GLOBAL RE BRINGS THE LAW IN LINE WITH REINSURANCE INDUSTRY PRACTICE

Thomas R. Newman[*]

It has taken thirty years, but the Second Circuit Court of Appeals and the New York Court of Appeals have each finally disavowed their respective decisions in *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*[1] ("*Bellefonte*"), *Unigard Security Insurance Co. v. North River Insurance Co.*[2] ("*Unigard*"), and *Excess Insurance Co. v. Factory Mutual Insurance Co.*[3] ("*Excess*") that had threatened "disastrous economic consequences"[4] for insurers who paid tens of millions of dollars in defense costs incurred by their policyholders in environmental, asbestos, and other product liability mass tort litigation, only to find their facultative reinsurance had "a gaping hole" created by a court-made unexpected cap on the coverage they thought they had purchased.[5]

This article will first present a brief overview of reinsurance, then discuss the earlier decisions that were "roundly criticized in the insurance industry"[6] and ignored by many arbitrators[7] confronted

[*] Thomas R. Newman has acted as lead counsel in more than 60 reinsurance arbitrations and is often called upon as an expert witness in insurance cases in the U.S. He has participated in over thirty insurance arbitrations in London and Bermuda, New York law expert, arbitrator and co-counsel. He is a Life Member of the American Law Institute and Adviser on the Restatement of the Law of Liability Insurance; Member of the American Academy of Appellate Lawyers, the American College of Coverage Counsel; ARIAS—U.S, and a Fellow of the Chartered Institute of Arbitrators. He is co-author of OSTRAGER & NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES, 19th ed. (Wolters Kluwer. 2019), and original author of BUZARD & NEWMAN, NEW YORK APPELLATE PRACTICE (Lexis Nexis, 2016).

[1] Bellefonte Reinsurance Co. v. Aetna Cas. & Sur. Co., 903 F.2d 910 (2d Cir. 1990).

[2] Unigard Sec. Ins. Co. v. N. River Ins. Co., 762 F. Supp. 566 (S.D.N.Y. 1991), *aff'd in part*, *rev'd in part*, 4 F.3d 1049 (2d Cir. 1993).

[3] Excess Ins. Co. v. Factory Mut. Ins. Co., 822 N.E.2d 768 (N.Y. 2004).

[4] Glob. Reinsurance Corp. of Am. v. Century Indem. Co., 843 F.3d 120, 126 (2d Cir. 2016), *certified question accepted*, 68 N.E.3d 98 (N.Y. 2017), *and certified question answered*, 91 N.E.3d 1186 (N.Y. 2017).

[5] *Id.* at 126.

[6] *Id.*

[7] Most reinsurance contracts call for resolution of disputes by arbitration before panels composed of active or retired insurance industry executives, names at Lloyd's or attorneys experienced in reinsurance. *See* Larry Schiffer, *Reinsurance Arbitration–A Primer*, INT'L RISK MGMT. INST., INC. (June 2006), https://www.irmi.com/articles/expert-commentary/reinsurance-

with "insurance–in-addition-to-limits" facultative reinsurance claims, and finally the New York Court of Appeals and Second Circuit's decisions in *Global Reinsurance Corp. of America v. Century Indemnity* Co. ("*Global Re*")[8] that brought the current state of the law in line with what has been the generally accepted reinsurance industry practice.

I. REINSURANCE GENERALLY

Reinsurance is a contractual arrangement that enables the reinsured (also called the "cedent") to transfer some or all of the risk of loss on policies it has underwritten to one or more reinsurers.[9] Simply put, reinsurance is "insurance for insurance companies."[10] Reinsurance permits the cedent insurer to "'minimize its exposure to catastrophic loss,' 'reduce the amount of the legally required reserves held for the protection of policyholders,' and [to] 'increase [its] ability to underwrite other policies or make other investments.'"[11]

There are two basic forms of reinsurance contracts: treaty reinsurance and facultative reinsurance treaties.[12] Treaty reinsurance "involves an ongoing agreement between two insurance companies binding one in advance to cede and the other to accept certain reinsurance business pursuant to its provisions."[13] *Facultative reinsurance*—so called because the cedent retains the "faculty," or option, to accept or decline the proffered risk, and the type involved in *Bellefonte, Unigard, Excess* and *Global Re*—"involves the offer of a portion of a particular risk to one or more potential reinsurers, who are then free to accept or reject the risk in whole or part."[14] The reinsurer agrees to indemnify the ceding

arbitration-a-primer.

[8] *See* Glob. Reinsurance Corp. of Am. v. Century Indem. Co., 890 F.3d 74, 77 (2d Cir. 2018) (remanding to District Court); Glob. Reinsurance Corp. of Am. v. Century Indem. Co., 91 N.E.3d 1186, 1188 (N.Y. 2017) (answering certified question); *Glob. Reinsurance Corp. of Am.*, 843 F.3d at 122 (certifying question to the New York Court of Appeals).

[9] *See* David M. Raim et al., *Scope*, *in* 4 NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE § 40.01 (Leo P. Martinez et al. eds., 2018).

[10] Cont'l Cas. Co. v. Stronghold Ins. Co., 77 F.3d 16, 20 (2d Cir. 1996) (citing Colonial Am. Life Ins. Co. v. Comm'r, 491 U.S. 244, 246–47 (1989); People *ex rel.* Cont'l Ins. Co. v. Miller, 70 N.E. 10, 12 (N.Y. 1904)).

[11] *Glob. Reinsurance Corp. of Am.*, 91 N.E.3d at 1189 (alteration in original) (quoting *In re* Midland Ins. Co., 590 N.E.2d 1186, 1188 (N.Y. 1992)).

[12] 2 BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 15.03(a), at 1206 (Elisa Alcabes & Karen Cestari eds., 19th ed. 2019).

[13] Sumitomo Marine & Fire Ins. Co. v. Cologne Reinsurance Co. of Am., 552 N.E.2d 139, 142 (N.Y. 1990).

[14] *Id.*

insurer in exchange for an agreed portion of the premium for the risk transferred.[15]

Facultative certificates "are usually 'standard forms', 'short and concise, using terms of art rather than lengthy, legalistic explications to define the obligations of the parties.'"[16] They commonly contain provisions defining the reinsurer's obligations to the ceding insurer, including a "follow-the-form" or "following form" clause that is intended to bring about concurrence between the reinsured policy and the certificate.[17] "[C]oncurrency between the insurance and reinsurance policies is a what makes reinsurance work; if the insurance policy is triggered, it should follow that the reinsurance policy is similarly triggered."[18]

They also contain "follow the settlements" clauses binding reinsurers to "the settlement or compromise agreed to by the cedent unless they can show impropriety in arriving at the settlement,"[19] or that the settlement was not "settled reasonably and in good faith."[20] And they will include provisions setting forth the type and amount of insurance provided by the underlying policy reinsured and the amount of "Reinsurance Accepted" by the reinsurer.[21]

II. *BELLEFONTE*

"Aetna issued primary and excess insurance policies [insuring A.H.] Robins against liability for personal injuries arising from use of Robins' products," including the Dalkon Shield, an intrauterine device.[22] Bellefonte and five other reinsurers facultatively reinsured certain of the excess policies issued by Aetna to Robins.[23] Those

---

[15] *See id.*

[16] *Glob. Reinsurance Corp. of Am.*, 91 N.E.3d at 1189 (first quoting N. River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1199 (3d Cir. 1995); then quoting BARRY R. OSTRANGER & MARY KAY VISKOCIL, MODERN REINSURANCE LAW AND PRACTICE § 2:02 (3d ed. 2014)) (citing *Sumitomo Marine & Fire Ins. Co.*, 522 N.E.2d at 142).

[17] *See* Edward J. Ozog et al., *The Unresolved Conflict Between Traditional Principles of Reinsurance and Enforcement of the Terms of the Contractual Undertaking*, 35 TORT & INS. L.J. 91, 110–11 (1999).

[18] Aetna Cas. & Sur. Co. v. Home Ins. Co., 882 F. Supp. 1328, 1337 (S.D.N.Y. 1995).

[19] Excess Ins. Co. v. Factory Mut. Ins. Co., 822 N.E.2d 768, 771 n.3 (N.Y. 2004) (quoting 2 BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 16.01(b), at 1020 (12th ed. 2004)); *see* Utica Mut. Ins. Co. v. Clearwater Ins. Co., 906 F.3d 12, 15–16 (2d Cir. 2018) ("When a reinsurance contract contains a follow-the-settlements clause, the reinsurer must indemnify the reinsured for losses settled reasonably and in good faith, even if the reinsured was not actually liable for those losses under the reinsured insurance policy.").

[20] *Utica Mut. Ins. Co.*, 906 F.3d at 16.

[21] *See*, *e.g.*, *Glob. Reinsurance Corp. of Am.*, 91 N.E.3d at 1190.

[22] Bellefonte Reinsurance Co. v. Aetna Cas. & Sur. Co., 903 F.2d 910, 911 (2d Cir. 1990).

[23] *See id.*

certificates contained the following provisions:

> [Provision 1]
> [Reinsurer] . . . does hereby reinsure Aetna . . . (herein called the Company) in respect of the Company's contract hereinafter described, in consideration of the payment of the premium and subject to the terms, conditions and amount of liability set forth herein, as follows. . . .
> [Provision 2]
> *Reinsurance Accepted* $500,000 part of $5,000,000 excess of $10,000,000 excess of underlying limits . . .
> [Provision 3]
> The Company warrants to retain for its own account . . . the amount of liability specified . . . above, and *the liability of the Reinsurer specified . . . above* [i.e., amount of reinsurance accepted] *shall follow that of the Company*. . . .
> [Provision 4]
> 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*, in the ratio that the Reinsurer's loss payment bears to the Company's gross loss payment, *its proportion of expenses . . . incurred by the Company in the investigation and settlement of claims or suits*. . . .[24]

> After a number of products liability actions were brought against Robins, Aetna and Robins had a dispute over the extent of Aetna's liability as insurer for expenses incurred in defending the actions. Robins commenced a declaratory judgment action against Aetna . . . [seeking] a decision that defense costs were to be paid by Aetna, regardless of whether those defense costs exceeded the limitations of liability stated in the excess insurance policies.[25]

The parties settled their dispute with "Aetna agree[ing] to pay an amount [far] in excess of the cap stated in its policies."[26] "The reinsurers did not participate in these settlement negotiations" and

---

[24] *Id.* (alteration in original) (emphasis added).
[25] *Id.*
[26] *Id.*

"did not sign the agreement."[27]

When Aetna turned to its reinsurers seeking more than $5 million as a portion of the excess amount it had paid, "[t]he reinsurers conceded that they were liable up to the amount of the limitation of liability provisions (Provisions 1 and 2) of each of the reinsurance certificates, but refused to pay any share of the excess amount."[28] The reinsurers then commenced a declaratory judgment action seeking to "limit[] their liability to the amount stated in the reinsurance certificates. Aetna answered and counterclaimed for a declaratory judgment that the reinsurance certificates obligated the reinsurers to 'follow the fortunes' of Aetna and indemnify Aetna for the excess defense costs owed to Robins."[29]

On cross-motions for summary judgment, "the district court held that the [$500,000] typed in the column entitled 'Reinsurance Accepted' was an overall limitation, and that the reinsurance certificates were cost-inclusive and capped by that amount."[30] The reinsurers appealed and "[t]he sole issue presented [was] whether the reinsurers [were] obligated" to pay more than the amount stated in their certificates as "Reinsurance Accepted."[31]

The Second Circuit affirmed.[32] It first found that "the district court correctly read the first two provisions of the reinsurance certificates to cap the reinsurers' liability, and that the 'follow the fortunes' doctrine does not allow Aetna to recover defense costs beyond the express cap stated in the certificates."[33] Rather, the Second Circuit noted that "follow the fortunes" clauses "are structured so that they coexist with, rather than supplant, the liability cap. To construe the certificates otherwise would effectively eliminate the limitation on the reinsurers' liability to the stated amounts."[34] When there is "genuine ambiguity over what a settlement covers, a 'follow the fortunes' clause may oblige a reinsurer to contribute to a settlement even though it might encompass excluded claims."[35] But, the Second Circuit did not think this was such a case.[36]

---

[27] *Id.*
[28] *Id.*
[29] *Id.* at 911–12.
[30] *Id.* at 912.
[31] *Id.*
[32] *Id.* at 914.
[33] *Id.* at 913.
[34] *Id.* (citing Calvert Fire Ins. Co. v. Yosemite Ins. Co., 573 F. Supp. 27, 29 (E.D.N.C. 1983)).
[35] *Bellefonte Reinsurance Co.*, 903 F.2d at 913 (quoting Am. Ins. Co. v. N. Am. Co. for Prop. & Cas. Ins., 697 F.2d 79, 81 (2d Cir. 1982)).
[36] *See Bellefonte Reinsurance Co.*, 903 F.2d at 913.

The Second Circuit also rejected Aetna's contention that the phrase "in addition thereto" in the fourth provision of the reinsurance certificate "indicates that the monetary limitation on liability set forth in the first two provisions of the certificates caps only the reinsurers' liability for the underlying losses, not the reinsurers' liability for defense expenses and costs,"[37] stating,

> Here, the limitation on liability provision capped the reinsurers' liability under the certificates. All other contractual language must be construed in light of that cap.
> . . . .
> Whatever the demand, the reinsurers' entire obligation is quantitatively limited by the dollar amount the reinsurers agreed to reinsure. Once the reinsurers have paid up to the certificate limits, they have no additional liability to Aetna for defense expenses or settlement contributions. . . . *The reinsurers are liable only to the extent of the risk they agreed to reinsure*.[38]

The *Bellefonte* decision does not examine what risk the reinsurers "agreed to reinsure." Such an analysis must await *Global Re*.

III. *UNIGARD*

Unigard, as reinsurer, appealed from a decision after a bench trial that held, in pertinent part, that cedent North River's case was distinguishable from *Bellefonte* because the evidence at trial showed that prior to *Bellefonte*,

> Unigard interpreted its standard form facultative certificate to require payment of expenses in addition to the indemnity limit whenever the policy reinsured did so [and] . . . consistently paid claims on that basis when submitted under this type of facultative certificate. Moreover, this interpretation was shown to be consistent with the customs

[37] *Id.* ("We read the phrase 'in addition thereto' merely to differentiate the obligations for losses and for expenses. The phrase in no way exempts defense costs from the overall monetary limitation in the certificate. This monetary limitation is a cap on all payments under the certificate. In our view, the 'in addition thereto' provision merely outlines the different components of potential liability under the certificate. It does not indicate that either component is not within the overall limitation.").

[38] *Id.* at 914 (emphasis added).

and practice of the industry.[39]

North River also argued that (i) it did not rely on "follow the fortunes," (ii) there can be no question about its good faith payment of expenses in excess of the policy limits because it was obligated to do so by a binding arbitration award, in contrast to Aetna's voluntary agreement to increase its liability limit to allow for recovery of expenses by the insured, and (iii) the "following form" clause required Unigard to pay its share of those expenses under the reinsurance certificate.[40]

The Second Circuit rejected these arguments and sought to foreclose repeated challenges to its *Bellefonte* decision by stating:

> *Bellefonte*'s gloss upon the written agreement is conclusive. The efficiency of the reinsurance industry would not be enhanced by giving different meanings to identical standard contract provisions depending upon 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.[41]

IV. *EXCESS*

In *Excess*, the New York Court of Appeals, affirming the Appellate Division, First Department, followed and applied the reasoning of *Bellefonte* and *Unigard* to a *property* reinsurance agreement.[42] Factory Mutual agreed to provide property insurance to Bull Data Systems, Inc. covering against the risk of loss or damage to Bull Data's personal computer inventory stored in a warehouse in France.[43] The policy had an indemnification limit of $48 million and was reinsured by various London reinsurers under a reinsurance policy with a "LIMIT" of "US$7,000,000 any one occurrence p/o US$13,500,000 any one occurrence excess of US$25,000,000 any one

---

[39] Unigard Sec. Ins. Co. v. N. River Ins. Co., 762 F. Supp. 566, 594–95 (S.D.N.Y. 1991).

[40] *See id.* at 594.

[41] Unigard Sec. Ins. Co. v. N. River Ins. Co., 4 F.3d 1049, 1071 (2d Cir. 1993) (citing Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039, 1048 (2d Cir. 1982)). "Idiosyncratic" seems a strange word to apply to a reinsurer's practice of paying expenses in addition to indemnity limits, where that was "shown to be consistent with the customs and practice of the industry." *Unigard Sec. Ins. Co.*, 762 F. Supp. at 594–95.

[42] *See* Excess Ins. Co. v. Factory Mut. Ins. Co., 822 N.E.2d 768, 771, 772 (N.Y. 2004).

[43] *See id.* at 769.

occurrence."[44] "[A] fire that generated a spate of litigation . . . destroyed the warehouse."[45]

When "Bull Data presented a claim to Factory Mutual" it was declined, the insurer "suspecting that the fire was the result of arson."[46] Coverage litigation followed.[47] "After incurring approximately $35 million in litigation expenses, both lawsuits were terminated and Factory Mutual settled the claims with Bull Data for nearly $100 million."[48] Factory Mutual sought payment from its reinsurers who refused.[49]

Litigation then ensued between Factory Mutual and its reinsurers in England and in federal courts in the United States, eventually resulting in a declaratory judgment action by the reinsurers in Supreme Court, New York County.[50] "Factory Mutual interposed a counterclaim, seeking the $7 million indemnification limit under the reinsurance policy as well as $5 million in loss adjustment expenses [that it] incurred . . . in the litigation of the original claim with Bull Data."[51]

> Both Factory Mutual and the reinsurers moved for partial summary judgment on Factory Mutual's counterclaims seeking loss adjustment expenses in [excess] of the amount stated in the indemnification limit. [The] Supreme Court denied the reinsurers' motion, granted Factory Mutual's cross motion and declared that the reinsurers' obligation to pay their proportionate share of the loss adjustment expenses was not subject to the stated indemnity limit of $7 million.[52]

The appellate division reversed, granted the reinsurers' motion and denied Factory Mutual's cross motion and declared that any portion of the loss adjustment expenses that the reinsurers were obligated to bear was subject to the $7 million limit stated in the reinsurance policy.[53]

The appellate division granted Factory Mutual leave to appeal to

---

[44] *Id.* at 769 tbl.1.
[45] *Id.* at 769.
[46] *Id.*
[47] *See id.*
[48] *Id.*
[49] *Id.* at 770.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*

the Court of Appeals which, following the decisions in *Bellefonte* and *Unigard*, affirmed the order of the Appellate Division.[54] The Court held,

> [A]ny obligation on the part of the reinsurers to reimburse Factory Mutual, whether it be for settling the original insurance claim with Bull Data or for the loss adjustment expenses . . . must be capped by the negotiated limit under the policy. Otherwise, the reinsurers would be subject to limitless liability. Indeed, this case well illustrates such an injustice as Factory Mutual now seeks to saddle the reinsurers with a portion of a litigation bill that exceeds the negotiated policy limit by more than 70%. To permit such a result would render the liability cap a nullity.[55]

Factory Mutual tried to distinguish *Bellefonte* and *Unigard* on the ground that those cases involved liability insurance while it had issued a property insurance policy to Bull Data.[56] The Court found this argument "unpersuasive and conclude[d] that this distinction does not provide a sufficient basis to extend the reinsurers' liability beyond the limit stated in the reinsurance policy."[57] "The limit clause in the policy is intended to cap the reinsurers' total risk exposure."[58]

Judge Read, dissenting, found the certificate to be ambiguous and that

> *Bellefonte*'s holding was not intended as a general rule applicable to any and all reinsurance certificates. . . . The Appellate Division and now the majority have converted a rule unique to the specific certificate language in *Bellefonte* into a general principle that a 'follow the fortunes' clause never supplants a policy limit. Thus, the majority, like the Appellate Division before it, expands *Bellefonte* from a contract-specific holding into a rule of general applicability.[59]

---

[54] *Id.*
[55] *Id.* at 771–72.
[56] *Id.* at 772.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 774–75 (Read, J., dissenting).

V. *GLOBAL RE* (2D CIRCUIT: CERTIFYING QUESTION)

Between 1971 and 1980, Global facultatively reinsured Century for specified portions of general liability insurance policies that Century had issued to Caterpillar Tractor Company.[60]

> Beginning in 1988, thousands of lawsuits were filed against Caterpillar alleging bodily injury resulting from exposure to asbestos. . . . As a result of [coverage litigation in Illinois], Century became obligated to reimburse Caterpillar for defense expenses in addition to the indemnity limits of the policies. Global alleges that Century has already paid more than $60 million to Caterpillar and has agreed to pay an additional $30.5 million. Global further alleges that only about 10% of this amount represents what Century refers to as "loss," whereas about 90% represents what Century refers to as "expenses."[61]

Century sought reimbursement from Global for portions of its payments to Caterpillar pursuant to the reinsurance certificates that provide, in relevant part, as follows:

> [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: . . .
>
> Item 1 - Type of Insurance
>
> Blanket General Liability, excluding Automobile Liability as original.
>
> Item 2 - Policy Limits and Application
>
> $1,000,000. each occurrence as original.
>
> Item 3 - [Century] Retention
>
> The first $500,000. of liability as shown in Item #2 above.
>
> Item 4 - Reinsurance Accepted
>
> $250,000. part of $500,000. each occurrence as original excess of [Century's] retention as shown in Item #3 above.

---

[60] *See* Glob. Reinsurance Corp. of Am. v. Century Indem. Co., 843 F.3d 120, 122 (2d Cir. 2016).

[61] *Id.*

> Item 5 - Basis
> Excess of Loss.[62]

The nine reinsurance certificates, which are materially similar, stated that "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 liability insurance policy]."[63] The certificates also provided that:

> All 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, in the ratio that [Global's] loss payment bears to [Century's] gross loss payments, [Global's] proportion of expenses . . . incurred by [Century] in the investigation and settlement of claims or suits.[64]

A declaratory judgment action followed and, in Global's view, the amount stated in the "Reinsurance Accepted" section ($250,000) caps the maximum amount that it can be obligated to pay for both loss and expenses combined.[65] The district court agreed and, relying primarily on *Bellefonte* and *Unigard*, granted Global partial summary judgment holding that "the certificates *unambiguously* capped Global's liability for both losses and expenses."[66] Century appealed to the Second Circuit and, with the support of four large reinsurance brokers as *amicus curiae* who had noted that, "*Bellefonte* and its progeny have been roundly criticized in the insurance industry," argued that *Bellefonte* and *Unigard* were wrongly decided.[67]

The Second Circuit found Century's argument

> is not without force. In particular, we find it difficult to understand the *Bellefonte* court's conclusion that the

---

[62] *Id.* at 122–23 (alteration in original).

[63] *Id.* at 123 (alteration in original) (citation omitted).

[64] *Id.* (alteration in original) (citation omitted).

[65] *Id.*

[66] *Id.* (emphasis added) (citing Bellefonte Reinsurance Co. v. Aetna Cas. & Sur. Co., 903 F.2d 910, 911 (2d Cir. 1990); Unigard Sec. Ins. Co. v. N. River Ins. Co., 4 F.3d 1049, 1071 (2d Cir. 1993)).

[67] *Glob. Reinsurance Corp. of Am.*, 843 F.3d at 126.

> reinsurance certificate in that case *unambiguously* capped the reinsurer's liability for both loss and expenses. Looking only to the language of the certificate, we think it is not entirely clear what exactly the "Reinsurance Accepted" provision in *Bellefonte* meant. Evidence of industry custom and practice might have shed light on this question, but the *Bellefonte* court did not consider any such evidence in its decision, although it is unclear if any was presented.[68]

Because the interpretation of the reinsurance certificates at issue, "is a question of New York law that the New York Court of Appeals has a greater interest and greater expertise in deciding than [it],"[69] and seeking to learn from the New York Court of Appeals whether "a consistent rule of construction specifically applicable to reinsurance contracts exists,"[70] the Second Circuit certified the following question to the New York Court of Appeals:

> Does the decision of the New York Court of Appeals in *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?
>
> In certifying this question, we do not bind the Court of Appeals to the particular question stated. The Court of Appeals may modify the question as it sees fit and, should it choose, may direct the parties to address other questions it deems relevant. This panel will resume its consideration of this appeal after the disposition of this certification by the Court of Appeals.[71]

The Court of Appeals accepted the certification and answered the question.[72]

---

[68] *Id.*

[69] *Id.* at 127.

[70] *Id.*

[71] *Id.* at 128. A United States Court of Appeals may certify a question to the New York Court of Appeals where "determinative questions of New York law are involved . . . for which no controlling precedent of the Court of Appeals exists . . . ." N.Y. COMP. CODES R. & REGS. tit. 22, § 500.27(a) (2019). While Global contended that the Court of Appeals' decision in *Excess* was controlling, the Second Circuit disagreed. *Glob. Reinsurance Corp. of Am.*, 843 F.3d at 127.

[72] *See* Glob. Reinsurance Corp. of Am. v. Century Indem. Co., 91 N.E.3d 1186, 1188 (N.Y.

VI. *GLOBAL RE* (N.Y. COURT OF APPEALS: ANSWERING QUESTION)

The Court of Appeals opinion starts by answering the certified question in the negative, stating that "[u]nder New York law generally, and in *Excess* in particular, there is neither a rule of construction nor a presumption that a per occurrence liability limitation in a reinsurance contract caps all obligations of the reinsurer, such as payments made to reimburse the reinsured's defense costs."[73] It then explains how it reached this result, seemingly at odds with *Excess*.[74]

The court begins by noting that "[a]lthough *Excess* did not say that third-party defense costs under any facultative reinsurance contract are unambiguously or presumptively capped by the liability limits in the certificate, some courts have nonetheless read our decision that way."[75] It then points out that

> [i]t is basic that principles of law "are not established by what was said, but by what was decided, and what was said is not evidence of what was decided, unless it relates directly to the question presented for decision." Accordingly, the Court's holding comprises only those "statements of law which address issues which were presented to the [Court] for determination."[76]

"The *Excess* Court was simply not faced with the question presently before the Second Circuit: whether there is a blanket 'presumption' or 'rule of construction' that a limitation-on-liability clause applies to all payments by a reinsurer whatsoever."[77] In its view, "[t]he only issue before the Court was whether that certificate's phrase 'LIMIT: US$ 7,000,000,' in context, established that the reinsurers' aggregate liability for both settlement costs and loss adjustment expenses was capped at $7 million."[78]

The court also distinguished *Excess* on the ground that "the loss

2017).

[73] *See id.*

[74] *See id.* at 1192.

[75] *Id.* at 1191 (citing Utica Mut. Ins. Co. v. Munich Reinsurance Am., Inc., 594 F. App'x 700, 704 (2d Cir. 2014)).

[76] *Id.* at 1192 (first quoting Knight-Ridder Broad. Co. v. Greenberg, 511 N.E.2d 1116, 1121 n.6 (N.Y. 1987); and then quoting Village of Kiryas Joel v. County of Orange, 43 N.Y.S.3d 51, 58 (App. Div. 2016)).

[77] *Glob. Reinsurance Corp. of Am.*, 91 N.E.3d at 1192.

[78] *Id.*

adjustment expenses were incurred in litigation between the insurer and its policyholder; they were not costs (such as third-party defense costs) that the insurer was obligated to pay under the terms of the underlying policy itself."[79]

> Whether a similar (or even identical) limitation clause would apply to third-party defense costs, in a certificate reinsuring a liability insurance policy, was never at issue. Consequently, the *Excess* Court did not pass on whether a follow-form clause such as the one in that case, 'subject[ing]' the reinsurance 'to the same valuation, clauses and conditions as contained in the original policy,' would require the reinsurers to cover third-party defense costs in excess of such a limit.[80]

A. Traditional Rules of Contract Interpretation to Be Applied to Reinsurance Contracts

The Court of Appeals presents a helpful refresher on the "traditional rules of contact interpretation" that it applied in reaching its decision, "hold[ing] definitively that *Excess* did not supersede the 'standard rules of contract interpretation' otherwise applicable to facultative reinsurance contracts."[81] "Critically, [the Court] did not read the limit clause in isolation, but in light of the entire agreement as an integrated whole, 'giv[ing] meaning to every sentence, clause and word' thereof."[82] In doing so, however, the court was "mindful that the certificate, while serving as written confirmation of a contract, might not in and of itself constitute the fully integrated agreement."[83]

> "Reinsurance, like any other contract, depends upon the intention of the parties, to be gathered from the words used, taking into account, when the meaning is doubtful, the surrounding circumstances." The agreement should be "read

---

[79] *Id.* at 1192. "Loss adjustment expenses are 'the expense incurred by the insurer to investigate and settle a claim.'" *Id.* at 1190 n.3 (citing CSX Corp. v. N. River Ins. Co., No. 3:08-CV-00531-J-25MCR, 2009 U.S. Dist. LEXIS 133311, at *27 (M.D. Fla. Sept. 25, 2009)).

[80] *Glob. Reinsurance Corp. of Am.*, 91 N.E.3d at 1192.

[81] *See id.* at 1192, 1193 (quoting Glob. Reinsurance Corp. of Am. v. Century Indem. Co., 843 F.3d. 120, 128 (2d. Cir. 2016)).

[82] *Glob. Reinsurance Corp. of Am.*, 91 N.E.3d at 1192 (quoting Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London, 760 N.E.2d 319, 326 (N.Y. 2001)).

[83] *Glob. Reinsurance Corp. of Am.*, 91 N.E.3d at 1193 (citing Sumitomo Marine & Fire Ins. Co.-U.S. Branch v. Cologne Reinsurance Co. of Am., 552 N.E.2d 139, 142 (N.Y. 1990)).

> as a whole, and every part will be interpreted with reference to the whole." Particularly where an agreement is "negotiated between sophisticated, counseled business people negotiating at arm's length . . . courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include."[84]
>
> 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." Ambiguity is ascertained by reading the terms of the agreement, not in isolation, but "as a whole." If a contract "is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." Rather than "adopting a blanket rule, based on policy concerns," the court must "look to the language of the policy" above all else.[85]

The court concluded by making it clear that

> [t]he foregoing principles do not permit a court to disregard the precise terminology that the parties used and simply assume, based on its own familiar notions of economic efficiency, that any clause bearing the generic marker of a 'limitation on liability' or 'reinsurance accepted' clause was intended to be cost-inclusive.[86]

B. Contra Proferentem: Not Applied to Reinsurance Agreements

One principle not discussed by the court but likely to come up in the final resolution of this reinsurance dispute now that the certificate has been found not to be clear and unambiguous is, "the general rule that ambiguities in an insurance policy are to be construed against the insurer."[87] Under New York law, if extrinsic

---

[84] *Glob. Reinsurance Corp. of Am.*, 91 N.E.3d at 1193 (first quoting London Assurance Corp. v. Thompson, 62 N.E. 1066, 1067 (N.Y. 1902); then quoting Beal Sav. Bank v. Sommer, 865 N.E.2d 1210, 1214 (N.Y. 2007); and then quoting Vt. Teddy Bear Co. v. 538 Madison Realty Co., 807 N.E.2d 876, 879 (N.Y. 2004)).

[85] *Glob. Reinsurance Corp. of Am.*, 91 N.E.3d at 1193 (first quoting Marin v. Constitution Realty, LLC, 71 N.E.3d 530, 534 (N.Y. 2017); then quoting Ellington v. EMI Music, Inc., 21 N.E.3d 1000, 1003 (N.Y. 2014); then quoting Selective Ins. Co. of Am. v. County of Rensselaer, 47 N.E.3d 458, 461 (N.Y. 2016); and then quoting *In re* Viking Pump Inc., 52 N.E.3d 1144, 1150 (N.Y. 2016)).

[86] *Glob. Reinsurance Corp. of Am.*, 91 N.E.3d at 1194.

[87] *See* Breed v. Ins. Co. of N. Am., 385 N.E.2d 1280, 1282 (N.Y. 1978) (citing Thomas J.

evidence and all other aids to construction do not resolve an ambiguity in an insurance policy, then, as a last resort, the ambiguous term will be construed against the insurer as the drafter of the policy, under the doctrine of *contra proferentem,* which literally means "against the offeror."[88] However, *contra proferentem* does not apply where contracts are negotiated by sophisticated parties of equal bargaining power.[89]

New York courts have specifically stated that the rule of *contra proferentem* "is not applicable in a contest between two insurance companies."[90]

> *Loblaw* suggests that the touchstone for applying *contra proferentem* is the insured's lack of sophistication. Where the dispute is between two insurance companies, both parties are sophisticated business entities, familiar with the market in which they deal and armed with relatively equivalent bargaining power; hence, the contra insurer rule serves little purpose.[91]

VII. *GLOBAL RE* (2D CIRCUIT: AFTER QUESTION ANSWERED)

After receiving the Court of Appeals answer to its question, the Second Circuit vacated its earlier decision and:

> [R]emand[ed] th[e] 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

Lipton, Inc. v. Liberty Mut. Ins. Co., 314 N.E.2d 37, 39 (1974)).

[88] *See* U.S. Fire Ins. Co. v. Gen. Reinsurance Corp., 949 F.2d 569, 573 (2d Cir. 1991); State v. Home Indem. Co., 486 N.E.2d 827, 829 (N.Y. 1985) (first citing Fagnani v. Am. Home Assurance Co., 477 N.E.2d 1100, 1101 (N.Y. 1985); then citing Hartford Acc. & Indem. Co. v. Wesolowski, 305 N.E.2d 907, 909 (N.Y. 1973); then citing *Breed*, 385 N.E.2d at 1282; and then citing *Thomas J. Lipton, Inc.*, 314 N.E.2d at 39).

[89] *See* Catlin Specialty Ins. Co. v. QA3 Fin. Corp., 36 F. Supp. 3d 336, 342 (S.D.N.Y. 2014) (citing Cummins, Inc. v. Atlantic Mut. Ins. Co., 867 N.Y.S.2d 81 (App. Div. 2008)), *aff'd*, 629 F. App'x. 127 (2d Cir. 2015); *Cummins, Inc.*, 867 N.Y.S.2d at 83 (citing Coliseum Towers Assocs. v. County of Nassau, 769 N.Y.S.2d 293, 296–97 (App. Div. 2003); Loblaw, Inc. v. Emp'rs Liab. Assurance Corp., 446 N.Y.S.2d 743, 745 (App. Div. 1981), *aff'd*, 442 N.E.2d 438 (N.Y. 1982)) (refusing to apply *contra proferentem* where parties had equal bargaining power).

[90] *Loblaw, Inc.*, 446 N.Y.S.2d at 745; *see* Standard Marine Ins. Co., v. Fed. Ins. Co., 336 N.Y.S.2d 692, 695 (App. Div. 1972) (citing New Amsterdam Cas. Co. v. Fid. & Cas. Co. of New York, 400 F.2d 237 (9th Cir. 1968)).

[91] *U.S. Fire Ins. Co.*, 949 F.2d at 574 (citing Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 n.2 (2d Cir. 1983)).

> 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."[92]

VIII. *UTICA MUTUAL*

In *Utica Mutual Insurance Co. v. Clearwater Insurance Co.*, the facultative reinsurer, "Clearwater, argued that [its] certificates' liability limits were hard caps that precluded Utica from recovering defense costs and other expense payments beyond the limits."[93] Clearwater's certificates listed, "'Liability and Basis of Acceptance' as $5 million and $2.5 million."[94] The Second Circuit, following the New York Court of Appeals decision in *Global Re*, disagreed and, finding Clearwater's liability is "Expense-Supplemental," stated,

> [T]he fact that the certificates state Clearwater's reinsurance liability limit has little significance on its own. Insurance companies generally do not offer limitless insurance, at least not on purpose. Under New York law, a naked 'limitation on liability' or 'reinsurance accepted' clause does not inherently cap the reinsurer's liability at that amount. Clearwater's liability limit, in other words, says nothing about whether that liability cap is expense-supplemental or inclusive.[95]

CONCLUSION

The evidence of the "specific context" in which the terms of the reinsurance certificate were agreed is likely to include expert evidence from reinsurance intermediaries who routinely assist both cedents and reinsurers in reaching agreement on and fashioning the terms of their contracts.[96] They "are particularly well-situated to understand the intent behind facultative reinsurance contracts like

---

[92] Glob. Reinsurance Corp. of Am. v. Century Indem. Co., 890 F.3d 74, 77 (2d Cir. 2018) (quoting Glob. Reinsurance Corp. of Am. v. Century Indem. Co., 843 F.3d. 120, 128 (2d. Cir. 2016)).

[93] Utica Mut. Ins. Co. v. Clearwater Ins. Co., 906 F.3d 12, 18 (2d Cir. 2018).

[94] *Id.*

[95] *Id.* at 19 (citing Glob. Reinsurance Corp. of Am. v. Century Indem. Co., 91 N.E.3d 1186, 1194 (N.Y. 2017)).

[96] Brief for Aon Benfield U.S. et al. as Amici Curiae Supporting Appellant at *1, Glob. Reinsurance Corp. of Am. v. Century Indem. Co., 843 F.3d. 120 (2d Cir. 2016) (No. 15-2164-cv).

the ones at issue [in *Global Re*]."[97]

Expert evidence may also be elicited to explain how reinsurance professionals would interpret the reinsurance certificate terms and the importance of such concepts as "risk follows premium" and "concurrence" in facultative reinsurance, especially when the underlying policy to be reinsured expressly pays defense costs in addition to its liability limits.[98]

> Where a following form clause is found in the reinsurance contract, concurrency between the policy of reinsurance and the reinsured policy is presumed, such that a policy of reinsurance will be construed as offering the same terms, conditions and scope of coverage as exist in the reinsured policy, i.e., in the absence of explicit language in the policy of reinsurance to the contrary.[99]

The "basic presumption of concurrence" between terms of a reinsurance certificate and the underlying policy is, "subject only to any *clear* limitation to the contrary in the [facultative certificates themselves]."[100]

One should never presume to know the outcome of a hotly contested litigation before all the evidence is proffered and carefully considered by the court, but when the "Reinsurance Accepted" provision is considered in light of likely extrinsic evidence, *Global Re* will probably and finally bring concurrency between New York law and the well-established reinsurance industry practice.

---

[97] *Id.*

[98] *See* Utica Mut. Ins. Co. v. Munich Reinsurance Am., Inc., No. 6:12-cv-00196 (BKS/ATB); 6:13-cv-00743 (BKS/ATB), 2018 U.S. Dist. LEXIS 106970, at *13, *14–15 (N.D.N.Y. June 27, 2018); *see, e.g.*, Aetna Cas. & Sur. Co. v. Home Ins. Co., 882 F. Supp. 1328, 1345 (S.D.N.Y. 1995) (discussing how expert testimony can be used to assess concurrency and obligations to indemnify).

[99] *Aetna Cas. & Sur. Co.*, 882 F. Supp at 1337.

[100] Commercial Union Ins. Co. v. Swiss Reinsurance Am. Corp., 413 F.3d 121, 128 (1st Cir. 2005).