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Courts Continue To Assess Insurance Policies' Unique Terms

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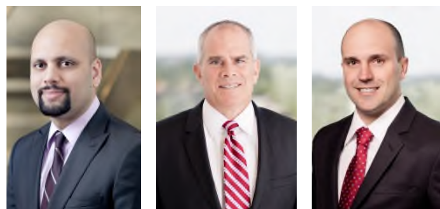

Joining a growing number of courts, a Pennsylvania appellate court recently rejected a reinsurer's "limits" defense. In Century Indemnity Co. v. OneBeacon Insurance Co., OneBeacon argued that its total exposure as Century's reinsurer was capped by the "reinsurance accepted" amount in the reinsurance contracts. The roots of this defense extend back to the Second Circuit's 1990 decision in Bellefonte Reins. Co. v. Aetna Cas. & Sur. Co. After the Bellefonte decision, more and more reinsurers began to contend that the reinsurance accepted amounts in their facultative reinsurance certificates capped their liability for loss and expense, even where the reinsured policy obligated the cedent to pay expense in addition to the reinsured policy limits. For a number of years, courts largely adopted the reinsurers' position. But, more recently, courts have often returned to first contract principles, examining each contract based on its unique terms and rejecting reinsurers' arguments that prior case law examining different language controlled. The Pennsylvania appellate court's decision in Century v. OneBeacon is the latest in that line of rulings.

There, the court thoroughly examined the relevant case law starting with the 1990 decision in Bellefonte and including the Second Circuit's 2014 decision in Utica Mutual Insurance Co. v. Munich Reinsurance America Inc., which distinguished Bellefonte and highlighted that even seemingly slight variances in contract language can lead to different results. In Utica v. Munich, the Second Circuit stated that Bellefonte "turned on a provision in the policies at issue that expressly made all of the reinsurers' obligations 'subject to' the limit of liability." The certificate in the Utica v. Munich case did not contain such a provision and the court concluded that Bellefonte "interpreted different policies than the one at issue in this case."

After reviewing the case law, the Pennsylvania court turned to the certificates before it. The court pointed out that certificates lacked the same "subject to" clause that was outcome determinative in Bellefonte. And, the court highlighted that since the reinsured policies covered expense in addition to limits, the follow-the-form provision in the reinsurance certificates meant that the reinsurance also covered expense in addition to limits. The court also noted that the certificate required the reinsurer to pay loss "and in addition thereto" expenses and that the certificate did not "state that expenses are included in (or 'subject to') the 'Reinsurance Accepted' amount." Given this contract language, the court affirmed the trial court's summary judgment decision finding the certificate ambiguous.

The New York Court of Appeals may be the next court to decide which side it will be on, the application of fundamental contract principles or a unique exception to those principles to apply a presumption to all

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reinsurance contracts irrespective of the actual contract terms. In late 2016, the New York Court of Appeals accepted certified questions from the Second Circuit related to the reinsurance limits defense. The Second Circuit asked whether the New York Court of Appeal's 2004 decision in Excess Insurance Co. v. Factory Mutual Insurance Co., imposed "either a rule of construction, or a strong presumption, that a per occurrence liability cap in a reinsurance contract limits the total reinsurance available under the contract to the amount of the cap regardless of whether the underlying policy is understood to cover expenses such as, for instance, defense costs." In its decision certifying those questions, the Second Circuit cast doubt on Bellefonte, noting that it was "difficult to understand" the result in Bellefonte. The Second Circuit's certified question about whether Excess establishes a presumption is particularly interesting given that the Second Circuit itself has already rejected reinsurers' reading of Excess as providing for such a uniform presumption, explaining correctly in Utica v. Munich that "in the reinsurance context as in any other, a party is bound by the terms to which it has agreed." Indeed, the New York Court of Appeals recently affirmed this fundamental principle in the insurance context. In In re Viking Pump, the high court explained seemingly inconsistent results by referring to minor differences in contract language and the different arguments presented to the court.

The New York Court of Appeals hears argument on the certified question on November 15 and its subsequent decision may further affect reinsurers' attempts to raise a reinsurance limits defense based on an alleged presumption for all reinsurance contracts.

Damages and Prejudgment Interest Defenses

The Pennsylvania court also rejected the reinsurer's arguments about damages and prejudgment interest. OneBeacon argued that Century's evidence did not support the damage award. The court disagreed, noting that one of Century's witnesses had provided an explanation for an apparent discrepancy in the amounts due on a summary trial exhibit and the amounts reflected in the actual billings. This decision is notable given the potential detail required to prove damages in reinsurance cases. The appellate court declined OneBeacon's invitation to wade into the particulars of Century's proof of damages.

On prejudgment interest, the trial court had awarded about $2.4 million on top of about $4.8 million of damages. OneBeacon attempted to reduce that award by contending it had no duty to pay until the cedent complied with OneBeacon's requests for information under an inspection of records clause. That clause required the cedent to "make available for inspection and place at the disposal of the Reinsurer at reasonable times any of its records relating to [the] reinsurance or claims in connection therewith." The court rejected OneBeacon's arguments because a separate part of the contract provided that "payment ... will be made by [the reinsurer] to [the cedent] promptly following receipt of proof of loss." The court concluded that while "the parties are bound by all of the terms in the contract, the policy cannot be interpreted so that the [payment] provision has no effect on the parties until, and only until all of the other enumerated terms have first been satisfied." In so finding, the Pennsylvania appellate court aligned itself with other courts finding that compliance with similar access-to-records clauses is not a prerequisite to enforcement of other provisions in reinsurance agreements, like the prompt payment and arbitration clauses.

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