SQUIRE PATTON BOGGS

Reinsurance Newsletter

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Recent Case Summaries

Second Circuit Remands Case Back to District Court to Construe Facultative Certificate Limit of Liability Language

Global Reins. Corp. of Am. v. Century Indem. Co., No. 15-2164, 2018 U.S. App. LEXIS 12121 (2d Cir. May 9, 2018).

The highly anticipated "shoe" has dropped and the Second Circuit has remanded this *Bellefonte* dispute back to the district court to review the certificate language in light of the New York Court of Appeals' December 2017 negative answer to the Second Circuit's certified question. The remand is not a surprise, because once the certified question was answered in the negative, the case had to go back to the district court to consider "in the first instance [] the contract terms at issue" by "employing standard principles of contract interpretation." Read our prior summaries of the New York Court of Appeals decision in the *March 2018 Reinsurance Newsletter* and the earlier Second Circuit decision in our *March 2017 Reinsurance Newsletter* for context.

The circuit court found that the district court's determination that the contract was unambiguous – essentially that the *Bellefonte* rule applied – was premised on an "erroneous interpretation of New York state law." Instead of presuming that the limit in the facultative certificate was an all-inclusive cap on the reinsurer's liabilities, the district court was instructed to "construe each reinsurance policy solely in light of its language and, to the extent helpful, specific context." The implication here is that if the district court cannot resolve the matter based on the plain language of the certificate, evidence of industry custom and practice might be necessary to shed light on how the language should be interpreted.

We now await the district court's determination, which may occur after trial, and which may never occur if the parties settle. That may still leave the *Bellefonte* rule out there for courts to continue to consider – or not.

New York Federal Court Denies and Adheres to Denial of Summary Judgment in Costs in Addition to the Limits Dispute

Utica Mut. Ins. Co. v. Munich Reins. Am., Inc., Nos. 12-cv-00196; 12-cv-00743 (BKS/ATB) (Mar. 20, 2018); 2018 U.S. Dist. LEXIS 86401 (N.D.N.Y. May 23, 2018).

The Northern District of New York has been a hotbed of reinsurance litigation, especially *Bellefonte* issues. In this latest case, with underlying asbestos settlements, disputes arose concerning whether the reinsurer was required to pay defense expenses in addition to the loss limits in the relevant facultative certificates.

In an unreported and lengthy decision, the motion court denied all motions for summary judgment (except for one issue), finding, among other things, that the expense provisions in the facultative certificates were ambiguous and that extrinsic evidence was not submitted by the parties. In its subsequent decision on a motion for reconsideration, the court adhered to its denial determination.

The underlying settlement involved issues of whether primary limits were exhausted and whether the settlement was properly allocated to the umbrella policies reinsured. The settlement capped the primary policies and the parties agreed that payment of expenses would erode the umbrella policies until exhausted.

The reinsurer paid the full limits of the certificates, but balked at expenses in excess of the certificate's limits. The reinsurer's position was that even if the certificates allowed for expenses in addition to the limits, those payments are not required unless the reinsured umbrella policies provided for expenses in addition to the limits.

In denying summary judgment, the court found material issues of fact concerning certain endorsements, denied collateral estoppel effect to a prior arbitration award with a different reinsurer, found material issues of fact as to whether declaratory judgment expenses are covered and found ambiguity as to whether defense expenses are covered. The court specifically ruled that to interpret the facultative certificates on the question of defense expense coverage extrinsic evidence will have to be considered by the court. Given that none was presented, the court declined to consider the issue further.

The court also declined to imply a follow-the-fortunes clause into the certificates.

On the motion for reconsideration, the court rejected the notion that extrinsic evidence on the ambiguity found in the facultative certificates was presented. The motion was denied because the cedent failed to show that reconsideration was required.

New York Federal Court Denies Renewed Motion for Judgment or New Trial

Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co., No. 09-CV-853, 2018 U.S. Dist. LEXIS 32271 (N.D.N.Y. Feb. 28, 2018).

A New York federal court denied a reinsurer's motion for judgment as a matter of law or, in the alternative, for a new trial following a significant jury award after trial in favor of the cedent. The underlying context is a familiar one: a cedent settled asbestos claims and ceded those claims under facultative certificates to the reinsurer.

The dispute was over allocation of the settlement, exhaustion of the underlying primary policies, whether the certificates covered the losses, whether notice was late and whether the follow-the-settlements doctrine applied or could be rebutted because of the manner in which the case settled. Myriad evidentiary points were raised on the motions.

In denying the motions and upholding the jury verdict, the court held that the follow-the-settlements clause applied unless the reinsurer could show that the cedent' settlement decisions were objectively unreasonable. The court stated that the cedent was not required to prove by a preponderance of the evidence that the underlying primary policies contained aggregate limits for bodily injury.

Follow-the-settlements applied, held the court, because the jury implicitly found that the cedent's settlement determinations were objectively reasonable when answering the question of whether the cedent did what it was obligated to do under the certificates. Moreover, the court found that the reinsurer did not prove that the cedent's settlement decisions were objectively unreasonable.

In reviewing the trial evidence, the court held that "it cannot be said that a reasonable jury did not have a legally sufficient evidentiary basis on which to render a verdict." On the issue of whether the primary policies had aggregate limits, the court noted that neither party presented a witness with personal knowledge and that, based on the evidence presented, a reasonable jury could have concluded that the cedent had a sufficient basis to conclude that the primary policies had aggregate limits.

While the court found that the reinsurer put on ample evidence refuting the cedent's contention that it acted reasonably, the court held that the evidence was not such that there could have been only a verdict in the reinsurer's favor. The court also addressed the issue of reinsurance considerations during settlement discussions and recognized that there is case law supporting the proposition that the cedent is permitted to choose the allocation most favorable to it when faced with multiple reasonable allocations. Nevertheless, as the court pointed out, the cedent's claims witness stated that she was unaware of the reinsurer's certificates and would not have done anything differently if there were no reinsurance coverage.

In denying the motion on the late notice defense, the court stated that the reinsurer had the burden to prove both late notice and either material breach or demonstrable prejudice. According to the court, the type of prejudice necessary to prove was actual prejudice, not speculative or hypothetical prejudice. The reinsurer argued that the late notice caused specific, tangible economic injury in the form of lost commutations.

The court held that a reasonable jury could have concluded that the reinsurer failed to carry its burden to prove tangible economic injury because it presented no witness actually involved in the commutations and that the evidence showed that, after notice of the settlements, the reinsurer failed to take it into account in two subsequent commutations.

The court denied the alternative motion for a new trial for essentially the same reasons. No doubt, the Second Circuit will weigh in on these issues on appeal.

Massachusetts Appeals Court Holds Reinsurer Obligated When Self-Insurer's Surety Bond Exhausts

Janocha's Case, No. 16-P-1181, 2018 Mass. App. LEXIS 50 (May 2, 2018).

A Massachusetts appeals court has held that a reinsurer, rather than the state trust fund, was obligated to continue to pay workers' compensation benefits after the self-insurer's surety bond exhausted.

The injured worker's employer was an approved self-insurer under Massachusetts law and had a surety bond to protect its self-insured position. The employer also had a reinsurance contract, also permitted under Massachusetts law, which had a US$400,000 self-insured retention per accident.

The employer issued direct payments to the injured worker and, after the employer became insolvent, payments were made by the surety. At the time the surety bond became exhausted, payments had not yet reached the US$400,000 self-insured retention.

The employee filed a claim with the Massachusetts Department of Industrial Accidents to compel the reinsurer to resume benefit payments. An administrative judge found that the Workers' Compensation Trust Fund, and not the reinsurer, was responsible for the benefits until the retention was reached. On appeal to the reviewing board, the board reversed and ordered the reinsurer to make the direct payments and to reimburse the trust fund for any payments it made.

On appeal, the court held that the review board's interpretation of the statute was correct. The court focused on the statute's consideration of the date of injury to determine whether there is a right of reimbursement from the trust fund. The trust fund, held the court, responds if, on the date of injury, the employer was uninsured. Because the employer qualified as a self-insurer on the date of injury, the trust fund had no obligations to pay the benefits to the employee.

The reinsurer, however, was found by the court to be on the hook. To qualify as a self-insurer, the employer is required to purchase reinsurance. The court found that the statute was created to protect injured employees and, therefore, the reinsurer was required to pay benefits when the self-insurer becomes insolvent and the bond becomes exhausted. The court also rejected the argument that the self-insured retention had to be reached before the reinsurer was obligated to pay. The reinsurance contract issued to a self-insurer was, by statute, a further guarantee of the payment of benefits to the injured employee and the retention provision was null and void under these circumstances.

California Appeals Court Affirms Summary Judgment for Non-Policy Issuing Affiliates

Hollander v. XL Capital Ltd., No. B276621, 2018 Cal. App. Unpub. LEXIS 2978 (Cal. App. 2d App. Dist. May 1, 2018).

This appeal involved a coverage dispute over certain artwork. The policyholder sued the policy issuing company and multiple related and affiliated entities, including the ultimate parent company, on various alter ego theories.

The motion court granted summary judgment to the carriers finding that there were no triable issues of material fact for the alter ego, single enterprise or agency theories of lability. The appellate court affirmed the judgment.

Three of the bases for the claims against the non-policy issuing entities were the intercompany pooling and quota share reinsurance agreements and general services contracts. No assertions were made that any of these agreements were improper or illegal.

In affirming summary judgment, the court held that the policyholder had failed to meet their evidentiary burden on all counts, including by not showing that the policy issuing company's assets were insufficient to pay an eventual judgment. The expert testimony provided, found the court, was based on unsupported and unexplained conjecture about the company's insolvency if certain reinsurance agreements were ignored. The court also rejected arguments concerning the sharing of one employee and the ability of that employee to make decisions for all the companies. Finally, the court found the policyholder's reliance on the reinsurance agreements misplaced given that none of the non-policy issuing companies were members of the pools that were subject to the pooling agreements or to the quota share agreements.

Missouri Federal Court Remands Case Based on Reverse Preemption

Foresight Energy, LLC.v. Certain London Market Ins. Cos., No. 17-CV-2266 CAS, 2018 U.S. Dist. LEXIS 69423 (E.D. Mo. Apr. 25, 2018).

In a non-reinsurance case, a Missouri federal court remanded a coverage dispute back to state court after finding that the Missouri arbitration statute, Mo. Rev. Stat. § 435.350 (2010), reverse preempted Section 205 of the Federal Arbitration Act (FAA) by operation of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015.

Whether McCarran-Ferguson requires the reverse preemption of the FAA is a question that has arisen in several federal circuit courts when faced with state arbitration statutes that preclude arbitration of insurance disputes between policyholders and their insurers. In this case, certain carriers removed the state case to federal court claiming federal jurisdiction under chapter 2 of the FAA, which implements the Convention of the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 21 U.S.T. 2517.

The relevant policies required disputes to be arbitrated in London and certain insurers obtained an anti-suit injunction from the London Commercial Court. The policyholder dismissed those carriers from the case, but continued litigation against the remaining carriers. The court placed the burden on the remaining carriers to establish that the federal court had subject matter jurisdiction.

In finding that it did not have subject matter jurisdiction, the court analyzed the cases on McCarran-Ferguson and state statutes, like Missouri's, that preclude insurance arbitration. The court adopted the analysis of the Second and Eighth Circuits in *Stephens v. American International Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) and *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619 (8th Cir. 1997) and rejected the reasoning of the Fourth Circuit, in *EAB Group, Inc. v. Zurich Ins. PLC.*, 685 F.3d 376 (4th Cir. 2012), which limited McCarran-Ferguson to domestic legislation.

The gist of the argument comes down to whether the New York Convention is self-executing and whether its implementing legislation in chapter 2 of the FAA is an act of Congress that interferes with state law regulating the business of insurance. The court found that the plain language of McCarran-Ferguson, stating that no act of Congress can supersede state law regulating the business of insurance, was applicable to Missouri's anti-arbitration provision when faced with chapter 2 of the FAA, an act of Congress. Accordingly, the FAA was reverse preempted and the case was remanded back to state court.

California Appeals Court Affirms Denial of Motion to Compel Arbitration

Neilsen Contracting, Inc. v. Applied Underwriters, Inc., No. D072393, 2018 Cal. App. LEXIS 395 (Cal. App. 4th Dist. May 3, 2018).

Reinsurance Participation Agreements (RPA), which include arbitration clauses, have been attacked by policyholders in disputes over workers' compensation programs. In this case, the insurer and related defendants sought to compel arbitration and the policyholder countered that the arbitration provision was invalid.

The arbitration provision delegated the authority to the arbitrator to rule on disputes concerning the enforceability of the arbitration provision. The trial court held that the delegation and arbitration provisions in the RPA were not enforceable because they were collateral agreements modifying the obligations of the underlying policy and should have been filed with the regulator for approval. Because they were not filed and approved, they were unenforceable.

On appeal, the court found that the policyholder's challenge to the delegation clause was sufficient to require the court to rule on the question of enforceability. The court noted that the policyholder raised contract challenges to the delegation clause because of it being a material change to the underlying insurance policy. The court went on to affirm the motion court's holding that the arbitration clause could not be enforced because it was not filed with the regulator.

Recent Speeches and Publications

- Deirdre Johnson co-chaired the ARIAS•U.S. Spring Conference, on May 9-11, 2018, in Palm Beach, Florida and also moderated a debate on "What Role Should or Do Court Decisions Play in Reinsurance Arbitration?" At the same conference, Suman Chakraborty moderated the panel "What Keeps Your Underwriters and Claims Handlers Up at Night," and Rachel Raphael presented a case in the "Rapid-Fire Case Presentations Redux" panel.
- Larry Schiffer moderated a reinsurance panel at the Surplus Lines and Reinsurance Forum on May 16, 2018, in New York.
- Larry Schiffer, Eridania Perez, Kelly Mihocik, India Scarver and Seth Osnowitz's article, "A Brief Review of Reinsurance Trends in 2017," was published in Westlaw Journal Insurance Coverage on March 23, 2018.
- Larry Schiffer's article, "When Interpreting Insurance and Reinsurance Contracts Under New York Law, Don't Presume Anything," was published as Insurance and Reinsurance Thought Leadership in Expert Guides Best of the Best USA in March 2018.
- Larry Schiffer's commentary, "Has Bellefonte Met Its Match?" was published on IRMI.com in March 2018.
- Congratulations to Larry Schiffer, who was named one of nine Thought Leaders in Who's Who Legal – Insurance and Reinsurance 2018, based on the highest number of nominations received from peers, corporate counsel and other market sources.
- Congratulations to Suman Chakraborty, Deirdre Johnson, Paul Kalish, former partner John Nonna, Larry Schiffer and Mark Sheridan for being ranked in Chambers USA 2018.

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Author

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