
When Did 'AIG' Become A 4-Letter Word?

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Remember the days when AIG was a company and a name with which the insurance companies within the AIG umbrella wanted to be affiliated? It seems that those days are long past. In fact, AIG insurance companies have asked courts to rule in limine that policyholders cannot even mention AIG at trial. Any such efforts should be rejected outright.

In many cases involving AIG member insurance companies, such as Lexington Insurance Company, National Union Insurance Company, and others, AIG likely was involved with the policy and the claim from start through finish. Public filings demonstrate that AIG assists in underwriting countless insurance policies for its member companies and shares the premium and risk. AIG entities also handle and adjust many claims for the AIG member insurance companies. Therefore, requests from AIG member insurance companies to prohibit the name AIG from being mentioned at trial should be rejected.

AIG Often is Involved with Underwriting Its Insurance Companies' Policies, Shares Premiums, and Will Share the Risks with Its Insurance Companies

With many insurance policies sold by AIG member insurance companies, AIG is intertwined. In fact, AIG's public filings reveal that AIG often is involved with underwriting the insurance policies with its member companies' names on them and AIG shares the premium and risk with its member insurance companies.

AIG provides Lexington Insurance Company, Landmark Insurance Company and Starr Excess Liability Insurance Company, for example, with "Underwriting" "Services."[1]

Lexington, for example, also shares the premium it receives for the policies it sells with AIG. In 1998, Lexington agreed that for all policies going forward, AIG had the rights to premium receivables under Lexington insurance policies. As of 1998, Lexington collects premiums and then must "sell and assign to AIG Funding all rights, title, absolute ownership, and interest" in Lexington insurance policies.[2]

Lexington shares the risk of its insureds with AIG and other companies within the AIG holding company. "The Company [Lexington], as well as certain other insurance company subsidiaries of the Ultimate Parent [AIG], is a party to an intercompany reinsurance pooling[3] agreement." [4]

National Union, along with "ten affiliates" in the AIG family of insurance companies, also "participates in an [AIG] inter-company pooling agreement" that "provides for the pooling of premiums [and] losses and expenses." [5] In addition, National Union "is a member of an AIG internal facility ... [that] allows AIG to retain business by ceding selected treaties to [AIG] affiliated companies." [6]

Several "member companies of AIG, including AIG Europe, AIRCO, AISLIC, AIU, AIUO, ALICO, American Home, Commerce & Industry, Commerce & Industry of Canada, HSBIC, Illinois National, ISOP, Landmark, Lexington, New Hampshire Insurance, NUFIC, NUFLA, PhilamLife and Starr Excess," [7] participate in that same "AIG internal facility" [8] so that "AIG [may] retain business." [9]

With that internecine sharing of risks and premiums on the underwriting and policy issuance side of the insurance business, can AIG member companies argue seriously that they have no relation to AIG?

AIG Often is Involved with Adjusting and Handling Claims

AIG often, if not always, handles and adjusts the commercial claims of its member insurance companies. For example, “AIG Risk Management,” for which it has been said that there is “no meaningful distinction ... [with] AIG Vendor Services,” is “the authorized representative of National Union for claims administration and analysis.”[10]

AIG also provides Lexington, Commerce and Industry Insurance Company (“Commerce and Industry”), and potentially other member insurance companies with “data center systems ... and claims management” services, among others.[11] AIG provides those services to Lexington, for example, through AIG Technology Inc., AIG Global Investment Corporation, and AIG Domestic Claims Inc.[12]

Moreover, since 1998, “Lexington Insurance Company and Landmark Insurance Company [have been party to] a Service and Expense Agreement with AIG. AIG has agreed to provide, at cost, services and facilities as required. Services include Law, ... Actuarial, Claims, [and] Underwriting ...”[13]

Because the AIG member insurance companies’ brands are interchangeable with AIG, AIG’s practices regarding honoring contracts and “legal obligations,” even those that AIG finds to be “distasteful,” are relevant.[14]

Any Supposed Potential Prejudice to AIG Insurers Would Not Substantially Outweigh the Probative Value of the Evidence

Any protests from an AIG member company that there should be no mention of AIG, or the insurer’s affiliation with AIG at a trial, should fail. To succeed in excluding relevant evidence from trial, a party must demonstrate that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under the federal rules and many state courts’ rules of evidence; evidence that is merely prejudicial to a party is not barred by Rule 403. See, e.g., Del. R. Evid. 403; *Cofrancesco v. Shop-Rite Supermarkets Inc.*, No. 98c-09-056-JRS 2001 WL 541482, at *5 (Del. Super. Ct. Apr. 19, 2001).

“[T]he prejudicial effect of admitting the evidence must rise to the level of creating an unfair advantage for one of the parties for the evidence to be excluded under Rule 403.” *Winters v. Marina Dist. Dev. Co.*, 317 F. App’x 286, 289 (3d Cir. 2009) (citations omitted) (citing Fed. R. Evid. 403); see also Del. R. Evid. 403 cmt. (“This rule tracks F.R.E. 403.”).

Arguments that a jury would impute the alleged acts and conduct of AIG onto the AIG member insurance company also should fail. The thought that a jury would be so prejudiced by the mere name “AIG” that they would be unable to render a verdict based on the evidence presented at a trial is meritless.

The risk of any such potential prejudice would be entirely speculative. A party's objections that there will be "undue prejudice" that "relate to a similar theme: jury speculation" are not sufficient to strike evidence under Rule 403. *Winters*, 317 F. App'x at 289-90 (admission of plaintiff's history of seizures was appropriate, even if the jury might speculate as to the relevance of the evidence to the accident in question).

Though the prejudice to an AIG insurance company would be speculative, at best, the relevance of AIG's involvement in the underwriting and treatment of a policyholder's claim is not. That is demonstrated above by AIG's clear involvement with insurance policies and claims from underwriting through claims handling.

Moreover, the relevance of AIG's treatment of contracts and its practices in paying its obligations is not substantially outweighed by speculative prejudice to an AIG insurance company. The evidence of such practices may be relevant to rebut any evidence or opinion testimony about a policyholder's risk management practices or any testimony about supposed doctrines of "moral hazard" and responsibilities of sophisticated companies. Undefined speculation about prejudice does not substantially outweigh the relevance of this information.

The intertwined nature of AIG and the AIG member insurance companies has been recognized by at least one court in the context of a dispute relating to insurance coverage. That court "[o]ok judicial notice that, on September 15, 2008, the Governor of the State of New York gave AIG permission to use \$20 billion of assets from its subsidiaries, to avert what then looked like the prospect of bankruptcy [and that o]n September 16, the Federal Reserve Bank agreed to an \$85 billion bailout of AIG." *Lenox Hill Hosp. v. Am. Int'l Group Inc.*, 21 Misc. 3d 1123(A) (table), 2008 WL 4745664, at *2 n.4 (N.Y. Sup. Ct. Oct. 20, 2008).

That action arose in the context of a dispute in which the insured tried to "enjoin[] Lexington and AIG from seeking any increased premium from Lenox under its 2004 insurance policy," as the policy's premiums "consisted of the amounts paid out by AIG [to cover claims], plus a 5% fee, and any extra costs incurred by AIG." *Id.* at *1. A court presiding over a coverage dispute involving an AIG insurance company should take the same judicial notice.

AIG and Its Member Insurance Companies Have Ignored Corporate Titles when Convenient, and Courts Have Done the Same

AIG member insurance companies should not be able to bar mention of AIG, now that they see it as politically expedient, after having gained advantage from touting the AIG name previously. In the past, the AIG member insurance companies have gained business advantage by relying on and marketing their relationship with AIG.

For example, the rating that A.M. Best assigns to Lexington is conditioned on its relation to AIG and other related insurance companies. "A.M. Best's flagship product [Best's Insurance Reports — Property/Casualty] provides in-depth reports on thousands of insurers, reinsurers and groups," including "Best's Credit Rating" and "the factors considered in assigning the rating." [15]

The 2004 Best's Insurance Reports — Property/Casualty assigned Lexington “a Best's Rating of A++ (Superior),” based on Lexington's participation in the “Lexington Insurance Pool.”[16] The Lexington Insurance Pool received the same rating, “based on the operating performance of American International Group's Lexington Insurance Pool ... led by Lexington Insurance Company.”[17]

Lexington and the Pool's “positive factors are supported by ... the competitive advantages derived from its affiliation with American International Group Inc. (AIG) — one of the nation's largest property/casualty insurance organizations.”[18]

In addition to doing so to gain business advantage, AIG member insurers have referred to themselves as AIG in other litigations, when convenient. For example, in *Lenox Hill Hospital*, the court noted that “Lexington [is] a subsidiary of AIG ... [and t]he parties at oral argument refer to Lexington and AIG interchangeably, so I will do the same.” 2008 WL 4745664, at *1 & n.1.

One court went a step further, and held, “[b]ased upon undisputed facts of th[e] case, ... [the] plaintiffs ha[d] established sufficient facts of AIG's ‘control’ over Lexington ... to defeat th[e] motion for summary judgment on th[e] issue.” *Becks v. Emery-Richardson Inc.*, Nos. 86-6866-CIVGONZALEZ, 1990 WL 303548, at *23 (S.D. Fla. Dec. 21, 1990) (adopting section of magistrate's report finding that plaintiffs made a prima facie case that AIG was a “controlling person” over Lexington). The court adopted the magistrate's report that AIG had “control” over Lexington. See *id.* at *4.

A Delaware Insurance Department report on Lexington has explained that AIG has confused its various corporate insurance names. For example, Lexington “verified with its underwriting unit that the 23 policies identified should not have been issued on Lexington Insurance Company paper,” but rather, should have been issued by another AIG entity.[19] Similarly, Lexington's 2008 Annual Statement admits that “AIG's domestic P&C subsidiaries have not always achieved symmetry between the parties named on a reinsurance contract and the Schedule F accounting treatment.”[20]

Conclusion

Policyholders that are litigating the scope of insurance coverage with AIG member insurance companies should be aware that AIG will, when the action goes to trial, ask the court to bar any reference to AIG. Such requests should be denied. AIG and its member insurance companies cannot have it both ways.

After AIG was involved with all aspects of the facts in dispute — from underwriting through claims adjustment — the AIG member insurance companies should not be heard to state that AIG is irrelevant to the action. Moreover, the AIG member insurance companies cannot claim that they would be prejudiced by the mere mention of AIG, when the AIG member insurance companies have trumpeted the affiliation elsewhere. Any attempt to bar the mention of AIG from a trial with an AIG insurance company should be rejected.

[1] Keith E. Misenheimer, Del. Ins. Dep't, Report on Examination of the Lexington Insurance Company as of Dec. 31, 2005, at 23 (accepted by Del. Ins. Comm'r on July 29, 2007) ("Lexington 2005 Report") (available at www.delawareinsurance.gov/departments/berg/ExamReports/Lexington2005FinalWEB.pdf).

[2] Lexington 2005 Report at 27.

[3] Members of a pooling agreement spread the risks that they underwrote directly. See, e.g., *Cont'l Cas. Co. v. Am. Nat'l Ins. Co.*, 417 F.3d 727, 729 n.1 (7th Cir. 2005) ("[R]einsurance is insurance for insurance companies" and typically, "a participant in the [reinsurance] pool (the 'reinsured') transfers ('cedes') its risk," "allow[ing] the reinsured to spread its risk of loss." (quoting 1A Lee R. Russ et al., *Couch on Insurance* § 9.1 and citing § 9.2 (3d ed. 995))).

[4] Lexington Insurance Company, Annual Statement for the Year Ended December 31, 2008 of the Condition and Affairs of the Lexington Insurance Company, at 14.17, 14.18 (Feb. 18, 2009) (available through the National Association of Insurance Commissioners' Web site, eapps.naic.org/insData/).

[5] David G. DelBiondo et al., Report of Examination of National Union Fire Insurance Co. of Pittsburgh, Pa. as of Dec. 31, 2005 (May 31, 2007), at 16 ("National Union 2005 Report") (available at www.portal.state.pa.us/portal/server.pt?open=18&objID=498338&mode=2).

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Rite Aid of S.C. Inc.*, 210 F.3d 246, 248 & n.3 (4th Cir. 2000).

[11] Lexington Insurance Company, Annual Statement for the Year Ended Dec. 31, 2008, at 14.7 ("Lexington 2008 Annual Statement") (available through the National Association of Insurance Commissioners' Web site, eapps.naic.org/insData/); Patrick R. White, Report on Examination of Commerce and Industry Insurance Co. as of Dec. 31, 2005, at 16-17 (Dec. 10, 2007) ("Commerce and Industry 2005 Report") (available at www.ins.state.ny.us/exam_rpt/19410f05.pdf).

[12] Lexington 2008 Annual Statement at 14.7.

[13] Lexington 2005 Report at 23.

[14] Testimony By Mr. Edward M. Liddy, Chairman and Chief Executive Officer, American International Group Before the House Financial Services Subcommittee on Capital Markets,

Insurance and Government-Sponsored Enterprises Wednesday, March 18, 2009, at 9 (available at www.house.gov/apps/list/hearing/financialsvcs_dem/fsc_testimony_of_mr_edward_liddy.pdf).

[15] A.M. Best, Products & Services – Best’s Insurance Reports, www.ambest.com/sales/birpc/default.asp (visited Dec. 24, 2009).

[16] 2004 Best’s Insurance Reports — Property/Casualty at 2283.

[17] *Id.* at 2284.

[18] *Id.*

[19] Lexington 2005 Report at 40.

[20] 2008 Lexington Annual Statement, Statutory Basis Financial Statements at S-15, 220.61.

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