receivers in the English courts for the purpose of causing TCT to obtain protection under Chapter 11;
2. it was Eurofinance SA which submitted to the English court that officeholders appointed by the US court would be able to pursue claim against third parties;
3. Eurofinance SA filed a notice of appearance in the Chapter 11 proceedings and, therefore, the judgment from the US Bankruptcy Court stated that it had personal jurisdiction over Eurofinance SA.

However, because submission was not argued, the Supreme Court did not rule on that point and held that the Rubin judgment was not enforceable.

4) With respect to the New Cap Re case, if the judgment is enforceable, whether enforcement is at common law or under the 1933 Act.

This point arose because of a possible interpretation of a potential exclusion for insolvency proceedings in the 1933 Act. The Supreme Court held that the 1933 Act applied to the Australian judgment as it was clear that the 1933 Act was supposed to cover “civil and commercial matters” and that there was no reason to conclude that insolvency proceedings were not also covered.

IMPACT – REINSURANCE: This case highlights the necessity to have long term views when embarking in litigation. In particular, a successful party will carry out the following checks prior to commencing multi-jurisdictional litigation:

1. determine the rules of recognition and enforcement of foreign judgments in the jurisdiction(s) where that judgment will likely need to be enforced; and
2. determine what is required for a court to issue a judgment which will both recognise and enforce the foreign judgment.

FEATURED ARTICLE

Points of Principle
By Daniel W. Gerber and Clive O’Connell

In June 2012, as part of a combined session between the United Nations Rio +20 Conference and the International Insurance Society’s annual seminar, the UNEP Financial Initiative Principles for Sustainable Insurance were launched in Rio de Janeiro, Brazil.

Twenty eight major insurance companies headquartered in 13 different countries agreed to abide by the principles. Many more companies are expected to join in the coming months and years as membership of the group will be seen as an essential step towards demonstrating a company’s ethical stance on environmental issues.

There are four principles:
1. We will embed in our decision-making environmental, social and governance issues relevant to our insurance business.
2. We will work together with our clients and business partners to raise awareness of environmental, social and governance issues, manage risk and develop solutions.
3. We will work together with governments, regulators and other key stakeholders to promote widespread action across society on environmental, social and governance issues.
4. We will demonstrate accountability and transparency in regularly disclosing publicly our progress in implementing the principles.

These principles are aimed at carrying the aspirations of the signatories into practical reality. The idea is for the insurance industry to act as leaders in imposing standards of practice, not only within their own organisations but also among their clients and others with whom they do business. The principles operate at all levels from corporate strategy through to risk management and underwriting to the way in which claims are handled.

Insurance can be a major force for social engineering. Health and safety has been assisted by insurers insisting upon certain behaviours of their policyholders, and household security has been enhanced by requirements for added security measures being taken by insureds. The Principles for Sustainable Insurance envisage insurers altering the behaviour of their customers in order, not to reduce the insured risk, but rather to improve the world.

The principles, like motherhood and apple pie, are good. Whether it is appropriate for an international body such as the UN to
attempt to coerce insurers into altering the activities of their clients and, indeed whether this is possible, is another question. The principles raise the philosophical issue as to whether insurance should be used as a mechanism for non-risk related change.

There are concerns, and it is noticeable that although many major insurers and reinsurers, such as Munich RE, Aviva, RSA, and Mapfre have subscribed, no US based companies have, and neither has Lloyd's. A question arises as to whether companies can impose non-risk related terms on policyholders and whether it is in the interest of any country for its insurance industry to threaten potential polluters with withdrawal of cover. Even if this can done, or risks are rated in a punitive fashion, so long as there is capacity, a non-signing insurer will probably step in, at a price, and offer alternative cover.

A company that abides by the principles runs the risk of being criticised by its shareholders for passing up upon good business opportunities and its regulator for failing to cover those that need cover. These concerns would be lessened if it can be shown that the benefits of abiding by the principles in terms of business won, outweigh the business lost, and if regulators indicated their approval of the Principles. That said, much of the benefit of the Principles could be gained if UN member states acted to regulate all businesses operating in their territories, rather than leaving the issue to the commercial clout of the insurance industry.

It is right that the insurance industry should take an ethical stand. It is right that insurers should look to improve their image among their consumers by demonstrating their support of sustainable businesses. In a global market place, however, unless all insurers live up to the principles, it is difficult to see how this objective can be attained.

Daniel W. Gerber is co-chair of Goldberg Segalla’s Global Insurance Services Practice Group across the firm’s 11 offices in the US and UK. Clive O’Connell is a partner in the London office of law firm Goldberg Segalla focusing on insurance and reinsurance. His experience includes representing clients in some of the largest reinsurance disputes in recent years.

NEWS AND NOTES

Downgrading of Sandy to Superstorm May Cost Insurers $20 Billion
The downgrading of the storm that struck the U.S. East Coast last month, killing more than 110 people, will cost insurers between $10 billion and $20 billion as Delaware, New York, Rhode Island, New Jersey, Connecticut, Pennsylvania, Maryland, and the District of Columbia declared hurricane deductibles invalid.

Low Wind Damage from Sandy
Reinsurance broker Willis Re reports that, despite high winds from Hurricane Sandy, wind damage from the storm is surprisingly minor. While damage from falling trees was widespread, direct damage from winds was none to minor.

Underwriters to Take Northeast and Mid-Atlantic Closer Look After Sandy
Brian Duperreault, CEO of Marsh & McLennan Companies, indicated the insurance industry has sufficient capacity to handle losses from Sandy. He opines, however, that underwriters will closely scrutinize the Northeast and Mid-Atlantic regions following two catastrophic storms within 14 months.

Reinsurers to Absorb Sandy Losses; Storm Could Cause Loss for Combine Re Cat Bond
Fitch Ratings projects reinsurers will be able to absorb losses from Sandy without a negative ratings impact, assuming losses fall within projections of $7 billion to $20 billion. Moody’s Investors Service reported that Sandy may, in a worst-case scenario, cause losses for the Combine Re catastrophe bond. Combine Re is a $200 million cat bond issued by Swiss Re in March for the benefit of COUNTRY Mutual Insurance Company and North Carolina Farm Bureau Mutual Insurance.

Insurance Companies Able to Absorb Losses From Hurricane Sandy
Several ratings firms have predicted insurers have sufficient reserve capital to deal adequately with Hurricane Sandy’s property and casualty losses. Fitch expected the brunt of the losses to be borne by primary writers including State Farm, Allstate, Liberty Mutual Group, and Travelers based on market share positions.

Prudential to Purchase Thai Insurance Unit For £368m
British insurer Prudential announced an agreement to purchase an insurance unit of Thailand’s Thanachart Bank. The acquisition will double Prudential’s market share in Thailand and will narrow the gap with AIA, the dominant insurer in Thailand. The transaction, subject to regulatory approval, is expected to close in Q1 2013.

U.S. Elections Impact Major Insurance Players in Washington
This month’s U.S. elections have impacted key decision makers in Washington affecting the insurance industry. While Treasury Secretary Timothy Geithner will be departing, Federal Office of Insurance Director, Michael McRaith will remain on, as will Kathleen Sebelius, HHS Secretary. A number of House and Senate seats affecting the industry will change

**Florida's State-backed insurer reduces risk, shifts policies to private insurers**
Homeowners Choice will assume 59,688 policies from Citizens Property Insurance Corp., Florida’s state-backed homeowner’s insurer. In an effort to reduce its risk, Citizens asked about 174,000 policyholders to move their policies to five private insurers, including Homeowners Choice, Florida Peninsula, Southern Fidelity, Southern Oak, and American Integrity.

**Aviva to Sell U.S. Life and Annuities Business**
U.K. insurer Aviva PLC has announced that it is collecting bids to sell its U.S. life and annuities business, as part of the insurer’s plans to sell or scale-back 16 businesses. The sale is expected to net substantially less than the unit’s $3.8 billion book value.

**Agents and Brokers Employment Drops More Than Expected in September**
Agent and broker employment in September 2012 experienced an expected but “sharp” decline, shedding 3,500 jobs, according to the Insurance Information Institute, citing U.S. Labor Department statistics. Employment is up by 8,100 jobs from the same month a year ago. Property and casualty insurers experienced a drop in September as well, but the sector’s employment is up 1,600 jobs compared to September 2011.
Professional Liability Monthly

Professional Liability Monthly provides the latest information regarding news in the professional liability industry. For more information, contact Brian R. Biggie at bbiggie@goldbergsegalla.com.

CaseWatch

CaseWatch is a summary of appellate decisions concerning insurance law from across the country. For more information, contact Sarah Delaney at sdelaney@goldbergsegalla.com.

Insurance and Reinsurance Report

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