A Battle Over 7 Rounds

The History and Implications of *Global v. Century*

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What Happened and What Might It Mean?

- The Background – From Foley Square to Albany and back again
- So is the cap defense dead nationwide – or even in New York?
- The significance of certified questions
- How do courts use “industry custom and practice?”
- Broader reinsurance implications beyond the cap defense?

The Background of *Global I* through *VII*

From Foley Square to Albany and Back Again

The “Highly Relevant Provisions”

- “[Global] [d]oes hereby reinsure [Century] in respect of [Century’s liability insurance policy with Caterpillar] and in consideration of the payment of the premium and subject to the terms, conditions, and amount of liability set forth herein, as follows:”

- Reinsurance Accepted: “$250,000. part of $500,000. each occurrence as original excess of [Century’s] retention as shown in Item #3 above.”

- “the liability of [Global] specified in Item 4 above shall follow that of [Century] and, except as otherwise specifically provided herein, shall be subject in all respects to all the terms and conditions of [the underlying policy].”

- “[a]ll claims involving this reinsurance, when settled by [Century], shall be binding on [Global], who shall be bound to pay its proportion of such settlements, and in addition thereto, … [Global’s] proportion of expenses[.]”

Global I, 2014 WL 40542600 (SDNY Aug. 15, 2014)

Summary judgment in favor of Global

"Based on the plain language of the Certificates and the Second Circuit's binding precedent, Global's motion is granted."

"[T]he relevant language in the Certificate is nearly identical to the language relied on by the Second Circuit in *Bellefonte*."

"If the parties intended to exclude expenses from the total liability cap, they could have made that clear in the Certificates." citing *Excess*

United States District Court,
S.D. New York.
GLOBAL REINSURANCE CORPORATION OF AMERICA, Plaintiff,
v.
CENTURY INDEMNITY COMPANY, Defendant.

No. 13 Civ. 06577(LGS).
Signed Aug. 15, 2014.

OPINION AND ORDER
LORNA G. SCHOFIELD, District Judge.

Global II, 2015 WL 1782206 (SDNY Apr. 15, 2015)

Denying Century's motion for reconsideration based on *Munich Re*

Later in 2014, the Second Circuit decided *Utica v. Munich Re*, where it vacated summary judgment for Munich on the cap defense finding *Bellefonte* did not apply.

"The holding in *Utica* was based on the language of the particular reinsurance certificate at issue there, which differs from the Certificates here."

"*Utica* confirms that where, as here, 'a provision in the policies at issue … expressly ma[kes] all of the reinsurer's obligations 'subject to' the limit of liability,' those policies 'are unambiguously expense-inclusive.'" quoting *Munich Re* citing *Unigard* and *Bellefonte*.

United States District Court,
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v.
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Signed April 15, 2015.

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge.

Global III, 843 F.3d 120 (2d Cir. 2016)

Certifying a question to the New York Court of Appeals

"Century now argues, with the support of four large reinsurance brokers, that *Bellefonte* and *Unigard* were wrongly decided."

"[W]e 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 expense."

"Our intention, therefore, is to seek [the views of] the New York Court of Appeals as to whether a consistent rule of construction specifically applicable to reinsurance contracts exists."

843 F.3d 120
United States Court of Appeals,
Second Circuit.

Global Reinsurance Corporation of America,
successor in interest to Constitution Reinsurance Corporation,
Plaintiff–Counter–Defendant–Appellee,
v.
Century Indemnity Company, successor in interest to CCI Insurance Company, successor in interest to Insurance Company of North America,
Defendant–Counter–Claimant–Appellant.[1]
Docket No. 15-2164-cv
|
August Term, 2015
|
Argued: May 5, 2016
|
Decided: December 8, 2016

Global III – The Certified Question

Does the decision of the New York Court of Appeals in *Excess Insurance Co. v. Factory Mutual Insurance Co.*, 3 N.Y.3d 577 (2004), 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 IV, 30 N.Y.3d 508 (2017)

The answer: no reinsurance-specific rules of construction

"Like any contract, a facultative reinsurance contract 'that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.'"

"Rather than 'adopting a blanket rule, based on policy concerns,' the court must 'look to the language of the policy' above all else."

"New York law does not impose either a rule, or a presumption, that a limitation on liability clause necessarily caps all obligations owed by a reinsurer, such as defense costs, without regard for the specific language employed therein."

30 N.Y.3d 508
Court of Appeals of New York.

GLOBAL REINSURANCE CORPORATION OF AMERICA, successor in interest to Constitution Reinsurance Corporation, Respondent,
v.
CENTURY INDEMNITY COMPANY, successor in interest to CCI Insurance Company, successor in interest to Insurance Company of North America, Appellant.

No. 124
|
Decided on December 14, 2017

Global V, 890 F.3d 74 (2d Cir. 2018)

Summary judgment vacated and case remanded

"The decision from the Court of Appeals resolves the certified question and requires us to remand this case to the district court for consideration in the first instance of the contract terms at issue, employing standard principles of contract interpretation."

"Though reasonable in light of our reasoning in *Bellefonte* and *Unigard*, it is now clear that the district court's determination that the contract was unambiguous was premised on an erroneous interpretation of New York state law.

"The district court should construe each reinsurance policy solely in light of its language and, to the extent helpful, specific context."

890 F.3d 74
United States Court of Appeals, Second Circuit.

GLOBAL REINSURANCE CORPORATION OF AMERICA, successor in interest to Constitution Reinsurance Corporation,
Plaintiff-Counter-Defendant-Appellee,
v.
CENTURY INDEMNITY COMPANY, successor in interest to CCI Insurance Company, successor in interest to Insurance Company of North America,
Defendant-Counter-Claimant-Appellant.

Docket No. 15-2164
|
August Term, 2015
|
Argued: May 5, 2016
|
Decided: May 9, 2018

Global VI – The Hearing on Remand

The district court decided to hold an evidentiary hearing to determine two issues:

(1) whether the language of the reinsurance contracts here is ambiguous; and

(2) whether and how industry specific context helps interpret the reinsurance contracts.

Global VI – The Hearing on Remand

Court considered pre- and post-hearing briefing and testimony from six expert witnesses.

Two from Global (reinsurance broker and reinsurance claims)

Four from Century (direct underwriter, reinsurance underwriter, and two reinsurance claims witnesses)

Global VI, 442 F.Supp.3d 576 (SDNY Mar. 2,2020)

The Holding:

"For the reasons stated below, the plain and unambiguous meaning of the reinsurance contracts is that the dollar amount stated on the facultative certificates caps indemnity payments and also caps expense payments when there are no losses, but does not cap expense payments when there are losses."

442 F.Supp.3d 576
United States District Court, S.D. New York.

GLOBAL REINSURANCE CORPORATION OF AMERICA, Plaintiff,
v.
CENTURY INDEMNITY COMPANY, Defendant.

13 Civ. 6577 (LGS)
|
Filed 03/02/2020

Global VI, 442 F.Supp.3d 576 (SDNY Mar. 2,2020)

“This interpretation is based on the language of the policy, after having read the contract as a whole and with reference to the customs, practices, usages and terminology understood in the reinsurance industry in the 1970’s[.]”

The “subject to the limits” language? “This brief and general language is by its own terms an introduction to the more specific terms and conditions, such as the Following Form Clause and Payments Provision. This prefatory language is insufficiently detailed or explicit to override the Payments Provision’s specific directives as to expenses when there are loss payments and when there are no loss payments.”

Global VI, 442 F.Supp.3d 576 (SDNY Mar. 2,2020)

The role of industry custom and practice?

"This textual interpretation is confirmed by the credible expert testimony regarding the relevant industry custom and practice. The Court credits the Century Experts' testimony that concurrency was significant enough to the history of reinsurance and to the reinsurance market that parties to reinsurance agreements considered whether the reinsurance and insurance should be concurrent when drafting contracts. The Court also credits the Century Experts' testimony that concurrency was presumed, unless the policy contained an explicit statement of non-concurrency."

Global VI, 442 F.Supp.3d 576 (SDNY Mar. 2,2020)

The role of precedent and stare decisis?

"The Second Circuit's instruction in *Global III* that *Bellefonte* and *Unigard* are 'worthy of reflection' convinces this Court that even if these decisions have not been overruled, their continued applicability may be scrutinized."

And the other cases?

- *Excess* (NY 2014) – in its holding "follow[ing] the decisions" in *Bellefonte* and *Unigard*
- *Utica v. Munich Re* (2d Cir. 2014) – cited *Bellefonte / Unigard* for their holdings
- *Utica v. Clearwater* (2d Cir. 2018) – if the Clearwater certificates contained "subject to the limits" language, they "would therefore be capped[,] including expenses."

Global VII, 22 F.4th 83 (2d Cir. Dec. 28, 2021)

The Holding:

"Applying ordinary rules of contract interpretation, we agree with the district court: the reinsurance certificates' follow-form clauses require Global to pay its proportionate share of Century's defense costs in excess of the certificates' liability limits. We base this conclusion on the certificates' unambiguous language as well as the testimony of Century's experts confirming that a strong presumption of concurrency prevailed in the reinsurance market at the time the certificates were issued."

22 F.4th 83
United States Court of Appeals, Second Circuit.

GLOBAL REINSURANCE CORPORATION OF AMERICA, Successor in Interest to Constitution Reinsurance, Corporation,
Plaintiff-Counter-Defendant-Appellant,
v.
CENTURY INDEMNITY COMPANY, Successor in Interest to CCI Insurance Company, Successor in Interest to Insurance Company of North America,
Defendant-Counter-Claimant-Appellee.

No. 20-1476
|
August Term 2020
|
Argued: June 3, 2021
|
Decided: December 28, 2021

Global VII, 22 F.4th 83 (2d Cir. Dec. 28, 2021)

***What happened to* Bellefonte *and* Unigard?**

"To the extent that *Bellefonte* an *Unigard* suggest a different outcome, we conclude that those cases have been undermined by the decision of the New York Court of Appeals answering our certified question. For that reason, *Bellefonte* and *Unigard* no longer constitute the law of our circuit."

22 F.4th 83
United States Court of Appeals, Second Circuit.

GLOBAL REINSURANCE CORPORATION OF AMERICA, Successor in Interest to Constitution Reinsurance, Corporation,
Plaintiff-Counter-Defendant-Appellant,
v.
CENTURY INDEMNITY COMPANY, Successor in Interest to CCI Insurance Company, Successor in Interest to Insurance Company of North America,
Defendant-Counter-Claimant-Appellee.

No. 20-1476
|
August Term 2020
|
Argued: June 3, 2021
|
Decided: December 28, 2021

Global VII – Bases for the Holding?

Contract: "Follow Form" trumped "Subject to the limit"?

"In sum, nothing in the certificates 'specifically provide[s]' that the certificates differ from the Century policies with respect to the treatment of defense costs. Because the follow-form clause makes Global's 'liability ... subject in all respects to all the terms and conditions of the Company's policy' unless 'otherwise specifically provided,' Global must pay its proportionate share of Century's expenses 'in addition to the applicable limit of liability' contained in the Reinsurance Accepted provision."

- 2d Circuit footnoted that district court erred in finding cap applies to expense without indemnity

Global VII – Bases for the Holding?

Industry Custom and Practice: Presumption of Concurrency

- Presumption of concurrency based on Follow Form clause
  - According to Century experts, “subject to” would not have been understood as specific enough
- “Sound reasoning” of presumption to “promote efficiency in the reinsurance market.”
- Expert testimony that “premium follows risk” should apply to defense costs

Global VII – Bases for the Holding?

***Stare decisis* – *Global IV* "revealed a conflict"**

- "The decision … in *Global IV* revealed a 'conflict' between the approach our court took in *Bellefonte* and *Unigard*, and 'the standard rules of contract interpretation otherwise applicable to facultative reinsurance contracts[.]"
    - But Second Circuit acknowledged *Global IV* "did not confront" the issue in *Bellefonte* and *Unigard*

- ***The conflict?*** "Rather than analyze the language of the follow-form clauses and the underlying policies, we assumed from the outset that the applicable policy limits capped the reinsurers' liability as to both losses and expenses and held that '[a]ll other contractual language must be construed in light of th[ose] cap[s].'"

Is The Cap Dead Nationwide – or even in New York?

Erie Principles and Open Questions

Where Might The Cap Defense Remain Viable?

Illinois?

- State appellate court in 2014 ruled in favor of cap. *Continental Cas. Co. v. MidStates Reins. Corp*., 2014 IL App (1st) 133090 (2014)

- BUT, relied heavily on *Bellefonte* and that fact the "analysis and conclusion [in *Bellefonte*] has been widely accepted and cited by the courts and experts."

Where Might The Cap Defense Remain Viable?

Maybe even in New York?

- The only New York state (rather than federal) court to address the cap enforced it.

- *Utica Mut. Ins. Co. v. Alfa Mut. Ins. Co.* (the ECRA pool)
  - Trial court granted partial summary judgment on the cap defense, relying on *Excess, Bellefonte, and Unigard* .
  - That decision was affirmed on appeal to the N.Y. Appellate Division in 2017. *Utica Mut. Ins. Co. v. Alfa Ins. Co.*, 154 A.D.3d 1287 (4th Dep't 2017)

Where Might The Cap Defense Remain Viable?

Maybe even in New York?

- After *Global IV* was decided, Utica moved to renew its opposition to ECRA's summary judgment on the basis that *Global IV* was an intervening change in the law.

- Trial court rejected that argument and held that *Global IV* answered a narrow certified question and did not change law of contract or affect prior decision applying cap to ECRA certificates. *Case 15-2164, Doc. 144 (Feb. 15, 2018)*

The Significance of Certified Questions

When to use them and how to frame them

Certified Questions

- Governed by state rules
- Not all courts may certify
- Important, unsettled state issue
- Control framing?

Whither “Industry Custom and Practice”?

How does/will it work in court compared with arbitration?

Industry Custom and Practice

- Use in arbitration compared to litigation
- How does the law allow it to be used in litigation?

Beyond *Bellefonte* and the Cap Defense

How have/might the* Global *decisions affect other areas of reinsurance law?

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