UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AIU INSURANCE COMPANY,	:	
Plaintiff,	:	07 Civ. 7052 (SHS)(HBP)
-against-	:	REPORT AND RECOMMENDATION
TIG INSURANCE COMPANY,	:	
Defendant.	:	

PITMAN, United States Magistrate Judge:

TO THE HONORABLE SIDNEY H. STEIN, United States District Judge,

I. Introduction

By notice of motion dated April 20, 2009 (Docket Item 67), TIG Insurance Company ("TIG") moves for partial summary judgment or, alternatively, for an order narrowing the issues for trial pursuant to Fed.R.Civ.P. 56(d). For the reasons set forth below, I respectfully recommend that TIG's motion be granted to the extent it seeks a ruling that (1) Illinois law governs this dispute; (2) under Illinois law, a reinsurer need not demonstrate prejudice to deny coverage to a reinsured which has failed to comply with a policy provision requiring prompt notice of claims and (3) TIG did not provide reinsurance coverage for the period from October 1, 1981 - October 1, 1982. I further recommend that

TIG's motion be denied to the extent it seeks a ruling that AIU breached the Reinsurance Contracts by failing to provide prompt notice of a 2001 claim without prejudice to renewed summary judgment motion after the completion of discovery.

II. Facts

AIU Insurance Company ("AIU") brings this action alleging breach of contract and seeking declaratory relief based on TIG's failure to pay amounts due under nine reinsurance certificates[1] (the "Reinsurance Certificates") (Complaint, ("Compl."), ¶¶ 26-33; Statement of Undisputed Facts in Support of TIG Insurance Company's Motion for Partial Summary Judgment, ("Def's Statement of Facts"), ¶ 3; AIU Insurance Company's Response to TIG's Rule 56.1 Statement ("Pl's Statement of Facts") ¶ 3)).

AIU issued four umbrella insurance policies to the Foster Wheeler Corporation ("Foster Wheeler") covering the period from October 1, 1978 to October 1, 1982 (Def's Statement of Facts ¶ 2; Pl's Statement of Facts ¶ 2). These were excess insurance policies that covered certain losses to the extent they exceeded

[1]"A certificate of reinsurance is a contract between two insurance companies in which the reinsured company agrees to cede part of its risk to the reinsurer in return for a percentage of the premium. . . . [A] reinsurer's only obligation is to indemnify the primary insurer[.]" Unigard Sec. Ins. Co., Inc. v. N. River Ins. Co., 79 N.Y.2d 576, 582, 594 N.E.2d 571, 574, 584 N.Y.S.2d 290, 293 (1992) (internal quotations omitted).

the limits of Foster Wheeler's primary coverage with Liberty Mutual Insurance Company (Def's Statement of Facts ¶¶ 1,2; Pl's Statement of Facts ¶¶ 1,2). AIU subsequently reinsured its exposure under three of the umbrella insurance policies, covering the period from October 1, 1978 to October 1, 1981, with International Insurance Company ("IIC"), TIG's predecessor company, pursuant to nine Reinsurance Certificates, three of which covered each umbrella policy (Def's Statement of Facts ¶¶ 3, 16; Pl's Statement of Facts ¶¶ 3, 16).

L.W. Biegler, IIC's agent, signed six of the nine Reinsurance Certificates on behalf of IIC (Declaration of Julie Rodriguez Aldort, dated April 7, 2009 ("Aldort Decl."), Exhs. 13-15, 19-22; Def's Statement of Facts ¶ 18, Pl's Statement of Facts ¶ 18). The other three certificates were signed by R.G. Adams who, according TIG, was employed by L.W. Biegler (Aldort Decl. Exhs. 16-18; Declaration of Norman R. Reid, dated March 25, 2009 ("Reid Decl."), ¶ 16). The face of each of the Reinsurance Certificates reads "CERTIFICATE OF FACULTATIVE INSURANCE ISSUED BY" International Insurance Company and displays the logo of Crum & Forster Insurance Companies, IIC's corporate parent (Aldort Decl. Exhs. 13-21; Declaration of Michael Staley, dated March 31, 2009 ("Staley Decl."); Memorandum of Law in Opposition to TIG's Motion for Partial Summary Judgment, ("Pl's Opp."), at 6; TIG

Insurance Company's Reply Memorandum of Law in Support of its Motion for Partial Summary Judgment, ("Def's Reply"), at 8 n.13).

In the Reinsurance Certificates, AIU agrees to provide "[p]rompt notice . . . to [IIC] of any occurrence or accident which appears likely to involve" the Reinsurance Certificates, and IIC is obligated to indemnify AIU for payments AIU makes to Foster Wheeler pursuant to the umbrella insurance policies (Def's Statement of Facts ¶ 5; Pl's Statement of Facts ¶ 5; Staley Decl. Exhs. A-I).

Foster Wheeler was a manufacturer of boilers and other steam-generating and heat-exchange equipment, and, since the late 1970s, it has been the subject of thousands of asbestos-related personal injury claims (Def's Statement of Facts ¶ 26; Pl's Statement of Facts ¶ 26). In February 2001, certain underwriters at Lloyd's, London and various other insurance companies that did business in the London insurance market brought a declaratory judgment action (the "Coverage Litigation") in New York State court against Foster Wheeler and many of its insurers seeking a declaration of the obligations of Foster Wheeler and its insurers with respect to asbestos-related bodily injury claims (Def's Statement of Facts ¶ 27; Pl's Statement of Facts ¶ 27, Aldort Decl. Ex. 5). Foster Wheeler then filed a third-party complaint seeking declaratory relief against AIU and eleven of its other excess insurers seeking a declaration that these excess insurers

were responsible for the defense and indemnity costs of asbestos-related bodily injury claims against Foster Wheeler (Def's Statement of Facts ¶ 28; Pl's Statement of Facts ¶ 28; Aldort Decl. Ex. 6). On June 30, 2006, Foster Wheeler, AIU and other American International Group, Inc. member companies settled the third-party action and AIU began making payments to Foster Wheeler pursuant to the settlement agreement (Def's Statement of Facts ¶ 37; Pl's Statement of Facts ¶ 37; Compl. ¶ 21).

On January 25, 2007, AIU sought reimbursement for these settlement payments pursuant to the Reinsurance Certificates by submitting a reinsurance claim to Riverstone, an affiliate of TIG, and attaching the settlement agreement between Foster Wheeler and AIU (Pl's Statement of Facts ¶ 39; Def's Statement of Facts ¶¶ 38-39; Staley Decl. Ex. J). On February 2, 2007, Riverstone responded to AIU's January 25 letter by citing the prompt notice provision described above, requesting a series of documents related to the Foster Wheeler claim and reserving its rights under the Reinsurance Certificates (Def's Statement of Facts ¶ 40; Pl's Statement of Facts ¶ 40; Staley Decl. Ex. K).

Thereafter, AIU commenced this action against TIG, alleging that TIG had breached the Reinsurance Certificates by failing to indemnify AIU for its share of the settlement payments (Compl. ¶ 28). AIU claims that it has submitted over $16.6 million in invoices to TIG in connection with the Foster Wheeler

Settlement (Pl's Statement of Facts ¶ 42; Staley Decl. Ex. P). TIG claims that AIU breached the prompt notice provision of the Reinsurance Certificates and that TIG is, therefore, not obligated to indemnify AIU under the Reinsurance Certificates (Amended Answer, dated April 22, 2008, at 14).

TIG now seeks partial summary judgment, or, alternatively, an order narrowing the issues for trial pursuant to Fed.R.Civ.P. 56(d), resolving certain factual and legal issues. Specifically, TIG first seeks a ruling that Illinois law governs this dispute and that TIG may, therefore, deny coverage without showing prejudice from untimely notice. Second, TIG seeks a ruling that AIU breached the Reinsurance Contracts by providing late notice of the 2001 claim. Third, TIG seeks a ruling that it did not provide reinsurance coverage for the period from October 1, 1981 - October 1, 1982.

III. Analysis

A. Summary Judgment Standards

The standards applicable to a motion for summary judgment are well-settled and require only brief review.

> Summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). This form of relief is appropriate when, after discovery, the party -- here plaintiff -- against whom

> summary judgment is sought, has not shown that evidence of an essential element of her case -- one on which she has the burden of proof -- exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This form of remedy is inappropriate when the issue to be resolved is both genuine and related to a disputed material fact. An alleged factual dispute regarding immaterial or minor facts between the parties will not defeat an otherwise properly supported motion for summary judgment. See Howard v. Gleason Corp., 901 F.2d 1154, 1159 (2d Cir. 1990). Moreover, the existence of a mere scintilla of evidence in support of nonmovant's position is insufficient to defeat the motion; there must be evidence on which a jury could reasonably find for the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).
>
> If the movant demonstrates an absence of a genuine issue of material fact, a limited burden of production shifts to the nonmovant, who must "demonstrate more than some metaphysical doubt as to the material facts," and come forward with "specific facts showing that there is a genuine issue for trial." Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993). If the nonmovant fails to meet this burden, summary judgment will be granted against it. Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1224 (2d Cir. 1994).

Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 84 (2d Cir. 2004); accord Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 204 (2d Cir. 2009), citing Celotex Corp. v. Catrett, supra, 477 U.S. at 322-23 ("the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment"); Rubens v. Mason, 527 F.3d 252, 254 (2d Cir. 2008); Jeffreys v. City of New York, 426 F.3d 549, 553-54 (2d Cir. 2005).

"In determining whether a genuine issue of material fact exists, a court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant . . . . Stated more succinctly, '[t]he evidence of the non-movant is to be believed.'" Lucente v. Int'l Bus. Machs. Corp., 310 F.3d 243, 253-54 (2d Cir. 2002), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); accord Jeffreys v. City of New York, supra, 426 F.3d at 553 ("Assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment.") (internal quotations omitted); see also Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 142 (2d Cir. 2004); Dallas Aerospace, Inc. v. CIS Air Corp., 352 F.3d 775, 780 (2d Cir. 2003).

"Material facts are those which 'might affect the outcome of the suit under the governing law,' and a dispute is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Coppola v. Bear Stearns & Co., 499 F.3d 144, 148 (2d Cir. 2007), quoting Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 248; accord McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007). "'[I]n ruling on a motion for summary judgment, a judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [non-movant] on the evidence presented[.]'"

Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 788 (2d Cir. 2007), quoting Readco, Inc. v. Marine Midland Bank, 81 F.3d 295, 298 (2d Cir. 1996).

Fed.R.Civ.P. 56(f) permits a court to deny or stay a motion for summary judgment on the ground that additional discovery is necessary. However, a party attempting to assert an argument under Rule 56(f) must meet a stringent test. Specifically, a party relying on Rule 56(f) must submit an affidavit setting forth "the nature of the uncompleted discovery; how the facts sought are reasonably expected to create a genuine issue of material fact; what efforts the affiant has made to obtain those facts; and why those efforts were unsuccessful." Paddington Partners v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994), citing Hudson River Sloop Clearwater, Inc. v. Dep't of Navy, 891 F.2d 414, 422 (2d Cir. 1989) and Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 926 (2d Cir. 1985); accord Martinson v. Menifee, 02 Civ. 9977 (LTS)(HBP), 2007 WL 2106516 at *6 (S.D.N.Y. July 18, 2007) (Swain, D.J.); see Contemporary Mission, Inc. v. U.S. Postal Serv., 648 F.2d 97, 107 (2d Cir. 1981) ("A 'bare assertion' that the evidence supporting a plaintiff's allegation is in the hands of the defendant is insufficient to justify a denial of a motion for summary judgment under Rule 56(f).").

B. Choice of Law

TIG first moves for summary judgment on the issue of choice of law. Specifically, TIG seeks a ruling that Illinois law governs this dispute and that TIG need not, therefore, prove prejudice from late notice.

1. Admissibility of the Ahrenstedt Declaration

As a preliminary matter, TIG contends that the declaration of Werner Ahrenstedt, which attaches five proof of loss documents allegedly sent from AIU to IIC in Maryland between 1990 and 1996, should not be considered to the extent that it contains statements not within Ahrenstedt's personal knowledge because it does not comply with Rule 56(e) of the Federal Rules of Civil Procedure.

Rule 56(e) provides that affidavits submitted in support of or in opposition to a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." See also SCR Joint Venture L.P. v. Warshawsky, 559 F.3d 133, 138 (2d Cir. 2009). Furthermore, "[w]here a party wishes to have a court consider documents which are not yet part of the court's record, the documents must be attached to and authenticated by an appropriate affidavit and the

affiant must be a competent witness through whom the documents could be received into evidence at trial." New York ex rel. Spitzer v. Saint Francis Hosp., 94 F. Supp. 2d 423, 426 (S.D.N.Y. 2000) (Conner, D.J.), citing Crown Heights Jewish Cmty. Council, Inc. v. Fischer, 63 F. Supp. 2d 231, 241 (E.D.N.Y. 1999).

Ahrendstedt is a senior supervisor in AIU's Excess Claims Department and has been employed by AIU or its affiliates for more than 20 years (Declaration of Werner Ahrenstedt, dated June 1, 2009, ("Ahrenstedt Decl.") ¶ 1). He states that he reviewed AIU's files concerning the Reinsurance Certificates and located the documents attached to his declaration in those files (Ahrenstedt Decl. ¶¶ 3-4). He further states that AIU "appears to have distributed" one proof of loss to [IIC] at a Silver Springs, Maryland Location" and that the other four proofs of loss were "also submitted to International's Silver Spring Maryland address" (Ahrenstedt Decl. ¶¶ 5-9).

Ahrenstedt does not claim to have personal knowledge of the submission of the proofs of loss attached to his declaration and therefore the portions of his declaration referring to such submission will be disregarded. See Larouche v. Webster, 175 F.R.D. 452, 455 (S.D.N.Y. 1996) (Lowe, D.J.), citing United States v. Alessi, 599 F.2d 513, 515 (2d Cir. 1979) ("[a]ny portion of an affidavit that is not based on personal knowledge should be stricken").

The attached proofs of loss may nonetheless be considered because they are properly authenticated by Ahrenstedt's declaration. A document is properly authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed.R.Evid. 901(a). This requirement may be met by circumstantial evidence, United States v. Tin Yat Chin, 371 F.3d 31, 37 (2d Cir. 2004), and by "[a]ppearance, contents, substance . . . or other distinctive characteristics, taken in conjunction with circumstances." Fed.R.Evid. 901(b)(4). Here, Ahrenstedt, an AIU employee, states that he located the proofs of loss in AIU's files pertaining to the Reinsurance Certificates. Furthermore, the documents were all prepared on AIU letterhead or prominently display AIU's name and address and four of the five reference the specific AIU policies reinsured by the Reinsurance Certificates. On these facts, a reasonable juror could conclude that these documents are in fact proof of loss documents generated by AIU. See United States v. Tin Yat Chin, supra, 371 F.3d at 38, quoting United States v. Pluta, 176 F.3d 43, 49 (2d Cir. 1999) ("Rule 901's requirements are satisfied 'if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.'").

TIG also claims that the attachments to the Ahrendstedt Affidavit are hearsay (Def's Reply at 5). AIU offers these proof of loss documents for two different purposes: (1) to show that

notices under the Reinsurance Certificates were submitted to Silver Spring, Maryland (Pl's Opp. at 18), and (2) to show that TIG received notice satisfying the prompt notice provision prior to 2007 (Pl's Opp. at 22-23). In both instances, the documents are relevant for the mere fact that they were submitted, and not for the truth of their contents. See United States v. Harwood, 998 F.2d 91, 97 (2d Cir. 1993), citing United States v. Cardascia, 951 F.2d 474, 486-87 (2d Cir. 1991) ("[s]tatements may occasionally be offered, not to prove their truth, but solely for the limited purpose of proving that they were made . . . if the mere fact that they were made is relevant to some issue in the case"); Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991) (document is not hearsay if "offered for the purpose of proving something other than the truth of the matters stated therein, such as whether appellees had notice"). Therefore, although the Ahrenstedt Declaration will be disregarded to the extent it aeta forth facts not within Ahrenstedt's personal knowledge, the attached proofs of loss are admissible and will be considered below.

2. Choice of Law Analysis

Since the Court's subject matter jurisdiction is predicated on diversity of citizenship, New York's choice of law

rules control the choice of law issue. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941); Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1538-39 (2d Cir. 1997). In the absence of an express contractual provision designating the applicable law, New York courts apply the law of the forum which is the "center of gravity" or that has the most significant "grouping of contacts" in contract cases. Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 317, 642 N.E.2d 1065, 1068, 618 N.Y.S.2d 609, 612 (1994); accord Lazard Freres & Co. v. Protective Life Ins. Co., supra, 108 F.3d at 1539. As explained by the Court of Appeals in Tri-State Employment Servs., Inc. v. Mountbatten Sur. Co., 295 F.3d 256, 260-261 (2d Cir. 2002):

> Courts in New York . . . apply a "center of gravity" or "grouping of the contacts" approach to choice-of-law issues in contract cases. Under this approach, courts may consider a variety of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties. See In re Allstate Ins. Co. and Stolarz, 81 N.Y.2d 219, 227, 597 N.Y.S.2d 904, 613 N.E.2d 936 (1993). "[T]he traditional choice of law factors" -- the places of contracting and performance -- are "given heavy weight in [this] analysis." Id. at 226, 597 N.Y.S.2d 904, 613 N.E.2d 936 (internal quotation marks omitted).

See also Alderman v. Pan Am World Airways, 169 F.3d 99, 103 (2d Cir. 1999) ("Under New York's choice-of-law rules, the interpretation and validity of a contract is governed by the law of the

jurisdiction which is the 'center of gravity' of the transaction."); Beatie & Osborn LLP v. Patriot Scientific Corp., 431 F. Supp. 2d 367, 379 (S.D.N.Y. 2006) (Leisure, D.J.) (same); U.S. Fidelity & Guar. Co. v. Petroleo Brasileiro S.A.-Petrobras, 98 Civ. 3099 (JGK), 2001 WL 300735 at *21 (S.D.N.Y. Mar. 27, 2001) (Koeltl, D.J.) (same). In reinsurance cases, "the state where the reinsurance certificate issued and the location where performance is expected, i.e. the place to which the ceding insurer must make its demand for payment, typically control for purposes of choice of law." Folksamerica Reinsurance Co. v. Republic Ins. Co., 03 Civ. 0402 (HB), 2003 WL 22852737 at *5 (S.D.N.Y. Dec. 2, 2003) (Baer, D.J.), vacated on other grounds, 182 Fed. App'x 63 (2d Cir. 2006), citing Christiania Gen. Ins. Corp. v. Great Am. Ins. Co., 979 F.2d 268, 274 (2d Cir. 1992); accord Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela, 991 F.2d 42, 46 n.6 (2d Cir. 1993); Arkwright-Boston Mfrs. Mut. Ins. Co. v. Calvert Fire Ins. Co., 887 F.2d 437, 439 (2d Cir. 1989); Nat'l Union Fire Ins. Co. of Pittsburgh v. Travelers Indem. Co., 210 F. Supp. 2d 479, 484 (S.D.N.Y. 2002) (Conner, D.J.); TIG Premier Ins. Co. v. Hartford Acc. & Indem. Co., 35 F. Supp. 2d 348, 350 (S.D.N.Y. 1999) (Rakoff, D.J.); Constitution Reinsurance Corp. v. Stonewall Ins. Co., 980 F. Supp. 124, 126-27 (S.D.N.Y. 1997) (Leisure, D.J.); 1A Lee R. Russ, Steven Plitt, Daniel

Maldonado & Joshua D. Rogers et. al., Couch on Insurance § 9:14 (3d Ed. 1995).

TIG contends that Illinois law governs this dispute, while AIU contends that New York or New Jersey law governs. The center of gravity factors favor application of Illinois law. The Reinsurance Certificates state that "the Company [AIU] has caused this Reinsurance Certificate to be signed by its President and Secretary at New York, New York, but the same shall not be binding upon the Reinsurer unless countersigned by an authorized representative of the Reinsurer" (Aldort Decl. Exhs. 13-21). The Reinsurance Certificates were counter-signed by IIC's representative in Chicago and therefore became effective there.[2] Thus, the issuance of the Reinsurance Certificates, one of the factors to be given the most weight in the choice of law analysis, occurred in Illinois. See Folksamerica Reinsurance Co. v. Republic Ins. Co., supra, 2003 WL 22852737 at *5 (reinsurance certificates

[2]Six of the nine certificates produced by TIG indicate that they were counter-signed in Chicago (Aldort Decl. Exs. 13 - 18). While three of the certificates do not indicate where they were signed, AIG has offered the declaration of Norman Reid stating that he personally signed these three policies in Chicago (Reid Decl. ¶ 16). Because the certificates display a logo reading "Crum & Forster, New York, New York," AIU contends that the policies were issued in New York (Pl's Opp. at 6), but does not produce any evidence to rebut the Reid Declaration or to establish the state in which the certificates were countersigned. Furthermore, AIU's contention that IIC signed the certificates in New York (Pl's Opp. at 7) is plainly contradicted by the face of the Reinsurance Certificates (Aldort Decl. Exhs. 13-21).

"issued" in New York, when reinsurer's representative counter-signed the certificates already signed by the ceding insurer's representative); Restatement (Second) of Conflicts § 188 cmt. e ("the place of contracting is the place where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract binding effect[.]").

With respect to the place of performance, both parties agree that a reinsurance contract is performed where cedent submits claims (Def's Mem. at 19; Pl's Opp. at 16-17). The parties disagree, however, as to the place where claims were submitted under the Reinsurance Contracts. Defendants contend that L.W. Biegler in Illinois administered the claims (Def's Statement of Facts ¶ 25). In support of this contention, TIG produces the declaration of a former Senior Vice President at L.W. Biegler (Reid Dec. ¶ 18) and a report of a potential claim sent from AIU to L.W. Biegler in Chicago (Reid Decl. Ex. 1).

In opposition, AIU produces the January 2007 notice that AIU sent to Riverstone, New Hampshire (Staley Decl. Ex. J), five proof of loss documents that AIU allegedly sent to IIC in Silver Spring, Maryland,[3] and a letter dated February 10, 1993,

[3]I note that the proofs of loss do not in themselves establish such mailing because AIU proffers no evidence that copies of these documents were ever sent to IIC. See Tufano v. Riegel Transp., Inc., No. CV 03-0977 (JO), 2006 WL 335693 at *4-*5 (E.D.N.Y. Feb. 11, 2006) (file copy did not create presumption (continued...)

from Crum & Forster's Chicago office instructing Johnson & Higgins, AIU's agent, that all environmental matters be forwarded to Crum & Forster's New Jersey office (Declaration of Marc L. Abrams, dated June 3, 2009 ("Abrams Decl."), Ex. V). In addition, AIU produces a memo from C. Russell Sweet at L.W. Biegler in New York to Bart Wescott at L.W. Biegler in Chicago stating that three of the Reinsurance Certificates were mistakenly sent to the New York office and expressing concern about problems identifying the certificates if claims are sent to New York or New Jersey (Abrams Decl. Ex. S).

This evidence does not support an inference that the place of performance was New York because AIU has presented no evidence that claims were ever intentionally sent to New York or that the Reinsurance Certificates required claims be sent to New

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[3](...continued)
that document was mailed absent testimony of the sender or evidence that it was mailed pursuant to office procedures); Mount Vernon Fire Ins. Co. v. East Side Renaissance Assocs., 893 F. Supp. 242, 245 (S.D.N.Y. 1995) (Scheindlin, D.J.) ("[p]roof of mailing may be established either by offering testimony of the person who actually mailed the letter or by showing that it was the regular office practice and procedure to mail such a letter."); Bronia, Inc. v. Ho, 873 F. Supp. 854, 859 (S.D.N.Y. 1995) (Conner, D.J.) (same). Moreover, the Reid Declaratiion states that IIC never had an office in Silver Spring, Maryland (Reid Decl. ¶ 22). However, even if AIU established that it sent proofs of loss to Maryland, it would not change the conclusion below that performance under the Reinsurance Certificates occurred in many different states and, thus, the place of performance factor does not favor application of any particular state's law.

York. Although it does appear that some claims were sent to New Jersey, it is but one of many states to which claims were submitted. Indeed, because AIU and TIG have presented no evidence that the Reinsurance Certificates themselves contemplated a particular place of performance[4], and have presented evidence that claims were sent to many different states, the place of performance should not be afforded much weight in this choice of law analysis. See Restatement (Second) of Conflicts § 188 cmt. e ("the place of performance can bear little weight in the choice of the applicable law when (1) at the time of contracting it is either uncertain or unknown, or when (2) performance by a party is to be divided more or less equally among two or more states with different local law rules on the particular issue").

AIU contends that because the underlying insured is located in New Jersey and the underlying insurance policy was issued in New York, the location of the subject matter of the Reinsurance Contract favors application of New York or New Jersey law (Pl's Opp. at 20). As an initial matter, the subject matter of the contract -- indemnity for claims submitted under the Foster Wheeler umbrella policies -- was not confined to New

[4]AIU's contention that the "immediate notice provision" required performance in New York (Pl's Opp. at 19) is without merit. Elsewhere in its brief, AIU claims that the immediate notice provision was never a part of the Reinsurance Certificates (Pl's Opp. at 24). As a matter of logic then, the language of this provision cannot factor into a choice of law analysis.

Jersey or New York. Moreover, while the location of the underlying insured and the place where the underlying policy is issued may be considered in determining the law applicable to reinsurance disputes, such contacts are not dispositive. See Nat'l Union Fire Ins. Co. of Pittsburgh v. Am. Re-Insurance Co., 351 F. Supp. 2d 201, 207 (S.D.N.Y. 2005) (Chin, D.J.) (finding that these factors, along with the issuance of the reinsurance policy in Ohio and the negotiation of the policy in Ohio favored application of Ohio law); Nat'l Union Fire Ins. Co. of Pittsburgh v. Travelers Indem. Co., supra, 210 F. Supp. 2d at 484 (applying New York law because "[w]hile New Jersey is the corporate home of Integrated Packaging and the location of the insured property, Integrated Packaging is not a party in the instant dispute and has already received payment pursuant to the terms of the National Union policy."); see also Jefferson Ins. Co. of New York v. Fortress Re, Inc., 616 F. Supp. 874, 877 (S.D.N.Y. 1984) (Haight, D.J.) (location of the risk carries less weight in reinsurance cases than in direct insurance cases).

AIU contends that the location of the underlying insured should be given weight in this particular case because "unlike in a standard reinsurance relationship, there was direct contact" between IIC and Foster Wheeler (Pl's Opp. at 20). However, the only evidence of this "direct contact," is an endorsement that is part of the Reinsurance Certificates that

names Foster Wheeler Limited and Foster Wheeler Power Products as additional insureds (e.g. Staley Decl. Ex. B at TIG 0468). Although the endorsement does state that it is "Issued to Foster Wheeler Corp.," it is part of an agreement between AIU and IIC, is not addressed to Foster Wheeler, and there is no evidence that the endorsement was ever sent to Foster Wheeler by IIC.

The remaining "center of gravity" factors equally favor application of New York or Illinois law. IIC was an Illinois Corporation with its principal place of business in Illinois (Def's Statement of Facts ¶ 15, Aldort Decl. Ex. 23). TIG is a California Corporation with its principal place of business in New Hampshire (Pl's Statement of Facts ¶ 17; Def's Statement of Facts ¶ 17). AIU is a New York Corporation, with its principal place of business in New York (Pl's Statement of Facts ¶ 14; Def's Statement of Facts ¶ 14). Negotiation of the Reinsurance Certificates took place in Chicago and New York. AIU sent "Reinsurance Request Notes" referencing the AIU umbrella policies from New York to "L.W. Biegler (International Insurance Co.)" in Chicago (Def's Statement of Facts ¶ 19; Pl's Statement of Facts ¶ 19; Aldort Decl. Group Ex. A) and the insurance binders for the Reinsurance Certificates were printed on the letterhead of L.W. Biegler's Chicago Office and issued to Johnson & Higgins in New York (Def's Statement of Facts ¶ 21; Pl's Statement of Facts ¶ 21; Aldort Decl. Group Ex. B).

Finally, AIU contends that summary judgment is precluded on the issue of choice of law because TIG has previously taken the position that New York law applies to this dispute. Specifically, AIU cites the statement of a Riverstone employee in an internal memorandum that "in order to prevail on late notice, we have to show prejudice" as well as previous discovery motions citing New York law (Pl's Opp. at 20). These contentions are without merit. AIU cites no authority for the proposition that the statement of a party's employee in an internal memorandum can bind that party to a choice of law position in future litigation. Moreover, application of the law of a certain state to one issue in a case does not necessarily imply that that state's law should apply to all issues in the case. See generally In re Air Crash at Belle Harbor, New York on November 12, 2001, 02 Civ. 439 (RWS), 2008 WL 6515109 at *5-*6 (S.D.N.Y. Oct. 10 2008) (Sweet, D.J.).

Thus, most of the relevant contacts in this dispute equally favor application of New York or Illinois law and the only factor that favors New York or New Jersey law is entitled little weight in this choice of law analysis. Therefore because the Reinsurance Contracts were issued in Illinois, I conclude that Illinois law should govern this dispute.

AIU opposes summary judgment on the choice of law issue, relying on Fed.R.Civ.P. 56(f) and claiming that it has not

taken sufficient discovery to oppose summary judgment (Pl's Opp. at 1; Abrams Decl. ¶¶ 3, 7-8). AIU states that it requires the deposition of a corporate representative and document discovery about the domicile of TIG and its affiliates (Abrams Decl. ¶ 7). Specifically, AIU seeks information about Riverstone, which it contends "assumed and managed" TIG and its affiliates from New Hampshire beginning in 1997 (Abrams Decl. ¶ 7).

Although the domicile of TIG is relevant to the choice of law analysis, AIU has not shown how the information they identify is reasonably expected to lead to a genuine issue of material fact on the choice of law issue. Even if IIC was "assumed" by a company headquartered in New Hampshire, this would not change the fact that the contract was issued in Illinois and that IIC was domiciled in Illinois at the time of contracting. It would not weigh in favor of the application of New York law, and AIU has not asserted any other contacts with New Hampshire or argued that New Hampshire law should apply to this dispute.

Furthermore, AIU has failed to set forth what efforts it has made to gather information about TIG's domicile and why those efforts were unsuccessful. Failure to address these factors does not necessarily preclude relief under Rule 56(f), but does weigh against its being granted. See Paddington Partners v. Bouchard, supra, 34 F.3d at 1139. Moreover, AIU has not even requested any discovery on TIG's corporate structure (Sup-

plemental Declaration of Julie Rodriguez Aldort, dated June 17, 2009, ("Aldort Supp. Decl."), ¶ 12, Exhs. 1 and 2). See Paddington Partners v. Bouchard, supra, 34 F.3d at 1139 ("Requests for discovery in the face of motions for summary judgment put forth by parties who were dilatory in pursuing discovery are disfavored").

Similarly, AIU's contention that further discovery is required on the issue of whether IIC designated Crum & Forster New Jersey to receive notices under the Reinsurance Certificates is also without merit. Although this information would also be relevant to the choice of law inquiry, it would not create an issue of material fact because it would not alter the conclusion, based on the evidence already submitted, that the place of performance does not favor the application of any particular state's law because performance under the Reinsurance Certificates occurred in many different states. See Restatement (Second) of Conflicts § 188 cmt. e. Furthermore, AIU has again failed to identify what efforts it has made to gather this information or why such efforts have been unsuccessful.

Therefore, because (1) the additional discovery identified by AIU would not create an issue of material fact precluding summary judgment, (2) AIU's affidavits do not state what efforts have been made to gather this information or why such efforts have been unsuccessful, and (3) AIU has been dilatory in pursuing

the identified discovery, summary judgment on the choice of law issue should not be denied or stayed pursuant to Rule 56(f).

3. Prejudice

Because Illinois law applies to this dispute, prompt notice is a prerequisite to coverage under the Reinsurance Certificates. Keehn v. Excess Ins. Co. of Am., 129 F.2d 503, 505 (7th Cir. 1942); Allstate Ins. Co. v. Employers Reinsurance Corp., 441 F. Supp. 2d 865, 875 (N.D. Ill. 2005) ("[t]he law in Illinois . . . is clear that a notice requirement, such as the one contained in the [reinsurance] [t]reaty, is a condition precedent to coverage); 22A Paul Coltoff, Stephen Lease, Thomas Muskus & David Yanes, Illinois Law & Practice: Insurance § 580 (1999) ("[t]he failure of the reinsured to give the reinsurer notice of a loss in accordance with the terms of the reinsurance contract constitutes a bar to recovery by the reinsured against the reinsurer"). Thus, "when the insured fails to comply with a prompt notice requirement, the insurer may deny liability, regardless of whether it has been prejudiced by the delay." Allstate Ins. Co. v. Employers Reinsurance Corp., supra, 441 F. Supp. 2d at 875, citing INA Ins. Co. of Ill. v. City of Chicago, 62 Ill. App. 3d 80, 83, 379 N.E.2d 34, 37, 19 Ill. Dec. 519, 522 (Ill. App. Ct. 1st Dist. 1978); accord Keehn v. Excess Ins. Co. of Am., supra, 129 F.2d at 505; see also Country Mut. Ins. Co. v.

Livorsi Marine, Inc., 222 Ill. 2d 303, 317, 856 N.E.2d 338, 346, 305 Ill. Dec. 533, 541 (2006); West Am. Ins. Co. v. Yorkville Nat'l Bank, 388 Ill. App. 3d 769, 778-79, 902 N.E.2d 1275, 1283, 327 Ill. Dec. 889, 897 (Ill. App. Ct. 3d Dist. 2009); Employers Reinsurance Corp. v. E. Miller Ins. Agency, Inc., 332 Ill. App. 3d 326, 336-37, 773 N.E.2d 707, 715, 265 Ill. Dec. 943, 951 (Ill. App. Ct. 1st Dist. 2002); Northbrook Property & Cas. Ins. Co. v. Applied Sys., Inc., 313 Ill. App. 3d 457, 464, 729 N.E.2d 915, 920-21, 246 Ill. Dec. 264, 269-70 (Ill. App. Ct. 1st Dist. 2000).

AIU contends that the Illinois Supreme Court has not yet addressed whether a reinsurer that refuses coverage on the ground of late notice needs to show prejudice and that this issue is, therefore, "an open question" (Pl's Opp. at 16). Neither TIG's research nor my own suggest a contrary conclusion. However, neither additional discovery nor a plenary trial by jury will shed any light on the answer to a legal question and the uncertain state of Illinois law is not, therefore, an obstacle to a grant of summary judgment. See 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice & Procedure § 2725 (3d ed. 1998) ("The fact that difficult questions of law exist . . . is not in and of itself a ground for denying summary judgment inasmuch as refusing to grant the motion does not obviate the court's obligation to make a difficult decision"); see also Schwartzberg v. Califano, 480 F. Supp. 569, 578 (2d Cir. 1979);

SEC v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir. 1978). Furthermore, I find AIU's argument to be unconvincing on the merits. Although some jurisdictions have refused to relieve a reinsurer from liability in late notice cases in the absence of prejudice, AIG cites no Illinois authorities endorsing this result. To the contrary, Keehn v. Excess Ins. Co. of Am., supra, 129 F.2d at 505 and Allstate Ins. Co. v. Employers Reinsurance Corp., supra, 441 F. Supp. 2d at 875, both of which were decided by federal courts sitting in Illinois, have addressed the issue of whether, under Illinois law, a reinsurer needs to show prejudice from a lack of timely notice in order to deny liability, and both have rejected a prejudice requirement. Keehn was decided more than 65 years ago, and neither AIG's research nor my own have disclosed any Illinois authorities rejecting or even criticizing the decision. Given these decisions and the complete absence of any contrary authority decided under Illinois law, I conclude that Keehn and Allstate accurately state Illinois law.

Therefore, because TIG has demonstrated the absence of a genuine issue of material fact with respect to the choice-of-law issue and AIU has not produced any facts showing a genuine issue of fact for trial or made a sufficient showing to justify additional discovery under Fed.R.Civ.P. 56(f), I respectfully recommend that summary judgment on the issue of choice of law be granted in TIG's favor. Because Illinois law on the subject is

clear, I further recommend that summary judgment be granted in TIG's favor on the issue of whether a reinsurer needs to demonstrate prejudice to deny coverage to a reinsured which has failed to comply with a policy provision requiring prompt notice of claims.

C. Timeliness of Notice

TIG next seeks summary judgment on the issue of breach of contract. Specifically, TIG seeks summary judgment that AIU breached the Reinsurance Certificates by providing late notice of the claim at issue. According to TIG, AIU's obligation to provide notice arose in July 2001 when Foster Wheeler filed its third-party complaint against AIU (Def's Mem. at 9, 13). TIG contends that this obligation arose from two provisions in the Reinsurance Certificates: an "immediate notice" provision, stating that "'immediate advice' shall be given 'of all suits or demands in excess of Primary Limits'" (Def's Mem. at 9), and a prompt notice provision, stating that "[p]rompt notice shall be given to the Reinsurer by the Company of any occurrence or accident which appears likely to involve this reinsurance" (Def's Mem. at 9). TIG contends that AIU failed to give notice of the claim until January 2007 and that this delay constitutes late notice as a matter of law (Def's Mem. at 16-17).

1. The Immediate Notice Provision

There are genuine issues of fact as to whether AIU is bound by the "immediate notice" provision contained in the Reinsurance Certificates. Only two of the nine certificates produced by TIG contain such a provision, and these two certificates are not signed (Staley Dec. Ex. A at TIG 426, Ex. G at TIG 38317). In addition, there is no evidence that the certificates actually issued to AIU contained an immediate notice provision. TIG contends that this does not create an issue of fact because AIU has previously misplaced a file pertaining to another claim under the Reinsurance Certificates (Def's Reply at 4). TIG's argument misallocates the burden of production on a summary judgment motion. As movant, TIG bears the initial burden of showing the absence of a genuine issue of fact. Saunders v. Citibank, 305 F. App'x 750, 750 (2d Cir. 2009). If the movant fails to sustain this burden, summary judgment must be denied, even where the movant submits no evidence. Vermont Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004) ("If the evidence submitted in support of the summary judgment motion does not meet the movant's burden of production, then 'summary judgment must be denied even if no opposing evidentiary matter is presented." (emphasis in original), quoting Giannulo v. City of New York, 322 F.3d 139, 140-41 (2d Cir. 2003). Because TIG has

not carried its initial burden, any deficiencies in AIU's response are immaterial.

TIG also proffers the declaration of Norman Reid, who states that all nine policies contained the immediate notice provision (Reid Decl. ¶ 21). However, plaintiffs have not had the opportunity to depose Reid. Although the affidavit submitted by AIU pursuant to Rule 56(f) does not state what efforts have been made to depose Reid or why such efforts have been unsuccessful, a number of cases have held that summary judgment should be denied when the only evidence supporting the motion is the affidavit of an undeposed witness. See G-I Holdings, Inc. v. Baron & Budd, 01 Civ. 0216 (RWS), 2002 WL 31251702 at *5 (S.D.N.Y. Oct. 8, 2002) (Sweet, D.J.) (denying summary judgment because persons upon whose affidavits summary judgment motion was based had not yet been deposed); Rosen v. Trans World Airlines, Inc., 94 Civ. 0682 (LMM) 1997 WL 107640 at *1 (S.D.N.Y. Mar. 11, 1997) (McKenna, D.J.) (same); see also Paddington Partners v. Bouchard, supra, 34 F.3d at 1139 (failure to describe efforts made to obtain requested discovery and why such efforts were unsuccessful does not invariably preclude relief under Fed.R.Civ.P. 56(f)).

2. Prompt Notice

AIU does not dispute the existence of the prompt notice provision in the Reinsurance Certificates (Pl's Statement of Facts ¶ 5), but contends that this provision was satisfied by (1) proofs of loss sent to TIG's predecessor between 1990 and 1996, and (2) TIG's actual knowledge of its reinsurance exposure through its role as a direct insurer of Foster Wheeler.[5]

a. Proofs of Loss Sent between 1990 and 1996 as Adequate Notice

AIU contends that summary judgment should be denied because there are genuine issues of fact on the issue of whether proofs of loss allegedly sent from AIU to TIG between 1990 and 1996 satisfied the prompt notice provision with respect to AIU's 2007 claim. The five documents submitted by AIU in support of this argument are all proof of loss documents. AIU's name and address appears at the top of each document. The first document (Ahrendstedt Decl. Ex. A) is a proof of loss for partial payment, but does not contain any dollar amounts. The copy submitted is

[5]AIU also argues that TIG did not believe that the primary policies were exhausted in 2003 and, therefore, there is a question of fact as to whether notice was due before that date (Pl's Opp. at 24-25). This argument is without merit, as the question of whether notice is due turns on the cedent's, and not the reinsurer's, reasonable belief as to whether the policies may be involved. Allstate Ins. Co. v. Employers Reins. Corp., supra, 441 F. Supp. 2d at 871 (notice required on "the date at which [cedent] believed that the claim might result in a claim upon [reinsurer]")

addressed to IIC in Silver Springs Maryland, references Foster Wheeler and asbestosis but provides no substantive information concerning either the claim or policy involved. Exhibits B and C to the Ahrendstedt Declaration are also proofs of loss for partial payment. Exhibit B lists the "amount of checks" as $5756.50; the amount is illegible on Exhibit C. Exhibits B and C are not specifically addressed to IIC, but IIC's name and the Maryland address appear in the upper right corner of each. They also list Foster Wheeler as the assured, "48 Insulations" as the claimant, identify the loss as "asbestos" and reference at least one of the umbrella policy numbers.[6] Exhibits E and F to the Ahrendstedt Declaration are cover letters addressed to IIC at the Maryland address and proofs of loss for $12,451 and $7,470.60, respectively, for amounts expended in defending a declaratory judgment related to Foster Wheeler.

AIU contends that the proof of loss documents create a genuine issue of fact as to whether AIU satisfied its obligation under the Reinsurance Certificates to provide prompt notice of the "occurrence or accident" which gave rise to its instant claim.

As an initial matter, the mere presence of these documents in AIU's files does not establish that the proofs of

[6]Exhibit B contains all three policy numbers, Exhibit C contains one policy number and many illegible policy numbers.

loss were received by TIG. See Boomer v. AT&T Corp., 309 F.3d 404, 415 (7th Cir. 2002); Kent Meters, Inc. v. Emcol of Ill., Inc., 768 F. Supp. 242, 245 (N.D. Ill. 1991). Moreover, the Reid affidavit states that IIC never had offices in Silver Spring, Maryland (Reid Decl. ¶ 22). However, even if AIU established that these documents were received by IIC, they would not create an issue of fact as to whether AIU satisfied their obligations under the prompt notice provision.

According to AIU, the proofs of loss notified TIG that the original "occurrence," namely Foster Wheeler's being sued for asbestos exposure, would likely involve the Reinsurance Certificates. According to AIU, this notification satisfied the prompt notice requirement with respect to future asbestos-related claims under the Reinsurance Certificates. TIG, on the other hand, contends that notice was required upon receipt of the Foster Wheeler Complaint because "the [2001] Foster Wheeler Claim 'appeared likely to involve' the Reinsurance Agreements" (Def's Mem. 13) and that previous notices cannot have satisfied the prompt notice provision because they pertained to unrelated litigation (Def's Reply at 5).

The issue of what constitutes adequate notice under the Reinsurance Certificates turns on what constitutes an "occurrence or accident" under the Reinsurance Certificates and applicable law. If the five proofs of loss annexed to the Ahrenstedt

Declaration stemmed from the same "occurrence or accident" as the 2007 claim, then the proof of loss documents could create an issue of fact concerning AIU's compliance with the prompt notice provision of the Reinsurance Certificates. On the other hand, if the claims stemmed from different occurrences, then the proof of loss documents do not create an issue of fact on the issue of breach.

The Reinsurance Certificates themselves do not define "occurrence." However, "[t]he standard definition" of occurrence in liability insurance policies is "an accident, event, or continuing condition that results in personal injury or property damage that is neither expected nor intended from the standpoint of an insured party." Black's Law Dictionary 1109 (8th ed. 2004); see Vill. of Camp Point v. Continental Cas. Co., 219 Ill. App. 3d 86, 99, 578 N.E.2d 1363, 1371, 161 Ill. Dec. 717, 725 (Ill. App. Ct. 4th Dist. 1991) ("[o]rdinarily, if an insurance policy uses 'occurrence' without defining the term, the courts inquire whether there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damages." (internal quotations omitted)).

In the context of reinsurance contracts, "occurrence" generally refers to the underlying event that triggers primary coverage rather than the claim by the underlying insured. See Unigard Sec. Ins. Co., Inc. v. N. River Ins. Co., supra, 4 F.3d

at 1065 (under reinsurance policy, "'occurrence[s]' and 'accident[s]' were the exposures to asbestos" and notice was due upon the happening of an "event increasing the likelihood to a 'reasonable possibility' that the reinsurance would be involved in compensating claims based on such exposures or 'occurrences,'"); see also Zenith Ins. Co. v. Employers Ins. of Wausau, 141 F.3d 300, 305 (7th Cir. 1998) (cedent breached provision requiring notice "of any event or development which, in the judgment of the Reinsured, might result in a claim" by providing late notice of case filed against underlying insured); Liberty Mut. Ins. Co. v. Gibbs, 773 F.2d 15, 17 (1st Cir. 1985) (failure to provide notice of suit brought against underlying insured violated reinsurance contract provision requiring that insured "shall upon knowledge of any loss or losses which may give rise to a claim under this policy advise [Lloyd's] thereof as soon as reasonably possible"). But see Ins. Co. of State of Penn. v. Assoc. Int'l Ins. Co., 922 F.2d 516, 522 (9th Cir. 1990) (cross-claim against reinsurer by insured was an occurrence within the meaning of the reinsurance policy).

In this case, the proofs of loss sent between 1990 and 1996 do not pertain to the same "occurrence or accident" as AIU's 2007 claim. The proofs of loss concern the "Forty-Eight Insulations" litigation (Pl's Opp. at 9, 22-23; Abrams Decl. ¶ 9), which involved a corporation that "manufactured products contain-

ing asbestos between the 1920s and 1970" (AIU Insurance Company's Memorandum of Law in Opposition to TIG Insurance Company's Motion to Compel, dated April 30, 2008, ("Pl's Opp. to Motion to Compel"), at 7). Foster Wheeler acquired Forty-Eight Insulations "in or around 1973" (Pl's Opp. at 9). Forty-Eight Insulations was subsequently sued in thousands of actions over asbestos exposure, some of which named Foster Wheeler as a defendant (Pl's Opp. at 9). Additionally, after Forty-Eight Insulations filed for bankruptcy in 1985, the bankruptcy trustee sued AIU and Foster Wheeler's other excess insurers (Pl's Opp. at 9). AIU concedes that the five proof of loss documents it offers pertain only to Forty-Eight Insulations litigation (Pl's Opp. at 9, 22-23; Abrams Decl. ¶ 9).

In previous briefing to this court, AIU has admitted that Foster Wheeler did not acquire Forty-Eight Insulations until "several years after Forty-Eight Insulations had stopped manufacturing asbestos products" (Pl's Opp. to Motion to Compel at 8). Furthermore, AIU has stated that "[t]he Forty-Eight Insulations litigation is separate and apart from the hundreds and thousands of asbestos claims brought against Foster Wheeler directly, which ultimately led to the Foster Wheeler Coverage Litigation" and "AIU is not seeking reimbursement in this proceeding for any settlement or resolution of Forty-Eight Insulations claims" (Pl's Opp. to Motion to Compel at 8-9). Indeed, Foster Wheeler's

third-party complaint describes the underlying claims as alleging "that Foster Wheeler, along with numerous co-defendants, manufactured, sold, distributed, installed, supplied and/or otherwise placed in the stream of commerce asbestos-containing materials" (Aldort Decl. Ex. 6 ¶ 21). The complaint makes no mention of any claims stemming from asbestos exposure by Forty-Eight Insulations.

Under these circumstances, I conclude that the 1990-1996 proofs of loss stemming from the Forty-Eight Insulations litigation did not arise from the same "proximate, uninterrupted, and continuing cause" as AIU's 2007 claim based on suits brought directly against Foster Wheeler for the manufacture, distribution, and installation of asbestos-containing products. See Vill. of Camp Point v. Continental Cas. Co., supra, 219 Ill. App. 3d at 99, 578 N.E.2d at 1371, 161 Ill. Dec. At 725. The 1990-1996 proofs of loss did not, therefore, provide notice of the "occurrence or accident" which gave rise to the claim at issue here and, thus, do not create an issue of fact as to whether AIU breached the prompt notice provision of the Reinsurance Certificates.

b. Actual Notice

AIU next contends that TIG had actual knowledge of Foster Wheeler's third-party complaint and TIG's resulting reinsurance exposure because IIC and three other companies allegedly controlled by Riverstone were sued in the Coverage Litigation as excess insurers of Foster Wheeler (Pl's Opp. at 10, 23). AIU contends that evidence of this actual knowledge of TIG's reinsurance exposure precludes summary judgment on the issue of whether the prompt notice provision was breached (Pl's Opp. at 23).[7]

Nevertheless, TIG's involvement in the Coverage Litigation is insufficient to create an issue of fact as to the prompt notice provision. Although notice from third parties can satisfy

[7]Although TIG contends that AIU's actual notice argument is only relevant as an excuse for a breach of the notice provision and cannot itself constitute performance (Def's Reply at 6), the Illinois courts have held that, "if the insurer receives timely notice of an occurrence from a third party, this actual notice may satisfy the policy requirement." Casualty Indem. Exchange v. Vill. of Crete, 731 F.2d 457, 458 (7th Cir. 1984), citing Ill. Valley Minerals Corp. v. Royal-Globe Ins. Co., 70 Ill. App. 3d 296, 300-01, 388 N.E.2d 253, 256-57, 26 Ill. Dec. 629, 632-33 (Ill. App. Ct. 3d Dist. 1979). Although these cases were decided in the context of direct insurance, courts frequently apply direct insurance principles to the reinsurance context. See, e.g., Keehn v. Excess Ins. Co. of Am., supra, 129 F.2d at 505; Allstate Ins. Co. v. Employers Reins. Corp., supra, 441 F. Supp. 2d at 871-72; Centaur Ins. Co. v. Safety Nat'l Casualty Corp., 92 Civ. 5996, 1993 WL 434056 at *5 (N.D. Ill. Oct. 22, 1993); In re Liquidation of Inter-American Ins. Co. of Ill., 329 Ill. App. 3d 606, 615-16, 768 N.E.2d 182, 191, 263 Ill. Dec. 422, 431 (Ill. App. Ct. 1st Dist. 2002).

policy requirements under Illinois law, reinsurers are not charged with notice based merely on receipt of non-specific information that might lead to discovery of a potential claim. See Centaur Ins. Co. v. Safety Nat. Cas. Corp., supra, 1993 WL 434056 at *4 (coincidental receipt of summons in suit against underlying insured by reinsurer's agent did not constitute adequate notice that the claim may have involved reinsurer); see also Unigard Sec. Ins. Co., Inc. v. N. River Ins. Co., 4 F.3d 1049, 1067 (2d Cir. 1993) (letters from cedent to reinsurer concerning reinsurance agreement covering class of policies did not constitute notice that agreement covering specific policies would be implicated because "[t]o hold that such letters created a duty on the part of [the reinsurer] to investigate . . . [whether the policy] would be affected, would ignore the imperatives of the reinsurance market that reinsurers receive such information from ceding insurers.").

In the context of direct insurance, Illinois courts have declined to impose a burden of investigation on insurers based on information that they receive from third parties. See Board of Educ. v. TIG Ins. Co., 378 Ill. App. 3d 191, 194, 881 N.E.2d 957, 960, 317 Ill. Dec. 471, 474 (Ill. App. Ct. 1st Dist. 2007) ("We will not hold an insurer liable to investigate and determine whether there are possible collateral claims forthcoming from other insureds when some of the insurer's insureds are

sued for damages. Such a holding would vitiate the policy language requiring the [cedent] to immediately notify [the reinsurer] when it learned of such an occurrence."); Am. Family Mut. Ins. Co. v. Blackburn, 208 Ill. App. 3d 281, 288, 566 N.E.2d 889, 893, 153 Ill. Dec. 39, 43 (Ill. App. Ct. 4th Dist. 1991) (coverage in the press of criminal case against insured did not constitute adequate notice of occurrence because policy did not cover intentional acts and "to place a burden on all insurance agents to infer possible policy coverage whenever they read of an act of violence is unreasonable").

AIU's theory of actual notice imposes the type of burden that Illinois courts have declined to impose upon insurers. As discussed above, AIU contends that because IIC, along with three companies allegedly managed by its affiliate, were defendants in the Coverage Litigation, TIG should be charged with notice that a third-party complaint filed in the same action was likely to implicate the AIU reinsurance policies. However, IIC and the three other companies were among 39 defendants named in the Coverage Litigation, were named in connection with excess insurance, rather than reinsurance, policies and were not named in the third-party complaint. Furthermore, AIU was one of 13 third-party defendants named in the third-party complaint, which does not allocate liability among the 13 defendants. Because it is AIU's and not TIG's responsibility to examine the complaint to

determine whether it might implicate their reinsurance, see Board of Educ. v. TIG Ins. Co., supra, 378 Ill. App. 3d at 194, 881 N.E.2d at 960, 317 Ill. Dec. at 474; Unigard Sec. Ins. Co., Inc. v. N. River Ins. Co., supra, 4 F.3d at 1067, the mere fact that TIG and three companies allegedly managed by Riverstone were sued in the Coverage Litigation is not sufficient to create an issue of fact as to the giving of prompt notice.

In the alternative, AIU contends that summary judgment should be denied because additional discovery is necessary on the issue of whether the notice provision of the Reinsurance Certificates was satisfied. Specifically, AIU cites the need for discovery regarding TIG's knowledge of its reinsurance exposure gained through their direct insurance of Foster Wheeler (Abrams Decl. ¶ 11). The discovery AIU seeks includes the depositions of TIG claims handlers as well as the resolution of TIG's withholding of documents on the ground of privilege (Abrams Decl. ¶ 9).

AIU has met the requirements of Fed.R.Civ.P. 56(f) with respect to this contention. AIU has explained how these documents can reasonably be expected to lead to an issue of material fact. Foster Wheeler's third-party complaint states that as of December 31, 2000, Foster Wheeler had paid more than $265 million to defend or dispose of asbestos related claims and that its primary insurance policies had been exhausted (Aldort Decl. Ex. 6 ¶¶ 1, 27). This complaint gives notice therefore, that Foster

Wheeler's excess insurance policies were exposed to large claims, which, in turn, implicated the Reinsurance Certificates. Documents produced by TIG showing its own inquiry into reinsurance exposure during January through April of 2000 (Abrams Decl. Exhs. B, FF, KK), as well as evidence that TIG provided excess insurance directly above the limits of AIU's excess policies (Abrams Decl. Ex. X) provides further support for permitting additional discovery on the issue of TIG's knowledge of its reinsurance exposure. If TIG's reinsurance claims handlers did in fact have notice of the information in the third-party complaint, it would, at the very least, create an issue of fact as to whether the notice provisions of the Reinsurance Certificates were satisfied.

Finally, AIU has described some of its efforts to obtain discovery on this issue and explained why such efforts have been unsuccessful. AIU requested documents concerning the Foster Wheeler Coverage Litigation in November 2007 (Aldort Decl. Ex. 2 at 8-9). Both parties acknowledge that there are unresolved issues regarding TIG documents withheld on the basis of privilege (Abrams Decl. ¶ 6; Aldort Supp. Decl. ¶ 8). AIU notes that some of these documents have been ordered produced by this court (Abrams Decl. ¶ 6; Opinion and Order dated Aug. 28, 2008[8]).

[8]TIG's motion for partial reconsideration of this order was granted in part and denied in part on July 8, 2009 (see Opinion and Order dated July 8, 2009).

TIG states that these unproduced documents "overwhelmingly relate to TIG's and its affiliates' direct insurance coverage of Foster Wheeler" (Aldort Supp. Decl. ¶ 9). Such documents would be relevant to AIU's claims of actual notice based on TIG's involvement in the Foster Wheeler Coverage Litigation.

Thus, because AIU has met all the requirements of Fed.R.Civ.P. 56(f), summary judgment on the issue of AIU's compliance with the prompt notice requirement should be denied without prejudice to renewal at the completion of discovery. See Alali v. DeBara, 07 Civ. 2916 (CS), 2008 WL 4700431 at *8-*9 (S.D.N.Y. Oct. 24, 2008) (Seibel, D.J.) (denying summary judgment where additional discovery was needed on an essential element of plaintiff's case, such information was entirely in the possession of the defendant, and plaintiff had not yet taken depositions); Sanders v. Quikstak, Inc., 889 F. Supp. 128, 132-33 (S.D.N.Y. 1995) (Conner, D.J.) (denying summary judgment where defendant had not produced information requested by plaintiff and plaintiff had not yet taken party depositions).

E. Coverage from October 1, 1981 - October 1, 1982

Finally, TIG seeks summary judgment on the issue of coverage. Specifically, TIG seeks a ruling that TIG did not provide reinsurance coverage to AIU from October 1, 1981 -

October 1, 1982 (Def's Mem. at 1). AIU concedes that after filing its complaint it became aware that TIG had not, in fact, reinsured AIU for this period (Pl's Opp. at 25). Therefore, I respectfully recommend that TIG's motion for summary judgment on this issue be granted.

IV. Conclusion

Accordingly, for all the foregoing reasons, I respectfully recommend that TIG's motion for partial summary judgment (Docket Item 67) be granted to the extent it seeks a ruling that (1) Illinois law governs this dispute; (2) under Illinois law, a reinsurer need not demonstrate prejudice to deny coverage to a reinsured which has failed to comply with a policy provision requiring prompt notice of claims and (3) TIG did not provide reinsurance coverage for the period from October 1, 1981 - October 1, 1982. I further recommend that TIG's motion be denied to the extent it seeks a ruling that AIU breached the Reinsurance Contracts by failing to provide prompt notice of a 2001 claim without prejudice to renewed summary judgment motion after the completion of discovery.

V. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from the date of this Report and Recommendation to file written objections. See also Fed.R.Civ.P. 6(a) and 6(d). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Sidney H. Stein, United States District Judge, 500 Pearl Street, Room 1010, New York, New York 10007, and to the chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Stein. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS **WILL** RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140, 155 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838

F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
February 11, 2010

SO ORDERED

HENRY PITMAN
United States Magistrate Judge

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