

### “SERVICE OF SUIT CLAUSE” DOES NOT BAR FORUM NON CONVENIENS DISMISSAL

In a recent ruling, the New York Court of Appeals held that a “service of suit clause” contained in an insurance policy issued by certain Lloyd’s of London underwriters was not a mandatory forum selection clause, and therefore did not bar the underwriters from seeking dismissal on forum non conveniens grounds.

*Brooke Group Ltd. v. JCH Syndicate 488*, 87 N.Y.2d 530, 640 N.Y.S.2d 479 (1996), considered the question of whether the service of suit clause contained in many Lloyd’s policies constitutes a mandatory forum selection clause requiring an insurer to litigate in the forum chosen by its insured, precluding dismissal on forum non conveniens grounds. The insured held properties in Russia, and entered into a contract with certain Lloyd’s of London underwriters for “Expropriation and Forced Abandonment Insurance” to cover those properties. Government officials in Russia then attempted to extinguish the insured’s interest in the properties and, with the consent, the insured negotiated a substantial forfeiture of its interest.

The insured then submitted a claim for the loss under the policy, which the underwriters refused to pay. After the insured commenced an action in New York state court, the underwriters commenced an arbitration in London, seeking a declaration that they were not liable under the policy. The underwriters then moved to dismiss the New York action on forum non conveniens grounds.

At issue were two clauses contained in the policy, an arbitration clause and a service of suit clause. The service of suit clause stated that in the event the underwriters failed to pay any amount claimed due on the policy, they would submit to the jurisdiction of a court of competent jurisdiction within the United States. The arbitration clause provided for the arbitration in London of all disputes concerning the interpretation, validity and

performance of the policy or related to the determination of the amount of loss. The arbitration clause further provided that an arbitration award would be final and binding, and judgment thereon could be entered in any jurisdiction.

The insured argued that the service of suit clause was a mandatory forum selection clause offering an alternative to arbitration, and therefore precluded dismissal on forum non conveniens grounds. The underwriters contended that the service of suit clause did not limit jurisdiction to a particular venue, and that to interpret it as such would render the arbitration clause meaningless.

The Court of Appeals agreed with the underwriters’, holding that the service of suit clause did not require them to litigate in New York. Rather, the service of suit clause was merely permissive and a consent to jurisdiction, and did not preclude the underwriters from moving for a dismissal on forum non conveniens grounds.

The Court rejected the insured’s contention that *The Bremen v. Zapata Off-Shore Oil Co.*, 407 U.S. 1, 92 S. Ct. 1907 (1972), holding that a service of suit clause should be viewed as a mandatory forum selection clause, was controlling. *The Bremen* was distinguishable because the clause at issue in that case specifically provided for a mandatory forum. By contrast, the plain words of the parties to the instant dispute did not manifest an intent to limit jurisdiction to a particular forum.

### INSIDE

- Excess insurer required to show prejudice to sustain late notice defense ..... Page 2
- New York anti-subrogation rule held not to bar enforcement of car rental indemnity clauses ..... Page 4

### AND MORE . . .

See Page 2 for a complete listing of articles in this issue.

Finally, the Court held that the courts below did not abuse their discretion by concluding that factors such as the foreign corporations involved, the issuance of the policy in England, and the property's location in Russia, as well as the availability of the alternative arbitration forum, supported underwriters' motion for dismissal. 🍷

## EXCESS INSURER REQUIRED TO SHOW PREJUDICE TO SUSTAIN LATE NOTICE DEFENSE

New York's Appellate Division, First Department, in a case of first impression, recently held that an excess insurer must allege and demonstrate prejudice in order to sustain a defense of late notice against a claim by a co-excess insurer seeking contribution.

Disagreeing with a federal court decision arising out of the same claim, the Appellate Division in *American Home Assur. Co. v. International Ins. Co.*, \_\_\_ A.D.2d \_\_\_, 641 N.Y.S.2d 241 (1st Dep't 1996), held that the reasons behind allowing a primary insurer to avoid payment because of late notice do not apply to excess insurers. Expanding on the New York Court of Appeals decision in *Unigard Security Ins. Co. v. North River Ins. Co.*, 79 N.Y.2d 576, 584 N.Y.S.2d 290 (1992), the court stated that the role of an excess insurer (vis-a-vis the insured) is more akin to that of a reinsurer and significantly different from a primary insurer (which typically undertakes the defense and direction of the underlying litigation against the insured).

### Relevant Facts

On December 23, 1985, a family of five died in their Alabama home due to carbon monoxide poisoning caused by a gas furnace that had been improperly serviced by the insured, Mobile Gas. Ultimately, Mobile Gas' investigation confirmed its own negligence, and resulted in it conceding liability in the underlying wrongful death action.

Mobile Gas' primary insurer, Liberty Mutual Insurance Company, acknowledged the lack of any viable defense to liability and, anticipating that the underlying action would settle for approximately \$10 million, agreed to contribute the full amount of its \$300,000 policy toward any final settlement. Mobile Gas' excess coverage was divided into two

## IN THIS ISSUE

<b>“Service of suit clause” does not bar forum non conveniens dismissal .....</b>	<b>1</b>
Strict limits on punitive damages in insurance disputes reinforced	
<b>Excess insurer required to show prejudice to sustain late notice defense .....</b>	<b>2</b>
New York Appellate Division likens excess insurers to reinsurers	
<b>New York anti-subrogation rule held not to bar enforcement of car rental indemnity clauses .....</b>	<b>4</b>
Ruling may limit rental agencies' liability	
<b>Selected legislative and regulatory developments .....</b>	<b>4</b>
<b>New York legislature considers revisions to regulation of life insurance products .....</b>	<b>4</b>
<b>Washington Senate proposes to increase potential liability of insurers .....</b>	<b>5</b>

*Editor-in-Chief:* Steven H. Rosenfeld

*Board of Editors:* Terence P. Cummings, Christopher B. Hitchcock

*Editorial Staff:* Julia Davidson, Karla Sommella

*Contributors:* Michael Goldstein, Len Morton, Melanie Wilson

separate levels, the first level being a \$5 million policy issued by plaintiff American Home. The second level of \$10 million was subscribed to by seven individual insurers, one of which was American Home. Defendant International was responsible for 5% of the second level.

Based upon advice received from Mobil Gas' defense counsel in 1986, American Home attempted to settle the claims against Mobile for the full extent of the primary and first level excess policies, to wit, \$5.3 million. After this offer was rejected, American Home notified the other second level excess insurers, including International and informed them of the status of the claim and the settlement demand of \$12.2 million. Later, in December 1986, American Home telephoned a representative of International to advise that it intended to negotiate a settlement of up to \$12.5 million and that this would require a contribution from each of the second level excess insurers. American Home was able to settle the underlying wrongful death action for \$11.5 million, which would require a \$6.2 million contribution from the second level excess insurers. Several of the second level excess insurers, including International, refused to contribute to the settlement on the ground of untimely notice.

American Home commenced an action against International in state court. American also commenced actions against two other second level participants, Republic Insurance Company and United National Insurance Company, in federal court. In *American Home Assur. Co. v. Republic Ins. Co. and United Nat. Ins. Co.*, 788 F. Supp. 214, 216 (S.D.N.Y. 1992), *aff'd*, 984 F.2d 76 (2d Cir. 1993), *cert. denied*, 508 U.S. 973, 113 S. Ct. 2964 (1993), the federal court dismissed American Home's claim on the basis of late notice, and rejecting American Home's contention that the second level excess insurers were required to prove that they were prejudiced by the late notice.

### **Second Level Excess Coverage and the "No Prejudice" Exception**

The Appellate Division began its analysis of the legal issue presented by recognizing that it was long settled in New York that a notice provision for a primary insurer operates as a condition precedent and that the insurer need not show prejudice to sustain a defense of late notice. The court further noted that this so called "no prejudice" rule for pri-

mary insurers was a limited exception to the established rules of contract law, that one seeking to escape the obligation under a contract must demonstrate material breach or prejudice. The court further noted that the most compelling reason articulated for the New York exception, again as applied to primary insurers, is that it promotes prompt notice by the insured, which in turn, allows the insurer the opportunity to conduct timely investigations of claims while witnesses and physical evidence are still available, allows the insurer to adequately reserve a claim by making early estimates of potential exposure, and enables the insurer to exercise early control over the claim, which enhances the possibility of settlement.

The court then noted that in *Unigard*, the New York Court of Appeals recently had the occasion to consider extending the limited "no prejudice" exception to reinsurers, and refused. The Court of Appeals had noted that the reasons for adopting the "no prejudice" exception for primary insurers do not apply to reinsurers. Initially, the nature of reinsurance is such that the reinsurers are not obligated to indemnify an insured, but rather indemnify one or more other insurers. Secondly, the Court of Appeals noted that reinsurers are not responsible for providing a defense, for investigating claims or for attempting to get control of claims in order to effect early settlements. The Court of Appeals did not eliminate the possibility of reinsurers relying on the defense of late notice, it only required that reinsurers demonstrate that the late notice was prejudicial.

Relying principally on the second rationale articulated by the Court of Appeals in *Unigard*, the Appellate Division refused to extend the "no prejudice" exception to excess insurers and stated that claims against excess insurers should not be precluded by a failure to receive timely notice unless some prejudice is shown. The court noted that excess insurers rarely undertake investigations of claims, nor need to exercise control over the handling of the claim in order to effect a settlement. Taking plaintiff's cue from the Court of Appeals in *Unigard*, the Appellate Division did not preclude excess insurers from asserting late notice defenses, but only established a requirement that they plead and show prejudice, which it called a fair burden which applies to any party seeking to escape performance under a contract. 📌

---

## NEW YORK ANTI-SUBROGATION RULE HELD NOT TO BAR ENFORCEMENT OF CAR RENTAL INDEMNITY CLAUSES

New York's Appellate Division, Third Department has ruled that the anti-subrogation rule - prohibiting an insurer from making claims against its own insured which arise out of the very risk covered by the policy - does not bar enforcement of the indemnity clause in a car rental contract.

*In Laylaw v. Maguire Ford-Lincoln-Mercury, Inc.*, \_\_\_ A.D.2d \_\_\_, 639 N.Y.S.2d 544 (3d Dep't 1996), Mr. Laylaw entered into a rental agreement with Maguire Ford-Lincoln-Mercury for the use of a van, which resulted in Maguire's insurer becoming Mr. Laylaw's insurer. Thereafter, while the vehicle was being driven by an unauthorized driver, it struck a guardrail, overturned, and threw Mr. Laylaw from the van, thereby causing him severe injuries.

Mr. Laylaw commenced a personal injury action against Maguire and the driver. In response to the complaint, Maguire asserted a counterclaim alleging, among other things, that it was entitled to indemnification pursuant to the indemnification clause in the rental agreement. Mr. Laylaw sought dismissal of the counterclaim based upon New York's anti-subrogation rule.

Distinguishing prior anti-subrogation cases and allowing the claim for indemnification to stand, the court held that because the indemnification clause applied only to damages in excess of the insurance policy limits, the anti-subrogation rule did not apply. In so doing, the court reasoned that there is no inherent risk that an insurer is seeking to pass off a loss to its insured where the duty to indemnify does not accrue until the coverage provided by the policy is exhausted. The court also noted that since the insurer's interests were not affected by the indemnification agreement, the potential of conflict of interest between the insurer and insured did not exist. 📌

---

## SELECTED LEGISLATIVE AND REGULATORY DEVELOPMENTS

### NEW YORK LEGISLATURE CONSIDERS REVISIONS TO REGULATION OF LIFE INSURANCE PRODUCTS

**Senate Bill No. 3664-C** proposes to implement two significant changes to the current regulatory

scheme concerning life insurance products. The bill proposes to revise the approval procedure for individual life insurance and annuity forms filed with the Insurance Department, as well as delete and re-enact the statutory provisions concerning the expense limitations applicable to the sale of individual life insurance and annuity policies by life insurance companies doing business in New York.

Under section 2 of the bill, the Superintendent of Insurance would be authorized to grant conditional approval of any individual life insurance or annuity contract filed for approval. The insurer would remain obliged to modify the form if the insurance department later found that the form failed to comply with the insurance law. After 60 days from the filing date, however, approval could only be withdrawn upon notice and a full hearing.

Section 3 of the bill proposes to delete and re-enact section 4228 of the Insurance Law in order to simplify the current expense limitations that a life insurance company doing business in New York may incur during any calendar year. This revision would replace the current regulatory framework which imposes an aggregate expense limit and requires regulatory control of business operating details. The proposed regulatory mechanism would retain an aggregate expense limitation, but each insurer would have increased flexibility in managing its resources within the limit.

Under this scheme, the expenses subject to the statutory limit would be commissions, advances and loans, advertising and marketing, distribution and sales support, agency expenses, conferences and training seminars, and all other compensation paid to, or expenses incurred by, agents, including agents' benefits. Compensation of persons working on non-sales related activities (underwriting and claims administration), however, would not be included as selling expenses.

In ascertaining expenses, insurers would be entitled to allocate expenses between policies which are subject to this provision and other business. Other regulatory mechanisms that would continue to be imposed upon insurers are the filing of agent compensation contracts, the filing of certifications that the insurer's expenses will not exceed the statutory limit, and the requirement that issued policies be self-supporting.

The bill also allows for a transition period for existing carriers to achieve compliance with the proposed regime. Insurers would be allotted a five year period within which to achieve full compliance. Further, the current limitations on first-year compensation on life insurance policies would be continued for an additional year.

The bill also provides for penalties for carriers exceeding the expense limitation. First, insurers would carry forward 5% of the excess amount into each of the following 20 years. Additionally, such an insurer would be required to file a compliance plan with the insurance department and would be subject to increased regulatory scrutiny to monitor its compliance. Further, where the violations are found to be willful, the department may impose a fine of up to the lesser of \$1,000,000 or 5% of the company's total selling expense limit for the most recent calendar year.

#### **WASHINGTON SENATE PROPOSES TO INCREASE POTENTIAL LIABILITY OF INSURERS**

The Washington State Senate is considering a bill which would revise the Washington Insurance Law by enacting a provision which would increase the potential liability of insurance companies. Under **Senate Bill 3972:1**, an insured prevailing in an insurance coverage action against an insurer would be entitled to recover all consequential damages caused by a delay in the resolution of its claim. This additional recovery would be available to an insured regardless of whether the insured's total recovery would exceed the policy limits. 🌱

©1996 OHRENSTEIN & BROWN, LLP  
230 Park Avenue, New York, NY 10169

This newsletter is intended solely to alert readers to issues of general interest and should not be construed as legal advice. For advice about particular facts and legal issues, readers should consult legal counsel.

Printed on Recycled Paper. 