

New York Court Of Appeals Rejects Blanket Rule Or Presumption That Reinsurance Limits Apply To Both Defense and Indemnity Payments

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Answering a question certified by the Second Circuit, the New York Court of Appeals ruled that *Excess Insurance Co. Ltd. v. Factory Mutual Insurance Co.*, 3 N.Y.3d 577 (2004), did not establish a rule of construction or a presumption that a per occurrence liability limitation in a reinsurance contract caps all obligations of the reinsurer. *Global Reinsurance Corp. of Am. v. Century Indem. Co.*, 2017 WL 6374281 (N.Y. Dec. 14, 2017).

The dispute centered on 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. Century appealed, arguing that the reinsurance limit applied only to losses and that Global must also pay all expenses, even if those costs exceeded the limit. In support of its argument, Century noted that the reinsurance certificates follow form to underlying policies, which expressly provide for payment of expenses in addition to loss. As discussed in our December 2016 Alert, 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. Ltd. 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?

The Court of Appeals answered the question in the negative, emphasizing that "the standard rules of contract interpretation apply" and that policy language must be interpreted on a case-by-case basis. The court explained that the *Excess* decision depended on a particular phrase in the relevant certificate, which the court interpreted as providing an aggregate limit for both settlement and loss adjustment expenses. The court noted that its decision was based on "the unique turns of phrase in the certificate" and its interpretation of the clause "in light of the entire agreement as an integrated whole." Further distinguishing *Excess*, the court noted that the loss adjustment expenses at issue there were incurred in litigation between the insurer and policyholder; they were not third-party defense costs that the insurer was obligated to pay under the underlying policy.

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