

Second Circuit Asks New York Court Of Appeals If Reinsurance Limits Apply To Both Losses And Expenses

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By certified question, the Second Circuit asked the New York Court of Appeals to address whether the dollar amount provided in a “Reinsurance Accepted” section of a reinsurance certificate applies to both losses and expenses. *Global Reinsurance Corp. of Am. v. Century Indem. Co.*, 2016 WL 7156549 (2d Cir. Dec. 8, 2016).

The appeal arises out of a dispute between Century and Global Reinsurance regarding the extent of Global Reinsurance’s obligation to pay Century pursuant to certain reinsurance certificates. A New York federal district court ruled that the certificates unambiguously capped Global Reinsurance’s liability at \$250,000 (the amount set forth in the Reinsurance Accepted provision) for both losses and expenses. In so ruling, the district court relied on *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*, 903 F.2d 910 (2d Cir. 1990) and *Unigard Security Insurance Co. v. North River Insurance Co.*, 4 F.3d 1049 (2d Cir. 1993).

Century appealed, arguing that *Bellefonte* and *Unigard* were wrongly decided. Century argued that the certificates should be interpreted to cover both loss and expenses because the certificates follow form to underlying policies, and the underlying policies expressly provide for payment of expenses in addition to loss. Noting that Century’s argument “is not without force,” the Second Circuit rejected Global Reinsurance’s contention that *Excess Insurance Co. v. Factory Mutual Co.*, 3 N.Y.3d 577 (2004) is controlling because it did not explicitly address whether a stated limit represents a coverage limit for losses and expenses combined. The court further distinguished *Factory Mutual* because the expenses in question related to the cedent’s cost of litigating with the underlying insured, not the insured’s defense costs.

On this basis, 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 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?

We will keep you posted on further developments in this potentially-significant matter.

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