AIRROC Education Panel Summaries (March 12, 2014) – Summarized by Michael H. Goldstein, Mound Cotton Wollan & Greengrass

U.S. Court Rulings: A Look at Recent Cases Impacting Corporations

Partners Rich Dodge and Fred Reinke of Mayer Brown discussed recent court rulings that may impact the way corporations conduct themselves in the U.S. The presenters first discussed Daimler AG v. Bauman, -- U.S. --, 134 S.Ct. 746 (2014), in which the U.S. Supreme Court reversed the Ninth Circuit Court of Appeals' holding that the alleged malfeasance of an Argentine subsidiary of Daimler AG (a German corporation) could subject Daimler AG to general jurisdiction in California. This led into a discussion of Walden v. Fiore, -- U.S. --, 134 S.Ct. 1115 (2014), in which the U.S. Supreme Court again reversed the Ninth Circuit Court of Appeals' holding that personal jurisdiction was proper over a U.S. law enforcement agent who had seized funds in the Atlanta airport from travelers on their way to Nevada as the police officer lacked minimal contacts with Nevada for the court to exercise personal jurisdiction over him in that state.

The presenters then discussed Global Reinsurance Corp. v. Equitas Ltd., 18 N.Y.3d 722 (2012), in which the New York Court of Appeals reversed the Appellate Division and dismissed plaintiffs' case because, *inter alia*, New York's anti-trust laws under the Donnelly Act (N.Y. G.B.L. § 340, *et seq*.) could not be invoked by a German reinsurer as having extraterritorial application to London marketplace retrocession agreements. This led to a discussion of United States Fidelity & Guaranty Co. v. American Re-Insurance Co., 20 N.Y.3d 407 (2013), in which the New York Court of Appeals examined the "follow the settlements doctrine" and modified the holding of the Appellate Division -- in line with the lower court's dissenting opinion -- finding an issue of fact as to whether USF&G was unreasonable in (1) allocating the settlement amount by attributing nothing to the "bad faith" claims made against it and (2) in how it valued certain claims for settlement purposes.

The presenters then provided an overview of emerging trends and claims such as the issue of anti-terrorism extra-territorial jurisdiction where acts that actually take place outside of the U.S. can support causes of action in American courts. Specifically, Rothstein v. UBS AG, 708 F.3d 82 (2d Cir. 2013), in which the Second Circuit Court of Appeals affirmed that plaintiffs had Article III standing to bring suit against a Swiss bank (operating in the U.S.) -- that unlawfully furnished currency to Iran -- alleging that this constituted aiding terrorism against Israel. However, the Second Circuit dismissed the plaintiffs' Complaint as they failed to state a claim under the private right of action provision of the Anti-Terrorism Act (18 U.S.C. § 2331, *et seq*.) as (1) they insufficiently alleged a proximate causal relationship between the funds UBS transferred to Iran and the attacks by Hamas and Hezbollah that had injured the plaintiffs, and (2) it is unclear whether that section of the Act even supports a liability theory for aiding and abetting terrorism.

Finally, the presenters concluded with a brief overview of coverage issues related to claims for breaches of cyber-security.

Insurers' Chapter 11 Standing

Presenters Ted Zink and Francisco Vazquez of Chadbourne & Parke, provided an overview of insurers' standing in Chapter 11 bankruptcy proceedings. The presenters began with the "actual case or controversy" requirement of Article III of the U.S. Constitution and flowed into the concomitant "standing" requirement. More specifically, the Constitutional standing requirements are three essential elements: (1) "injury in fact" (concrete, particularized – actual or imminent), (2) causal connection between the injury and the conduct complained of, and (3) that it be "likely" that injury will be redressed by favorable decision. There are also "prudential" limitations on standing which remain within the court's discretion and are principally concerned with whether a litigant (a) asserts the rights or interests of a third-party, (b) presents a claim outside the scope of interest protected by the specific law invoked thereby, or (c) advances questions of wide public significance equating with generalized grievances more appropriately left to the legislature. The presenters then explained that standing in Chapter 11 bankruptcy proceedings is dictated by Section 1109(b), which provides that a "party in interest. . . may raise and may appear and be heard on any issue. . . ." Notably, this does not abrogate the above constitutional standing requirements, but rather coexists with these requirements. Section 1109(b)'s list of who may constitute a "party in interest" does not include an insurer; however, it is non-exhaustive and this lack of inclusion is obviously not determinative of an insurer's status. A bankruptcy court does require, however, that an entity have a "sufficient stake" (*i.e.*, a pecuniary interest that could be adversely affected by the issue before the court) in the outcome of the proceeding to participate therein. Yet, because of concerns related to multiple parties delaying reorganization, not every "party in interest" may be deemed to have standing to be heard on every issue before the court. Moreover, while a party denied bankruptcy standing may then acquire appellate standing to challenge that determination, appellate standing has a stricter requirement than "injury in fact" as it requires both direct effect and financial injury. The same holds true for an insurer trying to participate in its insured's proceedings.

Regarding an insurer's standing, it is important to understand that potential liability on a policy does not serve to automatically trigger "party in interest" standing and the relevant court will consider prudential limitations in determining insurer standing and thus whether it may be heard either inside or outside the context of the reorganization plan. The presenters then walked the attendees through bankruptcy court opinions that have assessed the issue of insurer standing as to all types of issues raised in Chapter 11 bankruptcy proceedings. Notably, courts will not grant an insurer standing to object to a reorganization plan confirmation if it is "insurance neutral." See, e.g., In re Combustion Engineering, Inc. Conversely, insurers will have standing to object to reorganization plans that directly affect them. See, e.g., In re Quigley Co. Inc. or In re Thorpe Insulation Co. Finally, the presenters walked the attendees through In re Fuller-Austin, in which the language of the reorganization plan was amended in order to specifically indicate that the rights of the insurers would not be affected by the confirmation of the plan, thereby eliminating the insurer's standing to participate in the proceeding.