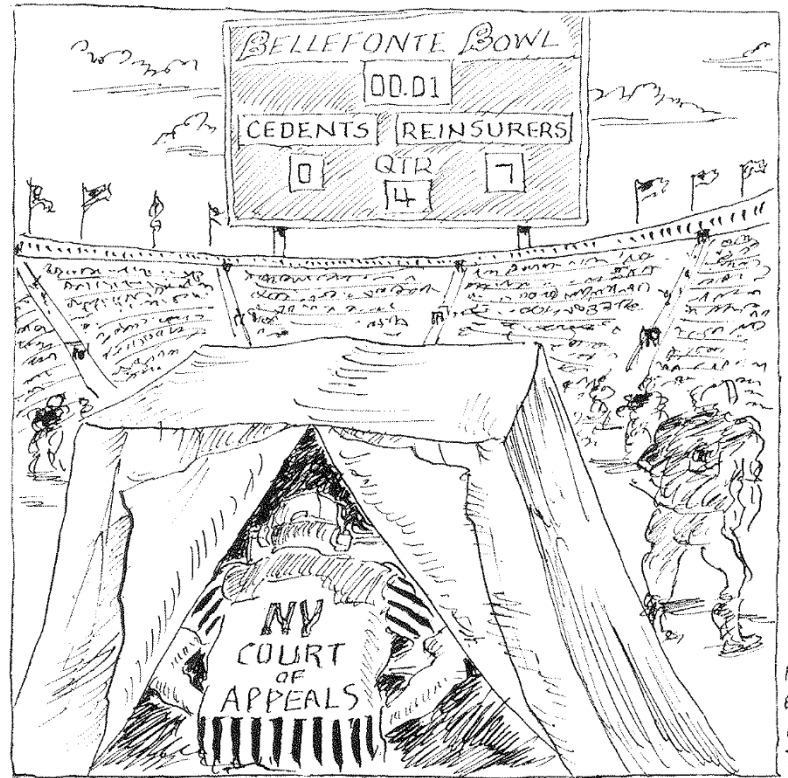


Looking Back and Fast Forward— Is Bellefonte Dead or Destined to Rule



"THE PLAY IS UNDER REVIEW."

Introductions

Patricia Fox, AIG

Sean Keely, Hogan Lovells

Amy Kline, Saul Ewing

Charlie Scibetta, Chaffetz Lindsey

POLL NO. 1

Have you read the *Bellefonte* decision?

A. Yes.

B. No.

POLL NO. 2

Have you handled a case/claim with the *Bellefonte* issue?

- A. No.
- B. Yes. But I have not arbitrated or litigated the issue.
- C. Yes. I have arbitrated, but not litigated, the issue.
- D. Yes. I have litigated, but not arbitrated, the issue.
- E. Yes. I have both arbitrated and litigated the issue.

POLL NO. 3

Have you had the *Bellefonte* issue decided in arbitration?

- A. No.
- B. Yes. *Bellefonte* rule applied.
- C. Yes. *Bellefonte* rule not applied.

Bellefonte: The Underlying Coverage and Dispute

- Excess Liability Coverage
- Dalkon Shield Coverage Litigation:
Costs erosive of or in addition to limits?
- Cedent settled for amount excess of underlying policy limit.

Bellefonte: The Facultative Certificate

- Reinsurance is “***subject to*** the terms, conditions and amount of liability set forth herein, as follows ...”
- Limits: “\$500,000 part of \$5,000,000 excess of \$10,000,000 excess of underlying limits”
- Reinsurer “shall ... pay its proportion of such settlements, and ***in addition thereto, in the ratio that the Reinsurer’s loss payment bears to the Company’s gross loss payment, its proportion of expenses***”

Bellefonte: The Decision

- Follow the fortunes does not alter limits of reinsurance.
- “[I]n addition thereto” does not mean in addition to limits.
- The reinsurance coverage is “subject to” the limits.
- Pure textual analysis – no reference to extrinsic evidence.

The Unigard Issue

Same as *Bellefonte*, but with some wrinkles ...

- Cedent argued “following form” provision, rather than “follow the fortunes” provision, and ...
- Cedent offered extrinsic evidence:
 - Course of Performance:* Pre-*Bellefonte*, Unigard consistently “interpreted its standard form facultative certificate to require payment of expenses in addition to the indemnity limit whenever the policy reinsured did so.”
 - Custom and Practice:* Unigard’s pre-*Bellefonte* interpretation was “consistent with the customs and practice of the industry.”

The Unigard Decision

Same as *Bellefonte*, regardless of the wrinkles ...

- “Following form” provision does not alter limits: Reinsurance only followed form “except as otherwise provided by this Certificate ...”
- Extrinsic evidence irrelevant: “*Bellefonte’s* gloss upon the written agreement is conclusive.”

The Unigard Decision

Same as *Bellefonte* ...

“The efficiency of the reinsurance industry would not be enhanced by giving different meanings to identical standard contract provisions depending on idiosyncratic factors in particular lawsuits. The meaning of such provisions is not an issue of fact to be litigated anew each time a dispute goes to court.”

What about different language?

The *Excess* Issues and Holding

- The Certificate lacked the express language that coverage was “subject to” the provisions, including the limits.
- Involved property, not liability, insurance.
- NY Court of Appeals held distinctions made no difference:
 - Found no reason to distinguish between property and liability coverage;
 - Affirmed Appellate Division decision, which held that “all contracts are subject to their terms and conditions;” and
 - Held “[t]he limit clause in the policy was intended to cap the reinsurers’ total risk exposure.”

“In case of dissension, never dare to judge till you've heard the other side.” — Euripedes, The Children of Herakles

Judge Read (dissenting in *Excess*):

- “[N]o way to tell from the plain language ... whether the parties intended for costs and expenses to be included in the reinsurance limit or excluded from it.”
- The majority “disregarded the ‘subject to’ analysis” and “expands *Bellefonte* from a contract-specific holding into a rule of general applicability.”
- Practitioners in the industry “have consistently criticized *Bellefonte*” and have noted it “ignored important extrinsic evidence of industry custom and practice.”

Utica Mutual v. Munich Re

Certificate contained separate provisions for indemnity and expense:

- “The Reinsurer agrees to indemnify the Company ***against losses or damages ... subject to the reinsurance limits shown in the Declarations ...***”
- “***The Reinsurer shall be liable for its proportion of allocated loss expenses incurred by the Company*** in the same ratio that the Reinsurer’s share of the settlement or judgment bears to the total amount of each settlement or judgment under the policy reinsured.”

Utica Mutual v. Munich Re

- Second Circuit: *Excess* held only that express limit was “presumptively” a cap; presumption rebuttable by express language or extrinsic evidence.
- Found ambiguity based on express language, and so turned to extrinsic evidence.

Utica Mutual v. R&Q

“All claims involving this reinsurance, when settled by the Company shall be binding on the Reinsurer, which shall be bound to pay its proportion of such settlements, ***and in addition thereto, . . . its proportion of expenses However, should the Company’s policy limit include expenses, the Reinsurer’s maximum limit of liability shall be as stated in Item 4, of the Declaration.***”

POLLS NO. 4 - 7

Do Language Variations Matter?

Limits stated as: “\$500,000 part of \$5,000,000 excess of \$10,000,000 excess of underlying limits”

Poll No. 4: “Reinsurer shall be bound to pay proportionate share of indemnity and expense, subject to stated reinsurance limits.”

- A. Reinsurance limits are a cap.
- B. Reinsurance limits not a cap.

POLLS NO. 4 - 7

Do Language Variations Matter?

Limits stated as: “\$500,000 part of \$5,000,000 excess of \$10,000,000 excess of underlying limits”

Poll No. 5: “Reinsurer shall be bound to pay proportionate share of indemnity and expense.”

- A. Reinsurance limits are a cap.
- B. Reinsurance limits not a cap.

POLLS NO. 4 - 7

Do Language Variations Matter?

Limits stated as: “\$500,000 part of \$5,000,000 excess of \$10,000,000 excess of underlying limits.”

Poll No. 6: “(A) Reinsurer shall pay proportionate share of loss or damages the Company is legally bound to pay, subject to stated reinsurance limits. (B) Reinsurer shall be liable for its proportion of allocated loss expenses in the same ratio as for indemnity.”

- A. Reinsurance limits are a cap.
- B. Reinsurance limits not a cap.

POLLS NO. 4 - 7

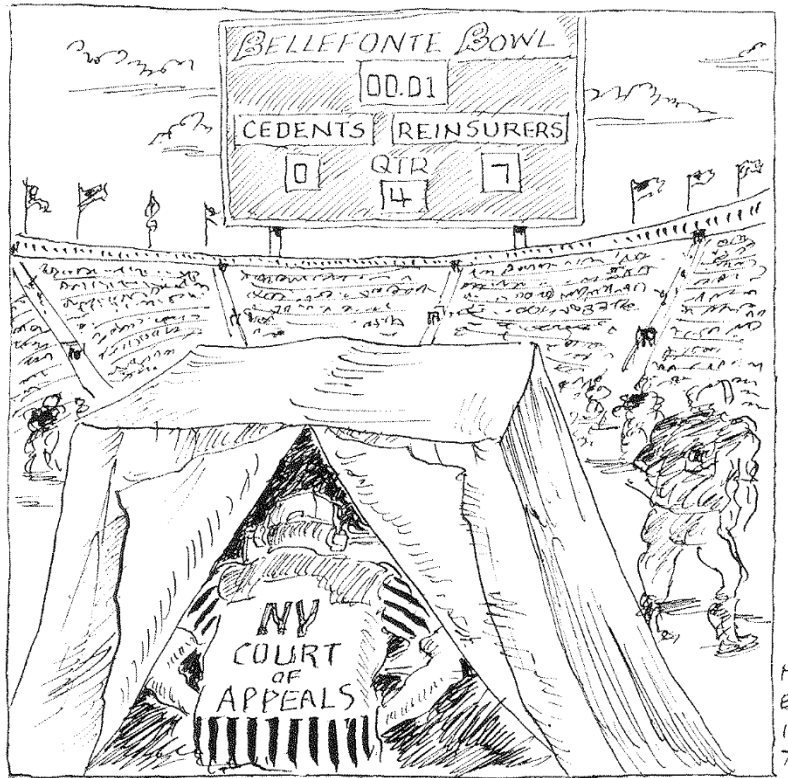
Do Language Variations Matter?

Limits stated as: “\$500,000 part of \$5,000,000 excess of \$10,000,000 excess of underlying limits.”

Poll No. 7: “Reinsurer shall pay its proportion of settlements, and in addition thereto, its proportion of expenses. However, should the Company’s policy limit include expenses, the Reinsurer’s maximum limit of liability shall be as stated in Item 4, of the Declaration.”

- A. Reinsurance limits are a cap.
- B. Reinsurance limits not a cap.

Global v. Century

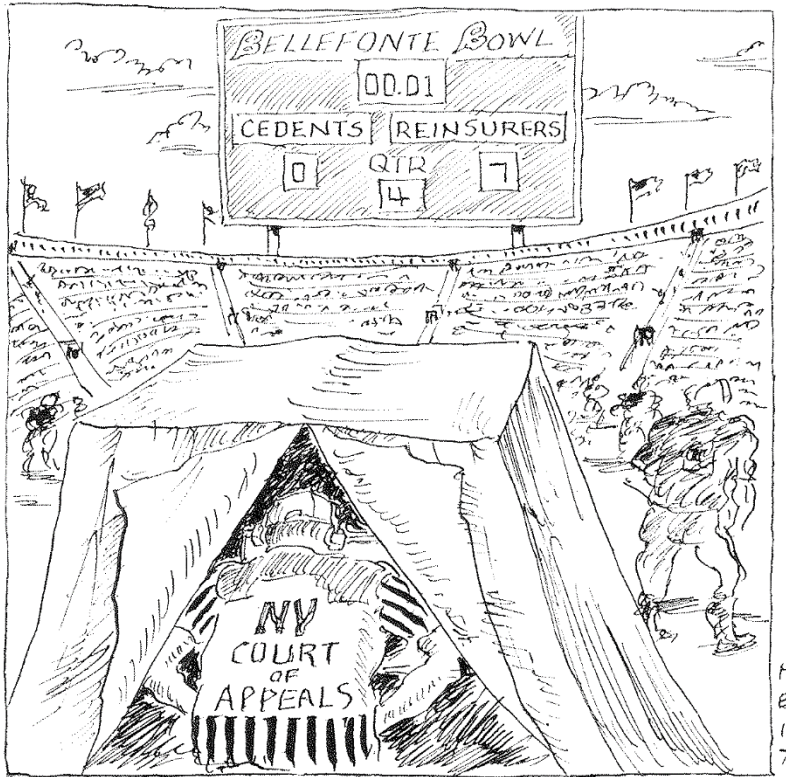


"THE PLAY IS UNDER REVIEW."

The Second Circuit questions its own decisions in *Bellefonte* and *Unigard*

"In particular, we find it difficult to understand the *Bellefonte* court's conclusion that the reinsurance certificate in that case *unambiguously* capped the reinsurer's liability for both loss and expenses."

Global v. Century



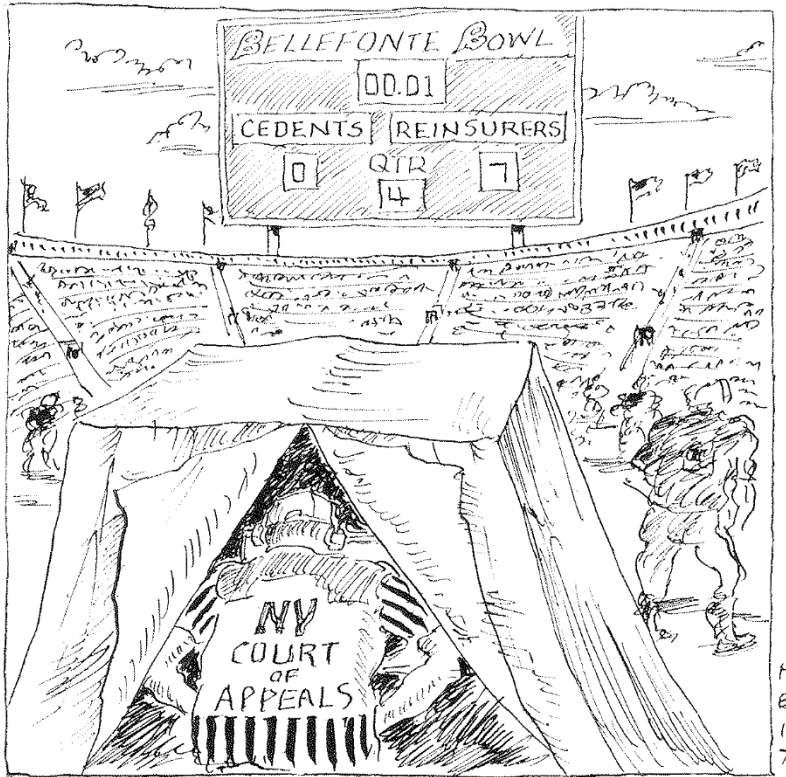
"THE PLAY IS UNDER REVIEW."

The Competing Considerations:

Cedents: Risk should follow premium. Plus, "massive exposures to insurance companies throughout the industry would be unexpectedly unreinsured"

Reinsurers: Reliance on *Bellefonte* and *Unigard* in estimating their exposure and in setting appropriate loss reserves.

Global v. Century

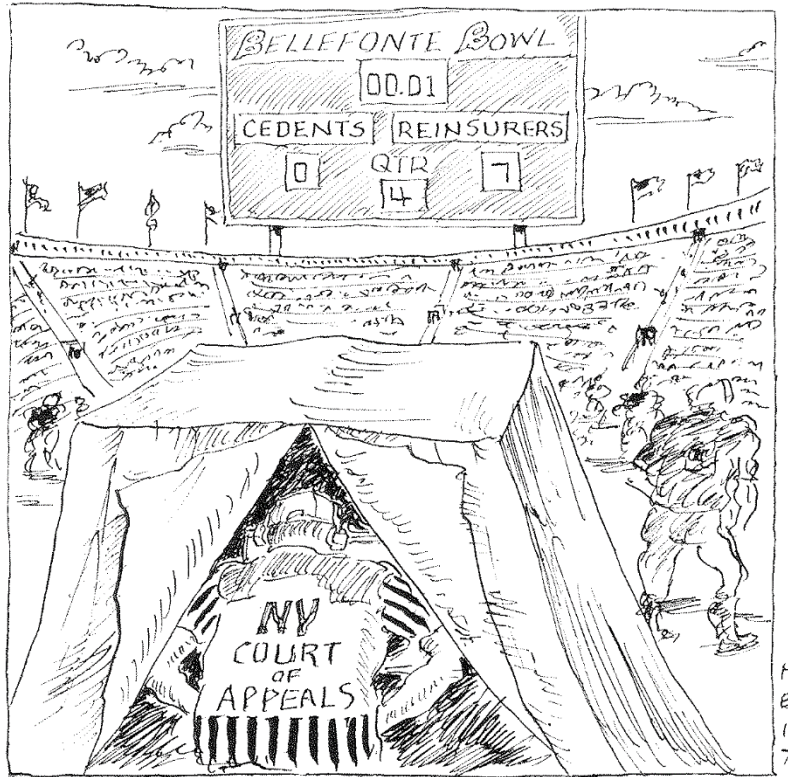


"THE PLAY IS UNDER REVIEW."

"Our intention ... is to seek [the ruling of] the New York Court of Appeals as to whether a consistent rule of construction [or presumption] ***specifically applicable to reinsurance contracts exists.***"

"If, on the other hand, the standard rules of contract interpretation apply, we would construe each reinsurance policy solely in light of its language and, to the extent helpful, specific context."

Global v. Century

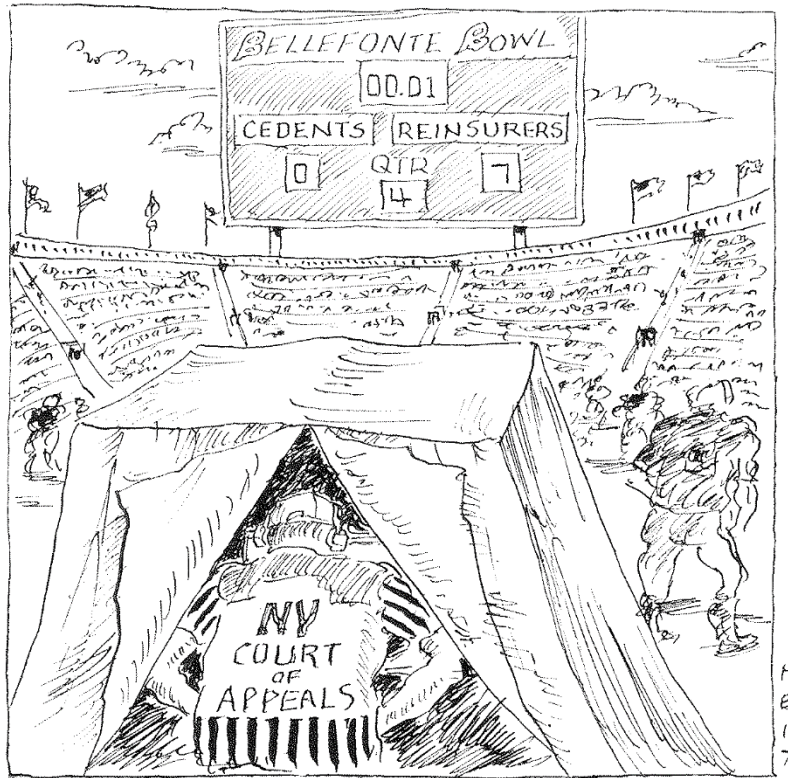


"THE PLAY IS UNDER REVIEW."

The Certified Question

Does [*Excess*] impose 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?

Global v. Century

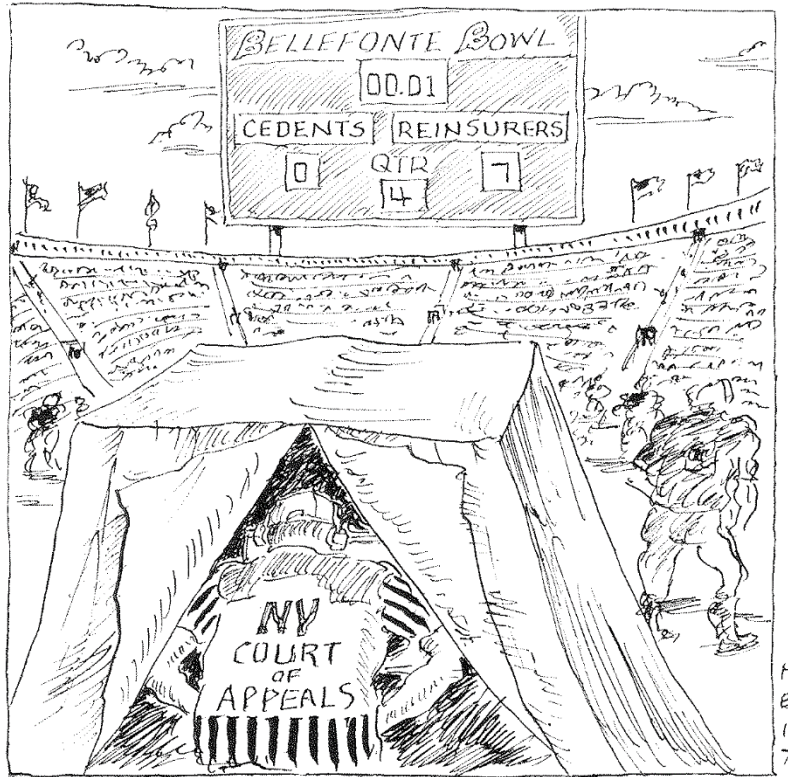


"THE PLAY IS UNDER REVIEW."

Century's Proposed Reformulation of the Certified Question:

If a facultative reinsurance certificate includes a "follow form" provision, and the underlying general liability policy covers defense costs outside the policy's indemnity-loss limit, is the reinsurer presumptively liable for its proportional share of defense costs beyond the reinsured indemnity-loss limit?

Global v. Century



**Status
and
Predictions**

"THE PLAY IS UNDER REVIEW."

POLL NO. 8

Will NY Court of Appeals Affirm *Bellefonte* rule?

A. Yes.

B. No.

POLL NO. 9

Will *Global* impact arbitrations?

If Court of Appeals affirms *Bellefonte* rule, will that:

- A. Have no impact on disputes in arbitration?
- B. Make it more likely arbitrators will apply the *Bellefonte* rule in arbitration?

END

OR TO BE CONTINUED?