

Eleventh Circuit Rules That Reinsurance Agreement Lacks A Follow The Fortunes Clause And Declines To Infer One (Insurance Law Alert)

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The Eleventh Circuit ruled that a reinsurance agreement does not contain a follow the fortunes clause and refused to infer application of the doctrine, finding that such a reading would be inconsistent with the agreement's plain language. *Public Risk Mgmt. of Fla. v. Munich Reinsurance Am., Inc.*, 2022 WL 2338572 (11th Cir. June 29, 2022).

Public Risk Management ("PRM"), a self-insured risk management program that insures local government entities in Florida, sought reinsurance coverage from Munich for a settlement PRM had reached with underlying claimants. Munich denied that it had any obligation to provide reinsurance because the underlying loss occurred before the inception of the reinsurance agreement. A Florida district court ruled in Munich's favor, finding that the evidence indicated that the operative occurrence happened outside the policy period. On appeal, PRM argued that Munich was obligated to cover the settlement pursuant to the follow the fortunes doctrine. The Eleventh Circuit disagreed and affirmed the district court decision.

The Eleventh Circuit ruled that the reinsurance contract did not contain a follow the fortunes clause. The agreement required Munich to indemnify PRM for "Ultimate Net Loss" "paid by PRM as a result of Occurrences . . . during the term of this Agreement under PRM's Coverage Document underwritten by PRM and covered under this Agreement." The agreement defined "Ultimate Net Loss" as "the sum or sums paid by PRM for which it is liable, under the Coverage Document reinsured hereunder." Additionally, the agreement specified that Munich must issue payment after it receives "proof of payment . . . and coverage hereunder." The court explained that pursuant to this language, Munich would not be required to reimburse PRM for defense or indemnity if PRM was not liable under the policy reinsured by Munich. The court further held that this language is squarely inconsistent with the follow the fortunes doctrine, which would bind Munich to PRM's good faith coverage decisions.

Finally, the court declined to infer that the follow the fortunes doctrine applies to all reinsurance agreements under Florida law. The court held that where, as here, a reinsurance agreement "contains terms that are plainly and unambiguously inconsistent with the follow the fortunes doctrine . . . the Supreme Court of Florida would not infer application of the doctrine." Notably, the court did not decide whether such inference would be appropriate in other circumstances, such as when an agreement lacks an express follow the fortunes clause and language that is inconsistent with the doctrine.

Authors and Contacts

[Bryce Friedman](#)

Partner

bfriedman@stblaw.com

+1-212-455-2235

