

INSURANCE AND REINSURANCE

NewsWire

September 2008

Creating a Federal Voice in Reinsurance Regulation in the United States — An Interview with Tracey Laws, RAA Senior Vice President and General Counsel

by Ellen Woodbury and LeeAnn O'Neill, in Washington, D.C.

On September 16, 2008, in an unprecedented move, the Federal Reserve Board (“Federal Reserve”), acting with support of the U.S. Treasury Department, authorized a loan of up to \$85 billion dollars to insurance giant American International Group (“AIG”). The purpose of the loan was to assist AIG in meeting its financial obligations and to facilitate an orderly sell off of certain of AIG’s businesses. The Federal Reserve acted after determining that a disorderly failure of AIG could add to the already significant levels of market fragility that have roiled the U.S. and international markets over the last year. The loan is expected to be repaid from the sale of AIG’s assets and the U.S. government is receiving an 80% equity interest in AIG and the right to veto dividend payments to AIG’s shareholders. The Federal Reserve, which has no experience selling off the assets of an insurance conglomerate, has

reportedly enlisted the aid of a committee of state insurance regulators to oversee the sale of AIG’s life and property-casualty insurance companies.

The federal government’s intervention to avert a bankruptcy by AIG rekindled the debate over what role, if any, the federal government should have in the regulation of insurance and reinsurance. In March of this year, the U.S. Treasury Department presented a Blueprint for a Modernized Financial Regulatory Structure which provides detailed recommendations to improve and reform the regulatory structure for the financial services sector, including the insurance and reinsurance industry. The Blueprint questions the efficacy of a state-based regulatory system now that insurance and reinsurance indus-

/ continued page 2

IN THIS ISSUE

- 1 **Creating a Federal Voice in Reinsurance Regulation in the United States — An Interview with Tracey Laws, RAA Senior Vice President and General Counsel**
- 4 **Shifting Sands: The New DIFC-LCIA Arbitration Scheme in Dubai**
- 7 **The U.S. Bankruptcy Court for the District of Delaware: Insurance Policies Assigned to a § 524(g) Trust are Valid and Enforceable Against Insurers**
- 9 **“Collective Redress” in Europe: One Step Closer**

Federal Voice in Reinsurance Regulation

continued from page 1

tries have become national and international. It recommends the creation of an office within the Treasury Department to advise the Treasury on insurance and reinsurance matters with national and international impact. The Blueprint also endorses the creation of a federal regulatory structure allowing insurers the choice of being regulated at the national level or continuing to be regulated by the states.

The Proposed Optional Federal Charter

The Blueprint was the first official endorsement by any presidential administration of an optional federal charter (“OFC”) for insurers. The National Insurance Act of 2007 (S. 40), introduced in the Senate in May 2007, set forth a plan to establish an OFC that would allow insurers and reinsurers the option of exclusive federal regulation and supervision. Parallel legislation was introduced in the House of Representatives several months later.

Debate over the OFC amongst insurance and reinsurance industry organizations has been rampant. Several organizations banded together to form the Optional Federal Charter Coalition (“OFCC”)¹ to support the Treasury’s recommendations to bring efficiency, consistency, and modernization to what they say is a fragmented and antiquated insurance regulatory system. In particular, they claim that the current state-based regulatory system hinders both the ability of U.S. licensed insurance and reinsurance companies to compete abroad and the ability of non-U.S. licensed companies to participate in the U.S. market. The Treasury Blueprint sounded a similar theme, pointing out that the lack of uniformity across state insurance regulations can lead to inefficiencies and undue regulatory burdens that can directly limit insurers’ ability to compete across state lines and international borders.

Critics of an OFC², in particular state regulators, maintain that the regulation of insurance and reinsurance industries should not be turned over to federal authorities. They point to the federal regulation of the financial services sector as the poster child for what is wrong with federal regulation. Rather than streamlining regulation, they claim that an OFC would create additional complexity with inefficient and overlapping regulatory systems.

The OFC debate in the U.S. Congress has been a difficult and drawn-out process. On July 29, 2008, various organizations, including the Reinsurance Association of America (“RAA”), presented their diverse views to the Senate Banking Committee on the pending legislation. Most emphasized the importance

of not allowing the debate over the OFC to hinder progress on other proposed legislation dealing with the insurance and reinsurance industry.

The Proposed Office of Insurance Information

One bill which has gained support is the Insurance Information Act of 2008 (H.R. 5840), introduced in April of this year by Senator Paul Kanjorski. The Kanjorski bill calls for the creation of an Office of Insurance Information (“OII”) in the Department of Treasury, to establish federal policy on international insurance issues and serve as an advisor to the Treasury on major domestic and international insurance policy issues, such as bond and financial guarantee insurance and reinsurance collateral requirements.

The most controversial aspect of the Kanjorski bill among various insurance and reinsurance interest groups is the bill’s preemption provision. This preemption provision, as originally drafted, granted the OII authority to determine whether state insurance laws are consistent with federal policy on international insurance matters as set forth in agreements or treaties between the U.S. and foreign governments or regulatory authorities. State laws which the OII determined were inconsistent with federal policy could not be enforced by the states. The original bill gave states the right to appeal any adverse determination only to the Secretary of the Treasury.

Critics of the OFC also initially opposed the creation of an OII, asserting that the OII would be a federal regulatory authority operating under the guise of an “information office.” In particular, the National Conference of State Legislators (“NCSL”) argued that the “determination as to whether or not a state insurance law is in violation of an international agreement or treaty should not be made by an unelected federal bureaucrat who holds no responsibility to the American consumer.”³ The National Association of

¹ These include: Agents for Change, American Bankers Association, American Bankers Insurance Association, American Council of Life Insurers, American Insurance Association, The Council of Insurance Agents & Brokers, The Financial Services Forum, The Financial Services Roundtable, Life Insurers Council, National Association of Independent Life Brokerage Agencies, and the Reinsurance Association of America.

² These include: National Association of Insurance Commissioners, National Association of Professional Insurance Agents, Independent Insurance Agents & Brokers of America, and National Association of Mutual Insurance Companies

³ See July 9, 2008 letter from NCSL to Sens. Paul Kanjorski and Deborah Pryce (“NCSL Letter”), available at http://www.ncsl.org/standcomm/sccomfc/HR5840_ltr070908.htm.

Insurance Commissioners (“NAIC”) and the National Conference of Insurance Legislators (“NCOIL”) expressed concerns that the OII would be used as a vehicle to create a federal insurance regulatory infrastructure and pave the way for an OFC.

In July of this year, the Senate’s Capital Markets Subcommittee approved an amendment to the Kanjorski bill that appears to have addressed the concerns of certain groups which initially opposed the OII, notably the NAIC and the National Association of Mutual Insurance Companies, which have recently voiced their conditional support for the legislation. The amendment introduced several modifications to the original bill’s preemption provisions. The amendment would restrict the OII’s authority to displace or preempt state laws, and provides an administrative process with judicial review for determinations on whether state insurance laws are inconsistent with agreements or treaties relating to federal policy on international insurance matters. The amendment also requires that the Treasury Secretary stay OII preemption determinations under certain circumstances, and adds a state legislative representative and representatives from the insurance industry to the Advisory Group, which consults with the OII and Treasury Secretary.

On September 11, the NAIC announced its support for the bill as amended, while noting that the decision was not unanimous. Other critics of an OII remain unsatisfied by the amended bill. In particular the NCOIL, which maintains that state legislators and regulators should take a united position to oppose federal oversight, has stated that even as amended the bill unacceptably vests unelected federal officials with the power to nullify state laws.

The RAA’s Support for the Proposed Office of Insurance Information

The RAA, a non-profit corporation that represents the interests of reinsurance professionals in Congress and state legislatures, has supported a single national regulator and therefore has supported both the proposed OFC and the Kanjorski legislation to create the OII. Tracey Laws, Senior Vice President and General Counsel of the RAA, discusses why Kanjorski’s bill appears poised for success and why the U.S. reinsurance regulatory environment is ripe for change.

The NAIC, which initially opposed Kanjorski’s bill, has now supported the legislation to create an Office of Insurance Information. What is the impetus behind the support for the OII?

All parties acknowledge that reinsurance is a global busi-

ness. This can be best illustrated by the number of reinsurers assuming risk from U.S. cedents. In 2007, more than 2,300 non-U.S. licensed reinsurers, domiciled in more than 75 foreign jurisdictions, assumed business from U.S. ceding insurers. This accounts for more than 56% of the U.S. unaffiliated premium ceded to professional reinsurers. That figure has grown steadily from 38% in 1997. Reinsurers from these other jurisdictions have the benefit of being subject to one national regulator.

Recently, there have been international efforts to set global insurance regulatory principles and standards. Established in 1994, the International Association of Insurance Supervisors (“IAIS”) represents insurance regulators from over 190 different jurisdictions to work towards establishing a global regulatory framework. Although the NAIC is able to participate in these initiatives, it lacks the binding authority that the national regulators of the other constituent countries have. An OII, while not given binding authority under the Kanjorski bill, would provide a single voice on international insurance issues with authority to express U.S. national policy.

Lastly, the NAIC has made several public statements recently expressing their desire to preserve state-based regulations of reinsurance. In acknowledging the legal and functional issues related to 50-state regulation of such global business, at least some state regulators have expressed a willingness to utilize federal “tools” to accomplish this goal.

Why is having a federal voice important to U.S. interests?

U.S. licensed reinsurers are disadvantaged by this lack of a single U.S. voice in international dialogues. If the European Union wants to address how to treat non-European Union reinsurers, for example, and discuss an “equivalence” assessment for non-European Union reinsurers, which would require European member states to treat reinsurers from countries deemed to be “equivalent” the same way European Union reinsurers are treated, U.S. companies do not currently have any representation on this issue. Although this matter is still being discussed, it is the RAA’s understanding that the European Parliament recently obtained a legal opinion that stated that the European Commission cannot grant equivalence to a U.S. state. U.S. regulators at the state level cannot address this issue with the European Union and advocate for the possibility of European Union equivalence assessment on a state-by-state basis because they lack the ability to do business with one voice.

/ continued page 4

Federal Voice in Reinsurance Regulation

continued from page 3

What role could an Office of Insurance Information play in domestic insurance and reinsurance policy issues?

The global reinsurance industry plays a major role in the stability of the U.S. insurance marketplace as well as in the economic recovery of the U.S. following major natural and man-made disasters. The federal government has a strong interest in understanding this important market as it responds to these crises. Currently, there is no federal entity that is tasked with responsibility for understanding how decisions made by the federal government in these situations, including Congress, can impact — both positively and negatively — the insurance and reinsurance industry. An OII would have the benefit of the NAIC's information and experience but would be empowered to conduct its own analysis and provide advice based on a broader perspective that is not driven by individual state interests.

The United States' state-based regulatory system has long been criticized by non-admitted reinsurers. Why has reform come into the spotlight now?

In the past, the United States was at the forefront of insurance regulation in creating risk-based capital. More recently, the European Union is providing a fresh look at insurance and reinsurance regulation with the Reinsurance Directive of 2005 and the pending Solvency II legislation

Until the Reinsurance Directive of 2005, each member state of the European Union was free to decide separately whether or not to regulate reinsurance. The Reinsurance Directive created a new regulatory "passport" framework that allows reinsurers, supervised by the member state in which its head office is located, to do business throughout the European Union. Under the Reinsurance Directive, reinsurers incorporated outside of the European Union are currently still dealt with on a country-by-country basis with respect to authorization to do business and collateral requirements.

Solvency II, which is estimated to be implemented in three to four years, focuses on harmonizing the treatment of non-European Union reinsurers. Solvency II raises reciprocity issues. Only those countries with regulatory regimes that are deemed "equivalent" to Solvency II are entitled to equal treatment. Solvency II has led jurisdictions like Bermuda to make enhancements to its disclosure and solvency requirements

with the express purpose of achieving equivalence, or mutual recognition status, in Europe and elsewhere. There is now pressure on U.S. state regulators to address the impact of Solvency II. The possibility that the entire 50-state system in the U.S. will be deemed "equivalent" appears questionable. Without federal involvement, the U.S. reinsurance industry will continue to be disadvantaged in the European Union's equivalence discussions.

Can the U.S.'s state-based regulatory system be harmonized with Solvency II?

The NAIC's Reinsurance Task Force is in the process of proposing a modernized reinsurance regulatory framework, which embraces a "home state" regulatory system similar to the European Union's passport system. Licensed U.S. reinsurers would have the option to be licensed and domiciled in one state and regulated by that "home state" only. The RAA has been very supportive of this initiative. Although many important issues have been reserved for the implementation phase, the Task Force's recent recommendation to utilize federal enabling legislation is a very positive step.

This work is complimentary to the NAIC's recently adopted Solvency Modernization Initiative which will analyze international solvency standards and propose related enhancements to the U.S. regulatory system. The work plan includes an assessment of the potential impact that Solvency II might have on U.S. insurers. ☺

Shifting Sands: The New DIFC-LCIA Arbitration Scheme in Dubai

by Mark Pring and Doroello Nixon, in Dubai

Introduction

The Dubai International Financial Centre ("DIFC") represents the cutting edge of international finance and global commerce in Dubai and the Middle East at large, and is playing a major part in attracting significant foreign investment and trading interests to Dubai.

The DIFC is a legal and financial free zone within Dubai and comprises three independent central authorities. The DIFC Authority administers the free zone and also promulgates laws regulating non-financial services business activities in the DIFC. The Dubai Financial Services Authority regulates financial services activities within the DIFC. Finally, the DIFC Judicial Authority (“DJA”) is charged with administering and enforcing the civil and commercial laws of the DIFC.

The DIFC has consistently recognised the need to ensure that all interested parties have confidence in its administration of justice. To that end, the DIFC courts were established, operating under international procedural standards and staffed by judges of international repute, including Chief Justice Sir Anthony Evans, a former Lord Justice of Appeal of the High Court of England and Wales, and Deputy Chief Justice Michael Wang SC of Singapore. Nonetheless, as a reflection of the flexibility of its structure, even parties based in the DIFC can, if they wish, choose another recognised jurisdiction. Equally, whilst, in the absence of a prior agreement between parties, DIFC laws will apply to disputes coming before the DIFC courts, if they have chosen the laws of another jurisdiction that choice will also be respected.

Whilst the jurisdiction of the DIFC courts has always extended to ratifying arbitration awards, their broader role in relation to arbitration proceedings has now firmly been put in the spotlight.

Recent Developments

Ever since 17 February 2008, when a joint venture was announced between the DIFC and the London Court of International Arbitration (“DIFC-LCIA”), international arbitration practitioners and their clients have eagerly awaited the publication of the 2008 DIFC Arbitration Law (the “2008 Law”). The 2008 Law has now been enacted by His Highness Sheikh Mohammed bin Rashid Al Maktoum, Vice-President and Prime Minister of the U.A.E. and Ruler of Dubai. According to its billing, it is *“universally applicable and compatible with both civil and common law systems. . . . [and] offers the international business community, international lawyers and arbitrators a comprehensive and modern set of rules”*.

The 2008 Law will enable any party to a contract to designate the DIFC as the seat, or place, of the arbitration (the identity of the “seat” determines the procedural law that will apply), irrespective of whether any of the parties is licensed by the DIFC, or the events giving rise to the dispute occurred in the DIFC. As discussed below, this is a clear departure from the

previous position. Moreover, such a choice significantly broadens the available options for international arbitration in Dubai.

The LCIA, which is more than 100 years old and is well-respected as a leading international commercial arbitration centre, will (unless the parties agree otherwise) administer DIFC-LCIA arbitrations, through a local secretariat. This will mean that parties to such arbitrations will have access to the extensive LCIA arbitrator database. This could also result in lower fees, because the LCIA calculates fees based on hourly rates rather than by reference to the amount in dispute (as is the case with the DIAC). Thus, for example, a party contemplating a commercial agreement that, if breached, could potentially cause hundreds of millions of dirhams in damages might feel more comfortable choosing DIFC-LCIA arbitration (although it will clearly have to weigh this up against many other factors).

Arbitration Options in Dubai

How will the 2008 Law affect parties contemplating entering into commercial agreements that provide for arbitration proceedings whose seat, broadly, will be Dubai?

Previously, there were three alternatives for arbitrating disputes (although Dubai-based parties may, of course, nominate other ad hoc or institutional rules that are not tied to Dubai at all): (1) arbitration under the rules of the Dubai International Arbitration Centre (the “DIAC”); (2) ad hoc arbitration through the Dubai courts; and (3) arbitration in the DIFC under the previous arbitration law, DIFC Law No. 8 of 2004 (the “2004 Law”).

To date, the most popular choice for arbitration in Dubai has been the DIAC. First created in 1994 as the “Centre for Commercial Conciliation and Arbitration”, the DIAC amended its rules (the “DIAC Rules”) on 7 May 2007, to harmonise them with established best practices in international arbitration proceedings. Examples of such practices include: granting the Tribunal the power to order document disclosure (Article 27) and the power to order interim and conservatory measures of protection (Article 31). As there is no document disclosure, generally, in a U.A.E. court action, arbitrating a dispute under the DIAC Rules can therefore provide a significant advantage to certain parties. Thus, the new DIAC Rules are broadly in step with and adopt the stronger provisions in the UNCITRAL rules and those developed by the ICC, the LCIA and others.

Last year, parties initiated 77 new arbitrations under the auspices of the DIAC, almost 80% of which were construction-related disputes. These are competitive statistics when weighed against, for instance, the

/ continued page 6

DIFC-LCIA Arbitration Scheme

continued from page 5

Stockholm Chamber of Commerce and the Singapore International Arbitration Centre. Further, awards, judgments, and orders from DIAC arbitrations may readily be enforced abroad in 142 countries under the New York Convention, to which the U.A.E. acceded on 13 June 2006.

A second option is “ad hoc” arbitration through the Dubai courts. Given, however, the complex nature of many international commercial disputes that are submitted to arbitration, for which a comprehensive set of rules and procedures is required, in practice this option would not be recommended for such disputes.

A third option has been, until now, to elect for arbitration proceedings under the DIFC’s previous arbitration law, the 2004 Law. This choice has always had one major drawback, however. The 2004 Law provided only three bases, or grounds, of jurisdiction for arbitration: (1) one of the parties was a DIFC-licensed business; (2) the dispute arose out of an “incident” that occurred in the DIFC; or (3) the contract or transaction was entered into in the DIFC. These grounds were narrow and restricted the DIFC’s ability to promote itself as a viable jurisdiction for international commercial arbitration, because companies without such connections to the DIFC could not arbitrate there.

The 2008 Law

The 2008 Law is therefore intended to strengthen this third option and turn the DIFC into a bona fide international arbitration jurisdiction for commercial disputes. The 2004 Law has, as a consequence, been repealed and replaced in its entirety.

The bases of jurisdiction for DIFC-LCIA arbitrations have, as flagged above, dramatically expanded from the grounds encompassed in the 2004 Law. The 2008 law allows parties to select the DIFC as the seat of arbitration even where they have no direct connection to the DIFC. In addition, Article 27 provides that, in the absence of any agreement on the identity of the seat, where a dispute is governed by DIFC law the seat shall be the DIFC.

As the courts of that seat, the DIFC courts will then play a supervisory and “assistance” role regarding procedural matters arising out of arbitrations that have a DIFC seat. This is significant, because, as indicated above, the judges of the DIFC courts are experienced commercial judges. Thus, questions regarding measures of interim relief or evidentiary issues, such as the scope of disclosure obligations, will be decided upon by judges

with decades of experience in some of the world’s leading commercial courts.

The 2008 Law recognises, therefore, that the courts of the seat of the arbitration should retain oversight of the appointment of the tribunal. Under Article 17, the DIFC Court of First Instance is (in the absence of agreement otherwise) the authority for appointing arbitrators where the parties have failed to appoint and there is no right of appeal in this regard. This oversight role extends to considering challenges to the composition of the tribunal and the determination of its mandate, as well as challenges to and the enforcement of awards.

It should be emphasised, however, that, in common with developments elsewhere, the intention of the 2008 Law is both to limit the scope for possible interference by the DIFC Courts and to bolster the authority of the arbitration tribunal. Hence, Article 10 (“**Extent of court intervention**”) states that “[i]n matters governed by this Law, no DIFC Court shall intervene except to the extent so provided in this Law.” The 2008 Law provides, for example, that “[it] is not incompatible with an Arbitration Agreement for a party to request, before or during arbitral proceedings, from a Court an interim measure of protection and for a Court to grant such measure.” Equally, Article 24 provides the arbitration tribunal, once it has been established, with extensive powers to order interim measures at the request of a party.

Enforcing Arbitration Awards Under the 2008 Law

During the enforcement process in relation to U.A.E. arbitration awards, some U.A.E. courts have undertaken a full review of the merits of the relevant dispute and have, on occasions, invalidated awards. Such action has been seen as an impediment to the effective enforcement of awards. Although there remains a debate as to whether, as a matter of U.A.E. law, “certification” is in fact required to ensure that an award is fully recognised, where the award is to be enforced in the U.A.E. then it can only be enforced through the U.A.E. courts. By contrast, some foreign jurisdictions have not required U.A.E. court certification of a U.A.E. arbitration award as a pre-condition to enforcement in their jurisdictions.

The new procedure made available by the 2008 Law should avoid such uncertainties, in any event. It provides that the DIFC Court, with its more international and pro-arbitration judges, will, on the application of a party, be able to certify a DIFC-LCIA arbitration award as valid and final under U.A.E. law. The limited grounds for refusing recognition (or, if an award is made outside the DIFC, its enforcement) are prescribed in Article 44.

The other U.A.E. courts will then be required to recognise that DIFC Court certification (just as they must recognise the court decisions of other Emirates), subject to the provision of an Arabic translation of the award by an approved translator. DIFC-LCIA arbitration awards should therefore be more easily enforced within the U.A.E. (and in the remainder of the GCC, through the Riyadh Convention), with only minimal recourse to the U.A.E. courts. The relevant party will submit the DIFC Court certification of the award to, for instance, the Dubai Court. The Dubai Court should then, without reviewing the merits, enforce the DIFC Court judgment.

In addition, DIFC-LCIA arbitration awards may now be enforced abroad in 142 states through the New York Convention, without any need for separate ratification by the U.A.E. courts.

This procedure for enforcing DIFC-LCIA arbitration awards in the U.A.E. is significant, because, as indicated above, the historical perception has been that the local courts in the U.A.E. have not always been unequivocally supportive of commercial arbitration awards.

For a number of reasons, therefore, the enactment of the 2008 Law should satisfy the concerns of an array of interested parties. ☺

The U.S. Bankruptcy Court for the District of Delaware: Insurance Policies Assigned to a § 524(g) Trust are Valid and Enforceable Against Insurers

by Don Mros, Francisco Vazquez and Stelio Tellis in Washington, DC and New York

In 1994, Congress amended the Bankruptcy Code to provide a framework for asbestos-related bankruptcies. Section (“§”) 524(g) is Congress’s attempt to provide a mechanism to facilitate reorganization of companies facing a large number of asbestos-related claims. A number of United States compa-

nies with large asbestos-related exposures, including Johns-Manville, Owens Corning, W.R. Grace & Co., Honeywell’s former subsidiary North-American Refractories, and Halliburton’s former subsidiary Harbison-Walker, have obtained protection under § 524(g).

The central component of § 524(g) is the creation of a trust as part of a debtor’s Chapter 11 plan. In general, the trust is assigned rights to the reorganized debtor’s stock and other assets, including rights to recoveries for asbestos liabilities under its insurance policies, which are used to pay current and future asbestos-related claims. As a result of creating the trust, and subject to compliance with the statutory provisions of § 524, the debtor and its predecessors and successors in interest receive the benefits of a channeling injunction that directs asbestos-related claims solely to the trust.

To qualify for protection under § 524(g), a court must find that (i) the debtor faces claims for damages allegedly caused by asbestos, (ii) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct that gave rise to the current asbestos-related claims; (iii) the actual amounts, numbers, and timing of future demands are uncertain; (iv) the pursuit of demands outside the trust is likely to threaten the plan’s purpose to deal equitably with claims and future demands; (v) seventy-five percent of a separate class of present claimants must approve the plan; and (vi) the trust will operate through mechanisms that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands involving similar claims. To qualify for the broad protection of the channeling injunction directing prospective claimants to the trust, the trust must (i) assume the asbestos-related liabilities of the debtor, (ii) use its income and assets to pay such claims, and (iii) must be funded in whole or in part by the securities of one or more debtors involved in the plan. If a debtor and a proposed trust meet the aforementioned requirements, § 524(g) authorizes the bankruptcy court to approve the trust and issue a channeling injunction that directs asbestos claimants solely to the trust.

Issues regarding § 524(g) trusts are being litigated in the bankruptcy courts of the United States. In a recent decision in the matter of Federal-Mogul Global Inc., T&N Ltd., et al., 2008 Bankr. LEXIS 824, 49 Bankr. Ct. Dec. 201 (March 19, 2008), the U.S. Bankruptcy Court for the District of Delaware (the “Court”) held that under the Bankruptcy Code the assignment of certain rights in insurance policies to a

/ continued page 8

Section 524(g)

continued from page 7

§ 524(g) trust is valid and enforceable against insurers notwithstanding an anti-assignment provision in or incorporated in the policies or applicable state law. The Court reasoned that insurance policies are property of the debtor's estate pursuant to § 541 of the Bankruptcy Code, and their transfer to a § 524(g) trust is permitted pursuant to § 1123(a)(5)(B), which preempts anti-assignment provisions and state law to the contrary.

Background

Federal-Mogul Global, Inc. ("Federal-Mogul") is an international supplier of vehicular parts, components, modules and systems in the automotive, small engine, heavy-duty, marine, railroad, aerospace and industrial markets. Federal Mogul has business operations in 34 countries and employs approximately 43,000 people on a full-time basis. On October 1, 2001, Federal-Mogul and its affiliated debtors filed voluntary Chapter 11 petitions for reorganization in the United States Bankruptcy Court for the District of Delaware. The plan of reorganization for Federal-Mogul and 81 of its United States and United Kingdom affiliates (the "Plan") became effective on December 27, 2007. The Plan had been approved by the Bankruptcy Court on November 8, 2007, affirmed by the District Court on November 14, 2007 and was supported by Federal-Mogul's creditors and shareholders. Under the Plan, liability for all asbestos personal injury and wrongful death claims against Federal-Mogul and its affiliates will be assumed by a § 524(g) trust.

On October 17, 2007, prior to the Plan's confirmation, certain objecting insurers and Plan proponents filed a joint motion seeking a determination of assignment and preemption issues pursuant to the Plan. Consistent with the agreement of the parties, the order confirming the Plan did not contain a ruling on the assignment and preemption issues. In accordance with the parties' agreement, the Court deferred its resolution of the assignment and preemption issues until after confirmation of the Plan.

The Decision

On March 19, 2008, the Court issued an order holding that the assignment of rights in certain insurance policies to a § 524(g) trust is valid and enforceable under §§ 524(g), 541(c)(1), and 1123(a)(5)(B) of the Bankruptcy Code. The Court based its decision on three grounds. First, the Court noted that § 541 of the

Bankruptcy Code defines property of the estate broadly to include "all legal or equitable interests of the debtor in property as of the commencement of the case," "[p]roceeds . . . from the property of the estate," and "[a]ny interest in property the estate acquires after commencement of the case." Relying on precedent, the Court concluded that an insurance policy is property of the estate within the meaning of § 541, even if the policy has not matured, has no cash value or remains contingent.

Second, the Court noted that § 1123(a) of the Bankruptcy Code provides that, "[n]otwithstanding any otherwise applicable non-bankruptcy law, a plan shall . . . (5) provide adequate means for the plan's implementation, such as . . . (B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan." Again relying on precedent, the Court found that § 1123 expressly preempts nonbankruptcy rights that might otherwise interfere with the implementation of a Chapter 11 plan, and § 541 of the Bankruptcy Code "prohibits restrictions on the interests of the debtor, which includes the insurance policies held by the [debtor]." Thus, the Court reasoned that taken together § 1123(a)(5) and § 541 hold that assignment of policy proceeds to a § 524(g) trust is not prohibited by anti-assignment provisions in insurance policies or state law to the contrary.

Third, the Court noted that permitting the assignment of insurance policies after liability has been triggered will not prejudice the insurers. Once an event occurs that gives rise to the insurer's liability under the policy, the policy itself can be assigned. Anti-assignment clauses are designed to protect insurers from an increase in the risk that they agreed to insure, and therefore assignment after a loss has occurred does not expand the risk to the insurer. The Court reasoned that "Once a loss has occurred, the right of the insured or his successor in interest to the indemnity provided in the policy becomes a fixed and vested right; it is an obligation or debt due from the insurer to the insured." Accordingly, to the extent that the events giving rise to liability have already occurred, there will be no additional risk to the insurance companies by virtue of the assignments.

In sum, the Court held that certain rights in the debtor's insurance policies can be vested in a § 524(g) trust under § 1123(a)(5)(B), notwithstanding state law or contractual provisions to the contrary. Furthermore, the vesting of the insurance rights in the trust neither diminishes nor impairs the enforceability of assigned asbestos insurance policies against a party that is not a released party, and it would not expand rights.

Appeal

On April 22, 2008, certain insurers appealed the March 19, 2008 decision of the Bankruptcy Court to the Bankruptcy Appeals Panel for the District of Delaware. Appellants allege, *inter alia*, that the Court erred in ruling that §§ 541(c) and 1123(a)(5) permit assignment of the insurance policies. They argue that § 1123(a)(5) is merely an administrative provision which provides the minimum requirements a plan must meet in order to be confirmed, not a substantive provision of the Bankruptcy Code sufficient to preempt state law. Appellants also allege that the Court erred in ruling that § 1123(a)(5)(B) preempts private contract rights. They argue that a plain reading of the provision evidences Congressional intent that it not preempt private contract rights. The appeal is pending.

Conclusion

The issue of assignment is one of several issues that may arise in an asbestos-related bankruptcy. Although the Court held that a debtor may assign certain rights in its insurance policies to a § 524(g) trust, this may raise concerns for an insurer who seeks to buy-back its policies. For example, where a debtor properly assigns its asbestos-related interest in a general liability insurance policy to a § 524(g) trust, the trust becomes the successor in interest of the debtor only with respect to the policy rights that were assigned. The trust would then be authorized as a matter of law to act on behalf of debtors in pending actions and to pursue causes of action for the benefit of holders of asbestos-related claims only with respect to those rights. The trust may have only received an assignment of certain rights to recovery for asbestos related claims, while the policy's rights to recover for other exposures such as environmental remain with the reorganized debtor. Accordingly, there may be an issue of whether the insurer could achieve a complete settlement with a trust of all potential liabilities under a general liability policy. ☺

“Collective Redress” in Europe: One Step Closer

by Maria Martinez in London

In this past year or so, Europe has become more receptive to the idea of “collective redress” mechanisms. The European

Commission (“EC”) has presented a White Paper⁴, on damages actions for breaches of the EC antitrust rules, which proposes specific measures to compensate the victims of such breaches, including collective redress. Further, at a national level, some European countries have recently proposed or introduced collective redress legislation and, in particular, the position in the UK and Italy is considered in this article.

At a European Level

Antitrust laws are designed to protect competition, a key element of any market economy, by preventing businesses from monopolising a market or acting in restraint of free trade. Although antitrust laws are contained in various legal instruments, the basic provisions are contained in the EC Treaty⁵. Article 81 of the Treaty prohibits any agreements between two or more firms which restrict competition, while Article 82 states that firms in a dominant position may not abuse that status. The EC and all national authorities are empowered to apply fully the provisions of the Treaty.

According to the EC’s White Paper, potential antitrust victims are less likely to bring claims in cases where the alleged damage is of low value and/or scattered among a number of victims, since the costs of bringing a claim might outweigh any potential recovery. Many potential claimants therefore do not seek compensation. If, on the other hand, all of these small claims were in fact pursued, it would be procedurally inefficient, to say the least, to have multiple courts deciding the same issues simultaneously.

To address this issue, the EC suggests a combination of two complementary mechanisms for collective redress. First, it advocates **representative actions** that can be brought by “qualified entities” on behalf of identified victims, or, in specific cases, on behalf of unidentified victims. The “qualified entities” (e.g. consumer associations, state bodies or trade associations) should either be: (i) officially designated in advance or (ii) certified on an *ad hoc* basis by a Member State for a particular antitrust infringement. Secondly, the EC suggests an “**opt-in**” **collective action** mechanism, in which victims expressly decide to combine their individual claims into one single / *continued page 10*

⁴ See the White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 2.4.2008; see also the European Commission Green Paper and Commission Staff Working Document on Damages Actions for Breach of the EC antitrust rules (December 2005).

⁵ Treaty establishing the European Community Official Journal C 340, 10/11/1997 P. 0208 - Consolidated version

Collective Redress

continued from page 9

action.

In order to prevent unfounded claims, the EC recommends accepting only representative actions filed by authorised consumer groups, which are believed to be less likely to lead to abuse.

At a National Level

The UK — The Civil Justice Council

In July 2008, the Civil Justice Council (CJC) published a series of recommendations to the Lord Chancellor on how to improve the access to justice for citizens through collective actions⁶.

The CJC proposes to introduce

- a generic collective action;
- individual and discrete collective actions in the wider civil context (i.e., before the CAT).

The CJC recommends that a wide range of representative parties, such as individual claimants and defendants and designated ad hoc bodies, should have standing to bring a collective claim. The CJC recommends a dual system where collective claims may be brought on an opt-in or opt-out basis. Under an “opt in” system, representative actions can be brought on behalf of named individuals and organisations who have already given their express consent to be bound by the outcome of the relevant action. The second model, the “opt-out” system, would allow representative actions to be brought on behalf of individuals and businesses at large, whereby, if a relevant individual or business does not wish to be bound by the outcome of the action, it must communicate this within a specified period.

The CJC indicates that it should be for the court to determine the more appropriate approach in any particular proceeding. Where a case is brought on an opt-out basis, the court should have the power to aggregate damages in an appropriate case. Emphasis is put on the certification procedure, and it is recommended that no collective claim should be permitted to proceed unless it is certified by the court as being suitable to proceed as such. It is proposed that, amongst the criteria to be considered in the certification process should be the numbers of parties involved, commonality of interest, superiority (i.e. the class action mechanism is superior to other means of resolving the dispute between group members and the defendant), adequate representation and “preliminary merits”. In addition, collective claims should be subject to an enhanced

form of case management by specialist judges. As is the case in other jurisdictions, to protect the interests of the represented class of claimants any settlement agreed by the representative claimant and the defendant(s) must be approved by the court. The CJC suggests holding a ‘Fairness Hearing’ before it can bind the represented class of claimants, in which case the court should take account of a number of issues in order to ensure that the represented class are given adequate opportunity to claim their share of the settlement or judgment. Unallocated damages from an aggregate award should be distributed by a trustee of the award, according to general trust law principles. In appropriate cases such a “cy-près” distribution could be made to a Foundation or Trust. Finally, the CJC recommends that, while most elements of a new collective action could be introduced by the Civil Procedure Rule Committee, it is desirable that any new action be introduced by primary legislation. The CJC has invited the Lord Chancellor to provide a formal response.

The UK — The Office of Fair Trading (OFT)

In the UK, competition law is enforced by the OFT concurrently with regulators for certain regulated industries, such as communications, the railways, etc⁷. Representative actions on behalf of named consumers are only accepted in follow-on cases where the OFT, a “concurrent” regulator or the EC has made an infringement decision⁸. The OFT believes that this is not an ideal mechanism, however, as the UK competition authorities have limited resources, which restricts the number of cases in which consumers can potentially seek redress.

In November 2007, the OFT published recommendations to the UK Government to improve the effectiveness of collective redress for victims of breaches of competition laws⁹. This OFT

⁶ “Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions, A Series of Recommendations to the Lord Chancellor”, Civil Justice Council, July 2008. The report should be read together with “The Future Funding of Litigation - Alternative Funding Structures” published in June 2007, which makes specific recommendations for the funding of collective or multi-party claims and “Improved Access to Justice - Funding Options and Proportionate Costs” published in August 2005.

⁷ For instance, the “Office of Communications” (Ofcom) has concurrent powers with the OFT regarding communications issues.

⁸ See Competition Act 1998, Section 47A/B as supplemented by Section 18 of the Enterprise Act 2002.

⁹ See “Private Actions in Competition Law: Effective Redress for Consumers and Business” Discussion Paper, from the Office of Fair Trading, November 2007 [OFTg16resp]

paper suggested allowing representative bodies (i.e. designated bodies or bodies granted permission by the courts) to bring stand-alone or independent representative actions on behalf of consumers. The OFT claims that the introduction of stand-alone representative actions on behalf of consumers would allow a greater number of meritorious cases to be brought, without prior action necessarily having been taken by a competition authority. In that regard, the OFT promotes representative actions over individual claims or Group Litigation Orders (“GLOs”, which can be made in relation to any claim where there are multiple parties or claimants to the same cause of action). The OFT points out that the system is more efficient if all relevant individual claims are aggregated and one claimant — the representative body — brings an action on behalf of all the relevant consumers. Specifically, representative actions are seen by the OFT as a better method of ensuring justice in circumstances where the aggregate loss to consumers is very large but each individual consumer’s loss is relatively small. The OFT also suggests extending the right of representative bodies to bring stand-alone and follow-on representative actions to claims pursued on behalf of businesses.

Interestingly, the OFT also recommends the two different systems for bringing representative actions — the “opt-in” system and the “opt-out” system. The OFT claims that both systems have their merits and that they can co-exist, adding that it could be left to the judge to decide, according to the circumstances of each case, which system is the more appropriate.

Finally, to encourage claimants’ lawyers to take on these types of cases, the OFT suggests widening and strengthening the alternative funding mechanisms. Specifically, with regard to Conditional Fee Agreements (commonly known as “no win, no fee” agreements), the OFT not only proposes revising the permitted percentages, but goes further in proposing that up to 100% of the percentage increase on the normal fees should be recoverable from the losing party, with any increase above that limit being met from the damages recovered.

Italy — A New Class Action Law

From 1 January 2009, a new class action law will be in force in Italy.

The Italian parliament has approved, as part of the 2008 Finance Bill, an amendment to Article 140 of the Italian Consumer Code. The new Article 140 “(bis)” of the Consumer Code provides that associations that meet certain requirements will have standing to protect consumers’ and users’ “collective interests”. The new law provides for an “opt-in” system,

in which any consumer or user that wishes to participate in appropriate legal proceedings will have to notify the relevant association in writing, at any time before the hearing at which the parties’ “conclusions” will be presented.

In contrast with, for example, the US system, the new Italian law does not establish strict requirements for “class certification”. The law simply provides that, at the first hearing, the Italian court, having heard the parties and taken any information necessary, will rule as to whether a collective claim is admissible and issue an order (which may then be challenged before the Court of Appeal). The law states that a claim will be inadmissible when it is clearly groundless, when there is a conflict of interest, or when the judge does not consider that there is a “collective interest” requiring adequate protection.

Looking Forward

It remains to be seen when (and how fully) these collective redress mechanisms will be implemented and whether, in practice, they provide effective redress for anti-competitive behaviour. In the meantime, it seems that many European claimants are trying their luck across the “pond” and filing class action lawsuits before the US Courts. Thus far, however, most of these lawsuits have been dismissed on *forum non conveniens* grounds, again putting pressure back on to the EU fully to address these collective redress concerns. ☺

Insurance and Reinsurance Group

Partners – Washington

Carey G. Child
+1 (202) 974-5730
cchild@chadbourne.com

Philip J. Goodman
+1 (202) 974-5621
pgoodman@chadbourne.com

Joy L. Langford
+1 (202) 974-5647
jlangford@chadbourne.com

Mary A. Lopatto
+1 (202) 974-5639
mlopatto@chadbourne.com

William K. Perry
+1 (202) 974-5611
wperry@chadbourne.com

David M. Raim
+1 (202) 974-5625
draim@chadbourne.com

Ellen H. Woodbury
+1 (202) 974-5718
ewoodbury@chadbourne.com

Partners – New York

John Finnegan
+1 (212) 408-5180
jfinnegan@chadbourne.com

John J. Sarchio
+1 (212) 408-5225
jsarchio@chadbourne.com

Partners – London

John Barlow
+44 (0)20-7337-8044
jbarlow@chadbourne.com

Christopher Cardona
+44 (0)20-7337-8041
ccardona@chadbourne.com

Michelle George
+44 (0)20-7337-8042
mgeorge@chadbourne.com

Adrian Mecz
+44 (0)20-7337-8040
amecz@chadbourne.com

Partner – Dubai
Mark Pring
+971 (4) 331-6123
mpring@chadbourne.com

Special Counsel – New York
Richard Liskov
+1 (212) 408-5340
rliskov@chadbourne.com

Counsel – Washington
Susan C.M. Aldridge
+1 (202) 974-5643
saldridge@chadbourne.com

Donald J. Mros
+1 (202) 974-5692
dmros@chadbourne.com

Associates – Washington
Jennifer Arnold
+1 (202) 974-5631
jarnold@chadbourne.com

Ryan Craig
+1 (202) 974-5762
rcraig@chadbourne.com

Anne E. Linder
+1 (202) 974-5794
alinder@chadbourne.com

Kate McSweeney
+1 (202) 974-5745
kmcsweny@chadbourne.com

Samantha Miller
+1 (202) 974-5754
smiller@chadbourne.com

LeeAnn O'Neill
+1 (202) 974-5798
lo'neill@chadbourne.com

Stelio Tellis
+1 (202) 974-5771
stellis@chadbourne.com

Christa Thorpe
+1 (202) 974-5770
cthorne@chadbourne.com

Associates – London
Anthony Bailey
+44 (0)20-7337-8047
abailey@chadbourne.com

Hoi-Yee Chan
+44 (0)20-7337-8054
hchan@chadbourne.com

Julia Ford
+44 (0)20-7337-8067
jford@chadbourne.com

Rebecca E. Huggins
+44 (0)20-7337-8061
rhuggins@chadbourne.com

Sally Mant
+44 (0)20-7337-8103
smant@chadbourne.com

Eugene Matveichuk
+44 (0)20-7337-8049
ematveichuk@chadbourne.com

Jonathan P.N. Ogle
+44 (0)20-7337-8068
jogle@chadbourne.com

Zelda E. Pitman
+44 (0)20-7337-8064
zstone@chadbourne.com

Other Attorneys
Kathryn L. Cervon
+1 (202) 974-5716
kcervon@chadbourne.com

Nancy Monarch
+1 (202) 974-5796
nmonarch@chadbourne.com

Insurance and Reinsurance NewsWire is an information source only. Readers should not act upon information in this publication without consulting counsel. The views expressed in these articles do not necessarily reflect the views of the firm or its clients. The material in this publication may be reproduced, in whole or in part, with acknowledgment of its source and copyright. For further information, complimentary copies or changes of address, please contact Leslie Stenuil, Director of Marketing (lstenuil@chadbourne.com).

Editor
Mark Pring, Dubai

Chadbourne & Parke LLP

New York
30 Rockefeller Plaza
New York, NY 10112
+1 (212) 408-5100

Washington
1200 New Hampshire Ave., NW
Washington, DC 20036
+1 (202) 974-5600

Los Angeles
350 South Grand Ave., Suite 3300
Los Angeles, CA 90071
+1 (213) 892-1000

Houston
1100 Louisiana, Suite 3500
Houston, TX 77002
+1 (713) 571-5900

London
Chadbourne & Parke
a multinational partnership
Regis House, 45 King William Street
London EC4R 9AN, UK
+44 (0)20 7337-8000

Moscow
Riverside Towers, 52/5 Kosmodamianskaya Nab.
Moscow 115054, Russian Federation
+7 (495) 974-2424
Direct line from outside C.I.S.:
(212) 408-1190

St. Petersburg
Stroganovskiy Business Centre
19A Nevskiy Prospect
St. Petersburg 191186 Russian Federation
+7 (812) 332-9300

Warsaw
Chadbourne & Parke
Radzikowski, Szubielska and Partners LLP
ul. Emilii Plater 53
00-113 Warsaw, Poland
+48 (22) 520-5000

Kyiv
25B Sahaydachnoho Street
Kyiv 04070, Ukraine
+380 (44) 461-7575

Almaty
Dostyk Business Center
43 Dostyk Avenue, 4th floor
Almaty 050010, Republic of Kazakhstan
+7 (727) 258-5088

Dubai
City Tower I, Sheikh Zayed Road
P.O. Box 23927, Dubai, United Arab Emirates
+971 (4) 331-6123

Beijing
Beijing Representative Office
Room 902, Tower A, Beijing Fortune Centre
7 Dongsanhuan Zhonglu, Chaoyang District
Beijing 100020, China
+86 (10) 6530-8846