SQUIRE PATTON BOGGS

Reinsurance Newsletter

December 2017

In This Issue

- Recent Case Summaries
- Recent Speeches and Publications

Recent Case Summaries

Alabama Federal Court Enforces Arbitration Clause in Reinsurance Agreement

Alabama Mun. Ins. Corp. v. Munich Reinsurance Am. Inc., No 2-16-vc-948-WHA-SRW, 2017 U.S. Dist. LEXIS 144748 (M.D. Ala. Sep. 7, 2017).

An Alabama federal court held that the parties must arbitrate a claim for breach of a reinsurance contract. The reinsurance contract contained an arbitration clause stating: "[a]s a condition precedent to any right to action hereunder, any dispute arising out of this Agreement shall be submitted to the decision of a board of arbitration . . . ." The court granted the cedent's motion to compel arbitration and stay the action in favor of arbitration.

The cedent brought this action after its reinsurer did not reimburse the full amount that the cedent claimed for its payments to defend and indemnify the underlying insured. The reinsurer argued that the arbitration clause did not apply, because the loss occurred within a different coverage period and under a different reinsurance agreement that did not contain an arbitration clause. The court rejected this argument, because the cedent brought its action alleging breach of the reinsurance contract. The court noted that the reinsurer's argument went to the merits of whether there was a breach of that contract – as long as the cedent was suing under that agreement, the case was subject to arbitration.

The reinsurer also argued that the cedent waived its right to enforce the arbitration clause, because the cedent brought its lawsuit in federal court and did not raise the arbitration clause until after filing an amended pleading. The court, however, found that there was no waiver, because the cedent first alleged breach of the reinsurance agreement in its amended complaint, so the arbitration clause was not invoked until that time. Further, the court found that the reinsurer was not prejudiced by the delay.

Pennsylvania Intermediate Appeals Court Affirms Order Denying Summary Judgment to Reinsurer and Granting Judgment to Cedents on *Bellefonte* Issue

Century Indemn. Co. v. OneBeacon Ins. Co., 2017 Pa. Super. 328 (Super. Ct. Pa. 2017).

As we wait for the New York Court of Appeals to answer the Second Circuit's certified question in *Global Reinsurance Corp. of Am. v. Century Indemn. Co.*, 843 F.3d 120 (2d Cir. 2016), which was argued on November 15, 2017, a Pennsylvania intermediate appeals court has affirmed a lower court order denying summary judgment to a reinsurer seeking to cap its liabilities based on the limits of a facultative certificate and granting judgment to the ceding companies on their claim for recovery of expenses. In doing so, the court affirmed the lower court's determination that the facultative certificate was ambiguous, allowed and credited the cedent's extrinsic evidence, including expert testimony on custom and practice, and provided a detailed analysis of *Bellefonte* and its progeny, through *Global Reinsurance*.

The court addressed whether a facultative certificate provided coverage for defense expenses in excess of the liability limit of the certificate. Case involved two cedents that issued similar excess blanket catastrophe liability policies to insureds hit with massive asbestos-related claims. Facultative certificates were purchased by the cedents to cover a certain layer of the reinsured policies. The reinsurer paid the reinsurance accepted amounts on the certificates, but refused to pay any defense expenses above the stated limit.

The reinsurer moved for summary judgment, which the motion court denied. The court found the facultative certificates ambiguous and allowed the cedents to present extrinsic evidence. The court also rejected the reinsurer's argument that the cedents were collaterally estopped from asserting their claims based on prior decisions. A three-day, non-jury trial resulted in a finding for the cedents. The reinsurer appealed.

The reinsurer relied on *Bellefonte* and its progeny, but the court noted that this was a case of first impression for the Pennsylvania courts. The court analyzed *Bellefonte* in detail and its history through *Global Reinsurance*. The appellate court, while agreeing that the General Conditions language was almost identical to *Bellefonte*, also agreed with the trial court that the "subject to" clause was materially different. In *Bellefonte*, the "subject to" clause stated that the reinsurance was subject to the terms, conditions and amount of liability set forth in the certificate. In this case, the "subject to" clause stated that the reinsurance was subject to the general conditions set forth on the reverse side of the certificate. It did not expressly provide that all of the coverage was subject to the reinsurance accepted limit. The court found that, because the certificate followed the underlying policy, it would cover expenses above the liability limit. The appellate court agreed with the trial court that the certificate language was ambiguous as to whether defense expenses are limited by the reinsurance accepted amount and that summary judgment was properly denied, and that the reinsurer was not entitled to any relief on its first claim.

The court also addressed and rejected the reinsurer's objection to the use of extrinsic evidence and expert testimony specifically and also that the cedents were collaterally estopped from raising their defenses. The court distinguished the prior cases on a similar basis as it distinguished *Bellefonte*.

The number of cases that have distinguished *Bellefonte* has grown. Next up is whether the New York Court of Appeals will continue this trend and whether the Second Circuit will follow suit.

New York Intermediate Appellate Court Modifies Partial Summary Judgment for Reinsurers

Utica Mut. Ins. Co. v. Alfa Mut. Ins. Co., No 1001 CA 17-00305, 2017 N.Y. App. Div. LEXIS 7064 (N.Y. App. Div. 4th Dep't Oct. 6, 2017).

In a very brief decision, a New York appellate court affirmed the grant of partial summary judgment to reinsurers, but modified the judgment to issue a declaration that the cedent was not entitled to recover from the reinsurers any amounts exceeding the "reinsurance accepted" amount set forth in item 4 of the certificates of facultative reinsurance. The court provided no analysis and no acknowledgement of the pending *Global Reinsurance* matter before the New York Court of Appeals.

New York Federal Court Readies for Trial in Reinsurance Dispute

Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co., No. 6:09-CV-853, 2017 U.S. Dist. LEXIS 189911 (N.D.N.Y. Nov. 16, 2017).

By the time you read this Newsletter, this longstanding reinsurance dispute over asbestos losses will be on trial. But before the trial started, a New York federal court had to address a panoply of *in limine* motions. Suffice it to say some were granted in whole, some in part and some were denied. These are all evidentiary rulings, including other reinsurer information, mixed fact and expert testimony and evidence of other disputes. The opinion gives useful insight into how a court views various types of evidence that cedents and reinsurers try to introduce when arguing policy provisions, follow-the-fortunes, late notice, prejudice and other issues.

One of the evidentiary problems was that the people who negotiated the facultative certificates and the underlying policies were no longer available. Other employees or former employees were proposed to testify about what was or should have been issued. The big issue was whether the underlying policies were issued with aggregate limits. The cedent moved to preclude expert testimony from a former reinsurer employee and the court agreed, holding that the witness was prohibited from testifying that the cedent misrepresented facts when procuring the facultative certificates and whether the primary policies had aggregate limits. The witness could testify to the reinsurer's standard practices and policies at the time.

In another ruling, the court precluded evidence of other disputes between the cedent and other reinsurers as irrelevant and inadmissible. The court also ruled that information known to the cedent was relevant to when a reasonably diligent insurance company in this cedent's position would have thought itself required to provide notice to the reinsurer under the facultative certificates. Thus, expert testimony providing an objective assessment of when there was a reasonable possibility that the reinsurance would be involved in the claim was permitted. The cedent's notice of claim to other reinsurers was also allowed, subject to the reinsurer establishing that the cedent did, in fact, provide blanket notice to all reinsurers other than the reinsurer in dispute (and one other).

Other evidentiary rulings included preclusion of testimony about why the cedent and its coverage counsel parted ways, evidence of post-settlement disputes between the insured and the cedent, and evidence of commutation agreements that had not been produced in discovery. A broker's underwriting files were allowed by the court subject to the reinsurer laying a proper foundation and establishing that the files come within a hearsay exception such as the one for ancient documents.

On the issue of utmost good faith in the allocation of the settlement to the cedent' policies and on late notice, the court ruled that the expert could opine even though the opinion embraces an ultimate issue. But, said the court, a proper foundation had to be laid to qualify the witness as an expert and the expert would not be permitted to testify on legal matters or based on speculation.

Recent Speeches and Publications

- Sue Stead spoke on "Cybersecurity Standards: What to Expect from New Regulatory Requirements," at a National Association of Mutual Insurance Companies (NAMIC) webinar on November 27, 2017.
- Mary Jo Hudson participated on a panel regarding "Our Changing Regulatory Climate" at the Association of Life Insurance Counsel Fall 2017 CLE at Allstate Headquarters in Northbrook, Illinois, on October 24, 2017.
- Mary Jo Hudson participated on a panel of current and former insurance commissioners at the Compliance and Ethics Forum for Life Insurers Annual Meeting in Orlando, discussing "The Future of Insurance Regulation," on October 17, 2017.
- Sue Stead spoke on "Social Media: Regulatory Issues, Compliance and Media Law" at the NAMIC Communications & Marketing Workshop on Oct. 10, 2017 in Chicago.
- John Nonna spoke on "Cyber Liability Insurance: Costs, Coverage and Things You Need to Know," at The Knowledge Group's webinar on September 25, 2017.
- Larry Schiffer's Commentary, "Confidentiality in Reinsurance Disputes," was published on IRMI.com in November 2017.
- Larry Schiffer's profile was published in IRMI.com's new Professional Profiles section, under Insurance Industry/People, in August 2017.

Congratulations to Squire Patton Boggs for its 138 practice area rankings in the 2018 edition of *U.S. News & World Report*'s "Best Law Firms" report, including Tier 1 rankings for Insurance Law, nationally and in New York City and Miami.

Subscribe to our *Insurance & Reinsurance Disputes* blog. Please visit InReDisputesBlog and subscribe on the right side of the page via RSS feed or enter your email address in the box indicated.

Authors

Larry P. Schiffer
Editor, Partner, New York
T +1 646 557 5194
E larry.schiffer@squirepb.com

Tania L. Rice
Associate, San Francisco
T +1 415 743 2565
E tania.rice@squirepb.com