

In this Issue

- 2 [Our Editors and Authors](#)
- 3 [Texas Department of Housing and Community Affairs and Its Potential Impact on Underwriting Policies and Procedures](#), by John A. Houlihan and Raymond M. Ripple
- 4 [The General Data Protection Regulation: What Insurers Should Do Now to Prepare for Its Implementation](#), by Alan Meneghetti
- 5 [Reinsurer "Access to Records" and "Common Interest" – Permitting Access and Preserving Privilege](#), by Mark Deptula and Joseph N. Froehlich
- 7 [Q&A on SCOTUS and Arbitration](#), by Matthew T. Furton and Julie L. Young
- 8 [Accolades](#)
- 8 [Articles & Quotes](#)
- 8 [Events & Speaking Engagements](#)

Locke Lord's Insurance & Reinsurance Newsletter provides topical snapshots of recent developments in the fast-changing world of insurance. For further information on any of the subjects covered in the newsletter, please contact one of the members of our Insurance team.

OUR EDITORS:



Alan J. Levin
Partner
Hartford | 860-541-7747
New York | 212-912-2777
alan.levin@lockelord.com



Thomas F. Bush
Partner
Chicago
312-201-2127
tom.bush@lockelord.com

OUR AUTHORS:



Mark Deptula
Senior Counsel
Chicago
312-443-1728
mdeptula@lockelord.com



Alan Meneghetti
Partner
London
+44 (0) 20 7861 9024
ameneghetti@lockelord.com



Joseph N. Froehlich
Partner
New York
212-812-8345
jfroehlich@lockelord.com



Raymond M. Ripple
Senior Counsel
Providence
401-276-6620
raymond.ripple@lockelord.com



Matthew T. Furton
Partner
Chicago
312-443-0445
mfurton@lockelord.com



Julie L. Young
Partner
Chicago
312-443-0254
jyoung@lockelord.com



John A. Houlihan
Partner
Boston
617-239-0485
john.houlihan@lockelord.com

Texas Department of Housing and Community Affairs and Its Potential Impact on Underwriting Policies and Procedures

By John A. Houlihan and Raymond M. Ripple

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), one of the most watched cases of 2015, the Supreme Court held that plaintiffs may rely on a disparate impact theory to establish a violation of the Fair Housing Act ("FHA"). Unlike direct discrimination claims, disparate impact liability does not require any evidence of intentional discrimination by a defendant. Historically plaintiffs have often established liability or at least compelled defendants to entertain plaintiff-friendly settlements by relying almost exclusively on statistical evidence to show that a facially neutral policy was discriminatory because of the particularly negative impact it had on a protected class. In recent years, the plaintiffs' bar, as well as the Department of Housing and Urban Development ("HUD"), have increased their efforts to utilize disparate impact analysis to challenge insurance underwriting practices that many in the industry long thought were beyond the scope of the FHA. As a result of the *Texas Department of Housing* decision, that trend is likely to continue and a different landscape will emerge as the government and plaintiffs' attorneys attempt to employ disparate impact allegations within the broad framework outlined by the Court, while insurers and state regulators adjust and adapt to the business implications of the Court's decision.

Although the Court's 5 to 4 opinion, written by Justice Kennedy, was most notable for the holding that disparate impact claims are cognizable under the FHA, the Court also noted that disparate impact claims were not without limits. For example, the Court made clear that disparate impact liability based solely on a showing of statistical disparities would not be sufficient to establish liability under the FHA and could present serious constitutional questions. The Court also emphasized that disparate impact liability is not intended to overturn legitimate governmental or business decisions. Accordingly, the Court instructed trial courts to "... examine with care whether a plaintiff has made out a prima facie case of disparate impact." *Id.* at 2523. The Court also broadly outlined an approach to resolving disparate impact claims that begins with the requirement that the plaintiff plead facts sufficient to demonstrate that the defendant has a concrete policy or practice that caused a disparate impact on a protected class, but also permits the defendant to establish a "valid interest" in the subject policy or practice that, at least in some circumstances, will outweigh the negative impact on the protected class.

At first glance, the Court's outline looks distressingly similar to the test proposed by HUD in its earlier rule making exercise. That facial similarity may well embolden plaintiffs' attorneys to continue the pursuit of what they perceive to be hidden discrimination resulting from otherwise facially neutral policies and practices. If so, the insurance industry needs to gird itself for another wave of litigation.

Given the inherently subjective nature of the risk analysis that lies at the heart of the underwriting process, underwriting guidelines and procedures are particularly susceptible to attack under a disparate impact theory. For example, a decision by an insurer not to underwrite certain risks in a particular region based solely

on loss history and actuarial analysis may be challenged if the decision disproportionately impacts members of a protected class. Similarly, utilizing an underwriting guideline that considers an insured's or the insured's tenants' sources of income, tenant make-up, age of the premises or even the type or style of construction may present similar problems.

In an effort to comply with the first step in the Supreme Court's analysis, resourceful plaintiff's counsel will develop data purporting to link such facially neutral underwriting criteria to an alleged lack of availability of property and casualty or specialty lines insurance in minority neighborhoods and communities or to an alleged increase in the cost of the insurance that is available. If a credible statistical argument can be developed demonstrating a link between a particular underwriting guideline and a specific negative impact on a minority group, the burden will then fall to the defendant company to show a "valid interest" in the form of a necessary connection between the underwriting policy or practice at issue and the reasoned analysis of the degree of risk associated with the hypothetical loss that a particular insurance product is designed to cover. While this may sound simple enough, producing admissible evidence of a business interest in a specific underwriting practice can be challenging. Relevant material would include: industry or company studies linking the challenged underwriting practice to a risk of loss, the date of any such studies, the manner in which any such studies were conducted, countervailing data if any, and the defendant's internal records relating to the specific policy or practice. In order to establish a "valid interest" the available memoranda and data will need to demonstrate that the defendant's focus was on the business interest of accurately assessing the risk of loss. But even if a company succeeds in establishing a "valid interest" in maintaining its existing underwriting policies and procedures, the plaintiff could still prevail by showing that other reasonable and less discriminatory alternatives could gauge the risk of loss with equal or greater accuracy.

Largely because of the evidentiary challenges it will present for defendant companies, the Court's discussion of the ability to defend disparate impact claims by establishing a "valid interest" in maintaining existing policies and procedures will likely have less impact on the development of FHA law, than will Justice Kennedy's emphasis on the importance of establishing a causal link between the challenged practice and the alleged discriminating impact. It is one thing to present statistical evidence demonstrating that a particular demographic is underserved by the insurance industry or that certain groups tend to pay more than others for similar coverage. However, it is another thing altogether to establish that a particular underwriting policy or procedure caused a minority community to be underserved or overcharged. Focusing on the need for such a causal connection, will likely prove to be the most effective line of defense to whatever suits follow in the wake of the *Texas Department of Housing* decision. Nevertheless, prudence suggests that companies review their underwriting policies and procedures to identify potentially problematic practices and consider whether alternative approaches might be equally effective at gauging the risk of loss without creating the appearance of discrimination by disproportionately impacting protected groups.

The General Data Protection Regulation: What Insurers Should Do Now to Prepare for Its Implementation

By Alan Meneghetti

The General Data Protection Regulation (GDPR or Regulation) has been approved by European Union (EU) members as well as the Council of Europe and, at the time of writing, the draft Regulation is before the European Parliament for consideration and approval. Work has already begun to be ready for 2018 implementation. The Regulation strives for common data protections in all EU countries. With this two year phase-in period and with much to be done, those in the insurance industry that collect personal data (or PII) in or from individuals in the EU should begin preparing now for the increased data compliance requirements, which will become mandatory as soon as the GDPR takes effect.

Key Features of the GDPR

Post the ECJ Safe Harbor case (*Maximillian Schrems v Data Protection Commissioner, Case C-362/14, 6 October 2015*), the GDPR will maintain the general prohibition of data transfers to non-EU countries that are not officially recognised as having an 'adequate' level of protection by the EU, but current systems are to be kept intact until repealed. At this stage, the validity of using model contract clauses and binding corporate rules (or BCR's) to transfer personal data outside the European Economic Area (EEA) remain valid (see Arts. 40-42 of the GDPR). However, the EU Article 29 Working Party (a policy body made up of the national heads of data protection authorities in EU countries) has also indicated in very recent announcements that they have concerns regarding the appropriateness of model clauses and binding corporate rules for transfers to the U.S., and will be reassessing those mechanisms in light of a new proposed Safe Harbor approach (the Privacy Shield framework) once it is released. Thus, while they made clear that businesses may rely on model clauses and binding corporate rules in the interim, that issue will be subject to review, the results of which are expected shortly. Indeed, it is fair to say that the Privacy Shield itself, as well as the model clauses and binding corporate rules, are susceptible to a legal challenge to their ability to afford an adequate level of protection for the transfer of personal data outside of the EEA (in much the same way that Maximillian Schrems, a privacy activist, challenged the adequacy of the first Safe Harbor framework).

Scope

U.S. and other non-EU insurers will be subject to the Regulation if they underwrite risks for or issue policies to individuals and companies located within the EU, or if they monitor individuals' behaviour which takes place within the EU. For example, an insurer who collects data of EU insureds using cookies will likely be subject to the Regulation. This is a key change from the current regulatory scheme and will likely mean that many more international companies and insurers will be subject to the EU data protection regime.

"One Stop Shop"

The GDPR aims to create a so-called "one stop shop" for regulatory approvals and the regulation of multi-state processing. Where a company's processing activity affects data subjects in more than one Member State in the EU, the country where the bulk of the data processing takes place will act as a "lead supervisory

authority" and will be primarily responsible for regulating that particular activity across the EU.

Data Impact Assessments

Companies will, in certain circumstances, need to carry out systemic and extensive data impact assessments, especially if the data processing is regarded as "high risk". Data processing is generally regarded as "high risk" if it involves sensitive personal data or its uses are more intrusive, both features which are often (although not always) the case when it comes to personal data held by insurers. Consultation with the authorities may be required in such "high risk" circumstances. Whether these reviews will be akin to data audits or cyber or data risk assessments in the U.S. is not yet clear. Data protection officers, as described below, will be responsible for this task.

Data Protection Officers

Entities with certain types of data or data activities will have to appoint a data protection officer (DPO), reporting to senior management. DPOs will be required for businesses with core activities that, by virtue of their nature, scope or purposes, require regular and systematic monitoring of data subjects on a large scale; or processing on a large scale of special categories of data (essentially, personal data and sensitive personal data, or data relating to criminal convictions and offences).

This may refer to processing which (in the words of Recital 71 to the GDPR) aims at "a considerable amount of personal data at regional, national or supranational level and which could affect a large number of data subjects and which are likely to result in a high risk, for example, on account of their sensitivity, where in accordance with the achieved state of technological knowledge a new technology is used on a large scale as well as to other processing operations which result in a high risk for the rights and freedoms of data subjects, in particular where those operations render it more difficult for data subjects to exercise their rights."

Data Breach Reporting

The GDPR introduces a general data breach reporting requirement. Data controllers must notify personal data breaches to the competent supervisory authority, where feasible, not later than 72 hours after becoming aware of the breach, unless the data controller is able to demonstrate that the breach is unlikely to result in a risk to the rights and freedoms of the data subjects concerned. Notifications must also be made to data subjects "without undue delay" if the breach is likely to result in a high risk to their rights and freedoms.

Under the new regime, businesses could be fined up to €20 million or 4% of annual global turnover in the most recent financial year, whichever is greater. For infringements not subject to administrative fines, Member States are given the authority to set their own penalties, including criminal penalties. Consumer bodies will now also be able to bring their own claims, which may open the door for class actions in Europe. Under the current regime, Member States determine the fines, and/or criminal penalties, at local level. The UK Information Commissioner's Office currently only has the power to impose fines of up to £500,000 for serious breaches, a level which it has never reached when issuing a fine. The considerably higher penalties under the GDPR will certainly act to raise awareness of companies' data protection obligations and hopefully encourage businesses to comply.

The GDPR has, as a fundamental underlying ethos, the aim of harmonisation in its application and enforcement across the EU. Joint operations between supervisory authorities from different Member States will be encouraged "where appropriate" and a

European Data Protection Board will be established to seek to ensure the consistent application of the GDPR across the EU (this is likely, at least in form, to be similar to the current Article 29 Working Party). The Board will include representatives from each Member State, and its tasks will include issuing guidelines, recommendations, and opining on supervisory authorities' application of the GDPR. It will advise the Commission much as the Article 29 Working Party does under the current regime, but the new Board will have a separate legal personality and will have the power to adopt binding decisions in disputes between Member State supervisory authorities.

Potential Challenges for Insurers

Using individual data

On the plus side, registration as a data controller will no longer be necessary. However, data controllers and processors alike will need to maintain internal records of their data processing activities. Data controllers may also be required to carry out a "data protection impact assessment" before processing personal data. For insurers it is essential that they understand the GDPR so as to know how to lawfully access, process, store and share data to continue to offer products. Data enables insurers to price products accurately and provide cover that best meets their customers' needs, which has been the basis of insurance for hundreds of years. The use of data also enables insurers to prevent and detect fraud, thereby minimising costs for honest customers.

Right to be forgotten

A flagship proposal of the GDPR (which has, in fact, simply reiterated the terms of the decision of the CJEU in the *Google v AEPD* referral from the Spanish courts), is the right to be forgotten. This right, however, needs to be accommodated to the larger legal environment. For example, an insurer, or any company for that matter, may not be able to delete all data it holds on an individual because it has to comply with other regulations (for instance, for anti-money laundering purposes) or in order to pay out an insurance claim at a later stage.

Data portability

The GDPR should not force insurers to disclose commercially sensitive information to competitors. The proposed legislation introduces a right to data portability, which allows data subjects to require that personal data held on them by one company be transferred to another. If the provisions remain in the final text (as we anticipate they are likely to), we hope that the language of the Regulation or, as a minimum, its enforcement (in time) is such that companies are safeguarded against having to disclose competitive and/or proprietary aspects of their underwriting.

Underwriting

It is important that the GDPR does not impede insurers' ability to underwrite risk. The provisions on 'profiling' could impact the provision of goods and services and so, therefore, these need to be proportionate to ensure insurers are still able to use customers' data (i.e. with their consent, or for the purposes of entering into or the performance of the contract) to provide customers with the products they need whilst protecting their business and the quality of the underwriting.

Reinsurer "Access to Records" and "Common Interest" – Permitting Access and Preserving Privilege

By Mark Deptula and Joseph N. Froehlich

An integral part of the relationship between the reinsurer and cedant is that the reinsurer be permitted access to the ceding company's books and records. A cedant, however, may face the dilemma of a risking waiver of privilege¹ if the reinsurer is provided access to privileged documents or records while, on the other hand, being accused of breaching the access to records provision by failing to permit the reinsurer unencumbered access. The interplay between the access to records clause and the common interest doctrine is at the heart of such disputes. This article discusses the issues that can arise.

I. The "Access To Records" Clause

Whether by contract or by industry custom, it is generally accepted that reinsurers are allowed access to all of the ceding company's files and records. As an example, a typical "access to records" clause in a reinsurance contract generally provides: "The Reinsurer or its designated representatives shall have access at any reasonable time to all books, records and papers of the ceding company which pertain in any way to this reinsurance." Reinsurers may also argue that access is supported by the "claims clause" to the extent the provision includes language that the reinsurers' obligation to pay is conditioned on "receipt of satisfactory evidence of payment of a loss for which reinsurance is provided."

Access to records is of such significance that there is authority that a breach of an inspection clause constitutes a material breach of contract, entitling the reinsurer to terminate its future obligations. See, *Manhattan Life Ins. Co. v. Prussian Life Ins. Co.*, 296 F.3d 7 (2nd Cir. 1924). On the other hand, some courts have found that the provision does not condition payment of a claim on the production of particular records. See *First State Ins. Co. v. Nat'l Cas. Co.*, 781 F.3d 7 (1st Cir. 2015) (confirming arbitration ruling that reinsurer's payment obligation was not conditioned on the exercise of the reinsurer's right to audit).

Reinsurers and cedants have disputed whether the access to records clause obligates the cedant to provide access to "all" records, including privileged documents. Although it may depend on the specific language, facts or venue involved in the dispute, in general, courts have declined to find that the access to records provision entitles the reinsurer to privileged materials. In *Liberty Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 87 Mass.App.Ct. 1127 (2015), the court affirmed the confirmation of an arbitration award denying a reinsurer access to documents the cedant claimed were privileged. Liberty Mutual refused to produce documents it claimed were protected by the attorney-client privilege or work product doctrine, which Nationwide argued it was entitled to under the access to records provision in the treaty. In accordance with the arbitration provision of the treaty, the parties submitted the dispute to arbitration. The arbitration panel determined that the access to records clause did not grant access to privileged documents. The appellate court affirmed the trial court's confirmation of the arbitration award noting the court's "severely limited review of arbitration awards."

¹ Generally, such privileged documents would include attorney-client communications or documents prepared in anticipation of litigation, which are subject to protection as work product.

Other courts have similarly rejected the argument finding that the access to records clause in reinsurance agreements did not operate as a “per se” waiver of the attorney-client privilege or work product protection. See, *Gulf Ins. Co. v. Travelers Reins. Co.*, 788 N.Y.S.2d 44, 45-46 (N.Y.App.Div. 2004) (“Access to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client or attorney work product privileges.”); *Travelers Cas. & Surety Co. v. Century Indemn. Co.*, 2011 WL 5570784 (D.Conn. Nov. 16, 2011) (“The reinsurer is not entitled under a cooperation clause to learn of any and all legal advice obtained by a reinsured with a reasonable expectation of confidentiality.”)

II. Common Interest Doctrine

In general, the common interest doctrine permits the sharing of privileged materials with another party with whom it shares a “common interest” as against a common adversary without waiving the ability to assert privilege as to third parties.² In this regard, “[t]he common interest doctrine is an exception to the general rule that [privilege] is waived following disclosure of privileged materials to a third party.”³ Reinsurers may assert that the common interest doctrine supports access to privileged materials in the cedant’s records, arguing that access is permitted because it does not result in waiver of privilege since both the reinsurer and cedant share a stake in the outcome of the underlying claim.

Courts, however, have been reluctant to permit the use of the doctrine “offensively” as a mechanism to obtain documents rather than the more traditional “defensive” use of the doctrine as a shield against production. For example, in *Granite State Ins. Co. v. R&Q Reins. Co.*, 2015 WL 4467756 (N.Y.Sup.Ct. July 21, 2015), the court determined that certain records were protected by the attorney-client privilege and not subject to disclosure to the reinsurer. The court held that the documents sought were protected by the attorney-client privilege and neither the common interest exception nor the “at issue” exception to the privilege applied to the dispute. As between the insurer and reinsurer, the court held that the common interest doctrine does not apply to the issue of waiver of privilege. Additionally, the court held that a cedant does not place the bona fides of a settlement at issue merely by alleging in a pleading that the settlement was reasonable and in good faith. The reinsurer sought reconsideration of this ruling, which the court denied.

A similar argument for access based on the common interest doctrine was rejected in *American Re-Insurance Co. v. United States Fidelity & Guaranty Co.*, 40 A.D.3d 486 (NY 2007). In *American Re*, certain reinsurers sought production of the cedant’s communications with its attorney, contending that the common interest doctrine required disclosure. The court declined to order production of privileged materials finding the interest were “indisputably adverse” and the mere fact that they shared an interest in the eventual outcome of the underlying coverage litigation was insufficient. In the alternative, the reinsurer argued that disclosure of certain documents to reinsurers resulted in the

waiver as to other documents on the same subjects. The court also rejected this argument, finding that there was a shared interest in the outcome of the underlying litigation at the time the privileged information was disclosed.

Other cases demonstrate that the business relationship between a cedant and reinsurer is insufficient to establish a common interest such that disclosure to the reinsurer results in waiver of privilege. For example, one court found that disclosure to the reinsurer was a waiver of privilege since there was no common interest between the cedant and reinsurer. In *Progressive Cas. Ins. Co. v. Federal Deposit Ins. Corp.*, 2014 WL 4947721 (N.D. Ia Oct. 3, 2014), FDIC sought certain communications between Progressive and its reinsurers. The magistrate judge overseeing discovery ordered the production of the communications but permitted Progressive to produce redacted versions of the communications. FDIC appealed that determination to the district court. The court rejected Progressive’s assertion that case updates, strategy reports, and similar documents provided to its reinsurers in connection with underlying litigation were privileged, either as attorney-client communications or attorney work product. As to the attorney-client privilege, the court held that disclosure of the communications to its reinsurers was a waiver of the privilege since there was no common interest between the insurer and its reinsurer. The court noted that the business relationship between those parties, without more, does not trigger the common interest doctrine. The assertions of work product failed because, according to the court, the communications were created in the ordinary course of business and not in anticipation of litigation.

A court also found a lack of common interest between cedant and reinsurer in *Bancinsure, Inc v. McCaffree*, 2013 WL 5769918 (D.Kan. Oct. 24, 2013). The cedant asserted attorney-client privilege and work product protection and asserted that the common interest doctrine warranted application of the privilege to its communications with its reinsurer. The court rejected the assertion of a common interest between the cedant and reinsurer because they share only a “common commercial and financial interest”. The court found that this was insufficient to meet the burden of proof to establish the privilege. The court noted that the cedant provided the court “nothing but the bare suggestion of any common legal interest between it and its reinsurer” and “offered no evidence of any agreement with its reinsurer to pursue a common legal defense or strategy.” Thus, the cedant failed to establish the common interest and the privilege was waived with respect to documents shared with the reinsurer.

On the other hand, certain jurisdictions have found a common interest in the cedant/reinsurer relationship. For example, in *Hawker v. Bankinsurance, Inc.*, 2013 WL 6843088 (E.D.Cal. Dec.27, 2013), the court found that reinsurance reports were subject to the common interest doctrine and privileged and the court declined to grant the insured access to such communications. Applying California law, the court found that to the extent the communication with the reinsurer reflects attorney-client communication, the documents were not discoverable and the cedant did not waive the privilege by communicating with reinsurers. Accordingly, the communications were not discoverable.

A similar finding upholding privilege was reached in *Artra 524(g) Asbestos Trust, v. Transport*, 2011 WL 4501375 (N.D.Ill. Sept. 28, 2011). The asbestos trust sought documents the cedant shared with a variety of reinsurers. The court upheld the common interest privilege finding that the shared interests between the cedant and reinsurer are not so “materially different from the shared interests of a direct insurer and its insured as to conclude that the common interest does not apply.” The court also took into account the fact

² It should be remembered, of course, that “[t]he common interest doctrine is not a privilege in its own right. Merely satisfying the requirements of the common interest doctrine without also satisfying the requirements of a discovery privilege [such as attorney-client] does not protect documents from disclosure...” *Hunton & Williams v. DOJ*, 590 F.3d 272, 280 (4th Cir. 2010)(internal citation omitted); *Sokol v. Wyeth, Inc.*, 2008 WL 3166662, *5 (S.D.N.Y.) citing *In re Commercial Money Ctr., Inc., Equipment Lease Litig.*, 248 F.R.D. 532, 536 (N.D. Ohio 2008) (“The common interest doctrine ‘is not an independent source of privilege or confidentiality.’ If a communication is not protected by the attorney-client privilege or the attorney work-product doctrine, the common interest doctrine does not apply.”)

³ *Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189, 190 (D. Del. 2004).

that a finding of no common interest would leave the cedant with no ability to provide its reinsurers with its attorneys' candid views of the merits of the disputed issues in the coverage litigation or to make recommendations for settlement or otherwise discuss litigation strategy.

III. Preservation of Privilege

As the foregoing demonstrates, privilege rulings can be inconsistent and dependent on contract language, particular facts and the venue or forum of the dispute. Given the potential risk of waiver in sharing privileged documents, cedants likely want to try to impose limitations on the reinsurer's access to records. A cedant may want to assert the privilege and document that the reinsurer was denied access to privileged documents. Doing so reduces the risk of waiver and the resulting harm caused by disclosing legal strategies.

Business considerations and an ongoing relationship with the reinsurer are likely also a factor. To the extent access to privileged material is contemplated, the execution of a confidentiality agreement prior to permitting or obtaining access that specifies that access is provided pursuant to a joint defense or common interest may help accomplish the preservation of privilege. A prudently drafted agreement documenting the common interest can help demonstrate the intent to protect against disclosure but also satisfy the reinsurer's desired access to records.

Q&A on SCOTUS and Arbitration

By Matthew T. Furton and Julie L. Young

Q: Why has the Supreme Court of the United States taken more cases involving disputes over arbitration over the past decade or so and what does it mean for the insurance and reinsurance industry?

Arbitration law used to involve non-ideological contract and statutory interpretation questions that rarely reached the Supreme Court. In the past decade or two, however, many different consumer-facing businesses have come to rely on arbitration and class arbitration waiver provisions in their contracts as a means of managing their consumer litigation exposures. This trend has put the law of arbitration in the middle of a battleground between advocates of consumer rights that tend to be anti-arbitration and advocates of free markets and freedom of contract that tend to be pro-arbitration. The insurance and reinsurance industry can no longer count on the Supreme Court to remain on the sidelines or view arbitration cases as mere contract and statutory interpretation questions. Instead, the industry must expect constant challenges to the strong federal policy in favor of enforcing arbitration agreements.

Q: What cases involving arbitration law are currently under review by the U.S. Supreme Court?

Two cases from the battleground state of California involving arbitration law are before the U.S. Supreme Court for the 2015–16 Term. In *Zaborowski v. MHN Government Services, Inc.*, 601 Fed. App'x 461 (9th Cir. 2014), the Court will determine whether the Federal Arbitration Act (FAA) pre-empts California common law allowing judges to declare an entire arbitration agreement to be unenforceable whenever the court finds multiple terms in an arbitration agreement to be unconscionable. The case focuses on the tension between the strong federal policy favoring enforcement of arbitration agreements and broad state laws

that allow courts to declare contracts unenforceable if they are substantively unconscionable.

In December, the Court issued its opinion in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). In a 6-3 decision, the Court held that the Federal Arbitration Act required the enforcement of an arbitration agreement despite references in the arbitration agreement to enforceability under California state laws that were found to be pre-empted by the FAA in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). *DIRECTV*, 136 S. Ct. at 467–71. Most of the more conservative justices on the Court supported this pro-business, pro-arbitration outcome.

Q: Why does it matter that the circuits are split as to whether to stay or dismiss an action after compelling arbitration?

Whether a court stays or dismisses an action after compelling arbitration greatly impacts what parties can do after the order to compel is issued. In jurisdictions that follow the "must stay" approach, where the court requires the suit be stayed until the conclusion of the arbitration, the parties are unable to appeal the order and must proceed to arbitration. The Second, Third, Seventh, and Tenth Circuit follow the "must stay" approach. For the "may dismiss" approach, the First, Fifth, Sixth, and Ninth Circuits have determined that it is within the court's discretion to dismiss if all of the issues are sent to arbitration. Under this approach, a party can immediately appeal the order to compel arbitration, and the parties may find themselves litigating the appeal at the same time they are arbitrating the case.

Q: What is the current state of the "manifest disregard" standard?

The circuit courts are currently split on the use of the "manifest disregard of the law" standard in vacating an arbitration award. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008), the Supreme Court cast doubt on whether an arbitration award could be vacated based on a "manifest disregard of the law." After *Hall Street*, the circuit courts have split on the continuing use of the "manifest disregard" standard. The Fifth, Eighth, and Eleventh Circuits do not recognize the "manifest disregard" standard because it is not listed as one of the four grounds for vacating an award in Section 10 of the Federal Arbitration Act. The Second, Fourth, Seventh, Ninth, and Tenth Circuits continue to use the standard as a "judicial gloss" on the four grounds. The First, Third, and Sixth Circuits have noted the split of authority but have not ruled on the issue. Whatever the Circuit, although the courts have described the standards differently, they have continued to recognize the same type of misconduct (i.e., arbitrators deliberately disregarding the law) as grounds for vacating an award. As such, insurers and reinsurers should continue to raise any such misconduct through a motion to vacate.

The above topics cover just a few of the areas where the Supreme Court and Circuits have recently ruled. We expect the insurance and reinsurance industry to continue to be affected by the Supreme Court's more active engagement in the law of arbitration.

ACCOLADES:

- Locke Lord Named [2016 Law Firm of the Year in Insurance Law By U.S. News/Best Lawyers](#); Receives 16 Practice Area National Tier 1 Rankings, 12 Metropolitan Tier 1 Rankings.

ARTICLES & QUOTES:

- We are happy to provide the 2016 edition of our [Excess and Surplus Lines Law Manual](#). This edition reflects all of the pertinent changes in the surplus lines laws and regulations of the 50 states and U.S. territories during the past year. The manual is available at <http://surplusmanual.lockelord.com/> - **John Dearie** (New York), editor.
- **Elizabeth Tosaris** (Los Angeles) and **Patrick Hatfield** (Austin) co-authored a [Locke Lord QuickStudy: New California Law Creates Dilemma for Insurers and Their E-Contracting Processes](#) on February 2, 2016.
- **Christopher Barth** (Chicago) authored "[Aviation and Airport Insurance: Do These Specialized Insurance Policies Respond to Cyber Risks?](#)" for the Thomson Reuters Westlaw Journal Aviation on January 27, 2016.
- **Brian Casey** (Atlanta) authored "[FAST Act Lightens Delivery of Privacy Notices Burden for Service Contract Industry](#)" for Warranty Week on January 14, 2016.
- **Rachel Coan** (Chicago) authored a Locke Lord article entitled "[New Tax Rules for Captives Target Abuse](#)" on January 2016.

EVENTS AND SPEAKING ENGAGEMENTS:

- Locke Lord will sponsor the breakfast at the [Reinsurance Association of America Re Contracts Seminar](#) in New York on July 17-19, 2016. **Thomas Bush** (Chicago) will present "Interactive Workshop on Reinsurance Contract Interpretation."
- Locke Lord will sponsor the [AICP Northwest Chapter E-Day](#) in Seattle, Washington on June 1-2, 2016. **Elizabeth Tosaris** (San Francisco) will present "Cybersecurity – Proposed Insurance Data Security Model Law."

- Locke Lord Attorneys, **John Hughes**, **Laura Bange Stephens** (Boston), **Matthew Murphy** (Providence) and **Michael Perlis** (Los Angeles) will attend the [UJA-Federation of New York General Insurance Annual Dinner](#) on May 31, 2016.
- **Mark Deptula** (Chicago) will speak on the legal update at the [AIRROC Chicago Regional Education Day](#) on May 25, 2016.
- Locke Lord sponsored the [2nd Annual Georgia State University Risk Science and Insurance Leadership Awards – The Riskies](#) in Atlanta on May 19, 2016. **Brian Casey** (Atlanta) is on the board.
- **John Hughes** (Boston) presented "[D&O Issues for Financial Institutions](#)" at the Boston Bar Association on May 5, 2016.
- Locke Lord sponsored the [AIRROC Boston Regional Education Day](#) on May 3, 2016, and the AIRROC Spring Membership Meeting in New York on March 15-16, 2016. **Laura Bange Stephens** (Boston) attended the Boston meeting, and **Jonathan Bank** and **Al Bottalico** (Los Angeles) attended the New York Meeting.
- **Geoffrey Etherington** (New York) co-chaired the [American Conference Institute's 4th Annual Advanced Forum on Captive Insurance](#) in New York City on May 2-3, 2016.
- **Matthew Kalas** and **Molly McGinnis Stine** (Chicago) spoke at the HUB National Claims Conference in Chicago on emerging drone and cyber issues on April 21, 2016.
- **Brian Casey** (Atlanta) presented "Going Digital: Electronic Signatures and Authentication" at the jointly hosted Life Insurance and Market Research Association (LIMRA) / Life Office Management Association (LOMA) [2016 Regulatory Compliance Exchange](#) that took place in Baltimore, MD on March 30-April 1.
- **Brian Casey** (Atlanta) presented "Service Contract Industry Legal & Regulatory Update" at the [2016 Warranty Chain Management Conference](#) in Jacksonville, FL on March 15-17.

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