

PEIC's billings were inconsistent with other terms and conditions of the reinsurance contract.

See Global Answer at ¶¶ 69, 70.¹

PEIC submitted its First Set of Interrogatories and Requests for Production of Documents to Global on August 16, 2010, which were tailored to discover information reasonably calculated to lead to the discovery of admissible evidence pertinent to Global's asserted defenses. These discovery requests and Global's responses thereto are attached as Exhibits "B" and "C" hereto. PEIC also served Global with a Rule 30(b)(6) notice of deposition which seeks a corporate designee on a list of topics relevant to the claims and Global's defenses. *See* 30(b)(6) Deposition Notice attached as Exhibit "D" hereto. As set forth below, Global's responses to PEIC's discovery requests are incomplete and evasive in a number of respects. By letter dated October 12, 2010, PEIC requested that Global supplement its responses and cure these deficiencies. *See* October 12, 2010 Letter from C. Russell to M. Sheridan, Exhibit "E" hereto. The parties met and conferred via telephone on October 18, 2010. Following that call, Global issued a written reply that confirmed that Global would not cure certain of its discovery shortcomings. *See* October 19, 2010 Letter from B. Garcha to C. Russell, attached as Exhibit "F" hereto. Global also served a formal response to PEIC's 30(b)(6) deposition notice. *See* Exhibit "G" hereto.

As discussed more fully below, PEIC's discovery requests seek documents and information that will enable PEIC to (1) identify what (and when) Global knew about the Buffalo Forge asbestos claims at issue in this litigation (as relevant to Global's late notice defense); (2) to assess the merits of Global's apparent claim that it was prejudiced by PEIC's alleged late notice;

¹ Global raised the "expense in addition" or "cap" issue on a motion for judgment on the pleadings which was decided by this Court in Global's favor. *See Pacific Employers Ins. Co. v. Global Reins. Corp. of America*, No. 09-6055 (E.D. Pa. April 23, 2010).

and (3) to discover how Global actually applied and interpreted the reinsurance contract terms at issue (as relevant not only to the “cap” issue, which we understand has been determined, but also as to Global’s argument that PEIC’s billings violate other provisions of the reinsurance contract).

Despite the obvious relevance of PEIC’s requests to Global’s various asserted defenses, Global has refused to provide virtually any substantive discovery on these issues. Without this discovery, PEIC will be severely hampered in its ability to put on its case, specifically, in its ability to demonstrate the lack of merit in Global’s late notice defense and its ability to demonstrate how Global actually applies relevant terms of the reinsurance contracts.

Accordingly, PEIC moves this Court pursuant to Fed. R. Civ. P. 37(a)(1),(4) for an Order compelling Global to make discovery as set forth more fully below.

II. LEGAL STANDARDS APPLICABLE TO DISCOVERY

Discovery under the Federal Rules of Civil Procedure is intentionally broad. *Pacitti v. Macy’s*, 193 F.3d 766, 777-78 (3d Cir. 1999). Under Fed. R. Civ. P. 26(b)(1) PEIC is entitled to obtain discovery relevant to any of Global’s defenses, whether or not admissible at trial, so long as it is reasonably calculated to lead to the discovery of admissible evidence. Relevant evidence is that which tends to make the existence of any facts of consequence more (or less) probable. F.R.E. 401. As discussed more fully below, the documents and information sought by PEIC in its discovery requests clearly meet this (purposefully low) threshold.

III. DEFICIENCIES IN GLOBAL’S DISCOVERY RESPONSES

A. Late Notice

As set forth above, Global asserts that it did not receive notice of the Buffalo Forge claims from PEIC until April 22, 2008 and that such notice was “late” under the terms of the reinsurance contract. *See* Global Answer, Exhibit “A” at ¶¶ 56, 58. PEIC, however, has a good faith basis to believe that, through its reinsurance of other Buffalo Forge policies, Global had

actual knowledge of the underlying claims well before that date. This knowledge, obviously, would undercut any claim of lack of notice of the underlying claims that Global might have vis-à-vis PEIC. Accordingly, PEIC has sought to discover what information Global had obtained about the Buffalo Forge claims from sources other than PEIC and when it had obtained such information. Global has refused to respond to those requests. The relevant portions of PEIC's Interrogatories directed to this issue (and Global's responses thereto) are as follows:

PEIC INTERROGATORY NO. 10: State in detail when and how Global contends its first received notice of the Underlying Claims.

RESPONSE: Global objects to this interrogatory for the reasons stated in its General Objections 5, 7 and 10. Subject to and without waiving said objections, Global refers PEIC to Count I and Exhibit B of its Counterclaim filed in this matter.

PEIC INTERROGATORY NO. 17: Identify all sources from which Global received any information of the Underlying Claims other than PEIC or the Broker.

RESPONSE: Global objects to this interrogatory for the reasons stated in its General Objections 1, 2, 3, 4, 6, and 9.

PEIC INTERROGATORY NO. 21: For each policy identified in question 20 [policies other than the PEIC policy which provided coverage for the Buffalo Forge claims], identify and describe, in detail, any reinsurance billing, claim, notice or advice ever received relating to any asbestos products personal injury claim against Buffalo Forge under that policy, if any.

RESPONSE: Global objects to this interrogatory for the reasons stated in its General Objections 1, 2, 3, 4, 6 and 9.

See Exhibit "B." PEIC also served the following, related document requests:

PEIC REQUEST NO. 7: All documents relating to the Underlying Claims, whether or not maintained in or part of Global's claim file for the Reinsurance Claim.

RESPONSE: Global objects to this Request for the reasons stated in its General Objections 1, 2, 3, 5, 6, and 7. Subject to and without waiving said objections, Global states that it will produce all relevant, non-privileged documents that it has located responsive to this request.

PEIC REQUEST NO. 8: All documents relating to any asbestos products personal injury claim against Buffalo Forge Company, whether or not those communications also relate to the Facultative Certificate.

RESPONSE: Global objects to this Request for the reasons stated in its General Objections 1, 2, 3, 5, 6, and 7. Subject to and without waiving said objections, Global states that it will produce all relevant, non-privileged documents that it has located responsive to this request.

PEIC REQUEST NO. 9: All documents relating to any agreement between Buffalo Forge Company and its insurers regarding payments for defense and indemnity of asbestos products personal injury claims, from whatever source originally obtained.

PEIC RESPONSE: Global objects to this Request for the reasons stated in its General Objections 1, 2, 3, 5, and 7. Subject to and without waiving said objections, Global states that it will produce all relevant, non-privileged documents that it has located responsive to this request.

PEIC REQUEST NO. 17: To the extent that Global does participate as a reinsurer of policies issued to Buffalo Forge Company by any insurance company other than PEIC, and to the extent those policies have responded or may respond to Underlying Claims, all documents related to any claim or potential claim for retrocessional coverage for reinsured loss or expense.

RESPONSE: Global objects to this Request for the reasons stated in its General Objections 1, 2, 3, and 7.

See Exh. "C."

These interrogatories and document requests are gauged to determine when Global first received information about the Underlying Claims (from whatever source) and what it knew. If

for example, Global knew about the Coverage In Place Agreements (“CIPs”) between Buffalo Forge and its carriers (including PEIC) based on information that it received from another Buffalo Forge insurer (as referenced in PEIC’s Request for Production No. 9, above), it would have learned of PEIC’s involvement, likely with respect to the specific PEIC policy that it reinsured, at that time as well. Global cannot simply ignore information that it, in fact, had available to it simply because that information was not derived from a specific source. Accordingly, the information sought by PEIC is relevant pursuant to Fed. R. Civ. P. 26(b)(1) and is reasonably calculated to lead to the discovery of admissible evidence regarding Global’s late notice defense.

In its Answers to PEIC’s Interrogatories however, Global (via a network of “General Objections” and limited responses) has effectively refused to provide the requested information. For example, as to PEIC Interrogatory No. 10, in which PEIC asks Global to identify when and how it first knew about the Underlying Claims, Global (after objecting on the basis that the interrogatory was an “improper” contention interrogatory, sought information already in PEIC’s knowledge and called for an “elaboration on documents,”) ² simply referred to its counterclaim and PEIC’s notice letter.

Similarly, in response to PEIC’s Document Request Nos. 7, 8 and 9, after reciting a litany of “General Objections,” including that the requests were irrelevant, vague, overbroad and unduly burdensome, privileged, within PEIC’s knowledge, trial preparation, and beyond the scope of discovery, Global stated that it would produce “relevant, non-privileged documents that it has located.” In fact, however, Global has not produced *even one* document related to notice

² Global’s “General Objections”, included in Exhibit “B” and “C” hereto, are virtually all asserted in response to virtually each PEIC discovery request and apparently are intended to make unclear what information Global has or does not have and what it will or will not produce.

or information regarding the Buffalo Forge Claims that came from a source other than PEIC. As to PEIC Document Request No. 17, Global simply objects and refuses to provide any response.³

Global's responses effectively dodge the whole point of the requests – to find out what Global knew about the underlying Buffalo Forge asbestos claims from sources *other than* or in addition to PEIC. Global's total production, less than one box of documents (and much of it duplicative), does not contain *any* information that it received regarding the Buffalo Forge claims from any source other than PEIC. Global's October 19, 2010 letter from counsel makes clear that, while there are such documents (at least there is no suggestion that such documents do not exist), Global will not produce them. *See* Exhibit "F" at p. 2.

What Global knew about the Buffalo Forge claims and when is relevant regardless of the source from which the information was derived. Accordingly, PEIC respectfully requests the Court to instruct Global to provide a full and complete response to the above interrogatories and document requests or, in the alternative, to withdraw its "late notice" defense.

³ This document request, directed to determining what information Global provided to its reinsurers regarding the Buffalo Forge claims serves dual purposes. First, it would require Global to produce documents that would show what information Global had about these claims and when (as relevant to late notice issues); and second, it would require the production of information that would demonstrate how Global treated these claims when it is seeking coverage for them under terms the same as or similar to those in the PEIC Facultative Certificate. The second issue is discussed more fully at Part III C. and D., below.

B. Global's Apparent Claim of Prejudice

Choice of law has yet to be resolved in this matter, but under any law likely to apply PEIC maintains that Global's late notice defense requires Global to prove prejudice (*i.e.* tangible harm) resulting therefrom. *See, e.g., Life and Health Ins. Co. of America v. Federal Ins. Co.*, 1993 WL 326404 at *2 (E.D. Pa. 1993); *see also, Christiana Gen. Ins. Corp. v. Great American Ins. Co.*, 979 F.2d 268, 274 (2d Cir. 1992). Global has pleaded, at ¶57 of its Answer (Exhibit "A" at ¶ 57), what appears to be an allegation of such prejudice, stating that, during the time period that PEIC allegedly should have notified Global of the Buffalo Forge claims but did not, Global commuted certain of its retrocessional contracts (so it allegedly no longer has coverage for the PEIC/Buffalo Forge claims that it otherwise might have had). PEIC has sought to take discovery related to this general allegation. For example, PEIC Interrogatory No. 7 requests Global to provide details regarding any alleged prejudice as set forth below:

PEIC INTERROGATORY NO. 7: If Global contends that it was prejudiced by the timing of the notice provided by PEIC regarding the Reinsurance Claim, state precisely, and detail how, Global was prejudiced.

RESPONSE: Global objects to this interrogatory for the reasons stated in its General Objections 4, 5, 8, and 9. Subject to and without waiving said objections, Global refers PEIC to Count I of its Counterclaim filed in this matter.

Rather than provide *any* substantive information regarding the alleged prejudice, Global objected that the interrogatory called for privileged information, was an improper contention interrogatory, comprised trial preparation materials and was beyond the scope of applicable discovery rules, before simply referring to the bald and unsubstantiated allegations of Count I of its Answer and Counterclaim.⁴

⁴ *See* Exhibit "B" for the full text of Global's "General Objections."

Similarly, in response to PEIC Request for Production No. 22 (which requests “all documents . . . supporting . . . Global’s alleged commutation of retrocessional coverage, as specifically referenced in Paragraph 57 of . . . [its] counterclaim),” Global states only (after objecting on the basis of vagueness and over breadth, privilege, “improper” contention request, trial preparation and beyond the scope of the applicable discovery rules) that it will produce “all relevant, non-privileged documents that it has located....”⁵

Global’s initial production did not include even one document responsive to this request. Global’s counsel, later, indicated that Global will produce only the retrocessional contracts that allegedly were commuted (although it has not done so yet) and the allegedly relevant commutation agreements (but only if the other party(ies) to the commutations agree, and they have apparently not so far agreed). *See* Exhibit “F” at p. 2. Global has continued to refuse, however, to produce any documents relating to the investigation, evaluation and discussions leading up to those agreements. As explained in the Affidavit of Thomas A. Greene (PEIC’s reinsurance expert in this matter), attached hereto as Exhibit “H,” the mere existence of a commutation agreement would not provide enough information to evaluate any claim of harm resulting from the timing of notice. Specifically, the documents leading up to the commutation agreements would include evidence of how claims that had been incurred but not yet reported to

⁵ PEIC’s Request No. 22 and Global’s response thereto, state in full as follows:

REQUEST NO. 22: All documents relating to, supporting or pertaining to Global’s alleged commutation of retrocessional coverage, as specifically referenced in Paragraph 57 of Global’s Answer, Affirmative Defenses and Counterclaim.

PEIC RESPONSE: Global objects to this Request for the reasons stated in its General Objections 2, 3, 4, 6, and 7. Subject to and without waiving said objections, Global states that it will produce all relevant, non-privileged documents that it has located responsive to this request.

Global (“IBNR”) (a category that Global apparently contends would apply to the PEIC/Buffalo Forge claims) were accounted for. Typically, in commutation agreements, the parties recognize that “long term exposure” claims such as asbestos will have a significant IBNR component and will provide coverage for them. Likewise, the documents leading up to the commutations (given that Global would have been evaluating its asbestos exposures in connection with the commutations) would likely provide evidence of what information Global had regarding the Buffalo Forge claims at the time the commutations were entered and whether the potential PEIC reinsurance claim was specifically acknowledged and valued.

As set forth more fully in the Greene Affidavit (Exhibit “H”), if Global is to maintain a defense of late notice, the requested information clearly is relevant and calculated to lead to the discovery of admissible evidence. Accordingly, Global should be required to fully and completely respond to the above Interrogatories and Document Requests or, in the alternative, to withdraw its late notice claim.

C. Global’s Retrocessional Program Relating to this Claim

In its Interrogatory No. 9 and Document Request No. 15, PEIC requested Global to produce documents and provide information relating to its retrocessional program for the Underlying Claims.⁶ Rather than providing any of the requested information, Global simply

⁶ See PEIC Interrogatory No. 9, Document Request No. 15 and Global’s Responses thereto, as set forth below:

PEIC INTERROGATORY No. 9: Identify any document or communication from Global to any retrocessionaire relating to the Reinsurance Claim or Underlying Claims or any claim or potential claim for asbestos products bodily injury against the Buffalo Forge Company.

RESPONSE: Global objects to this interrogatory for the reasons stated in its General Objections 1, 2, 3, 4, 6 and 9.

objected that the requests were vague, overbroad and irrelevant, that the information was privileged, that PEIC had improperly asked Global to identify the persons responding to the discovery and that the requests were beyond the applicable discovery rules. *See* Exhibits “B” and “C” for the verbatim language of Global’s “General Objections.”

The relevance of these documents is manifest. Global, itself, has put it retrocessional program at issue by claiming harm based on alleged commutations that it made related to that program. Likewise, Global’s communications with its retrocessionaires regarding the Underlying Claims are relevant to demonstrate what and when Global knew about the claims, undercutting Global’s late notice defense. Global’s objections to these requests on the basis that they are vague or overbroad are meritless. The requests are clearly limited to communications regarding the claims at issue in the litigation. Neither are such communications with retrocessionaires privileged. *See, e.g., U.S. v. Rockwell Intern.*, 897 F.2d 1255, 1265 (3d Cir. 1990); *see also Reliance Ins. Co. v. America Lintex Corp.*, 2001 WL 604080 at *1 (S.D.N.Y. 2001); *North River Ins. Co. v. Columbia Cas. Co.*, 1995 WL 5792 at *4-5 (S.D.N.Y. 1995) (reports to retrocessionaires not privileged). Accordingly, Global should be required to fully and completely answer PEIC Interrogatory No. 9 and respond to PEIC Document Request No. 15.

PEIC REQUEST NO. 15: All documents relating to Global’s retrocessional coverage for the Reinsurance Claim or for other reinsurance covering policies that responded for asbestos products personal injury claims against Buffalo Forge Company.

RESPONSE: Global objects to this Request for the reasons stated in its General Objections 1, 2, 3, and 7.

D. Interpretation of Global's Reinsurance Certificate Form

PEIC has requested that Global provide information and documents regarding its interpretation and application of reinsurance terms and conditions identical or substantially similar to those contained in the Facultative Reinsurance Certificate at issue in this case.⁷ Global has simply objected to these Requests.

Global's objection and refusal to provide documents seems to be based on this Court's April 23, 2010 ruling on the "expense in addition to limits" or "cap" issue. While the requested discovery would, in fact, reveal how Global itself treats the "cap" issue in the light of language similar or identical to that found in the PEIC facultative certificate, the relevance of these

⁷ See PEIC's Document Request Nos. 18 and 20 and Global's Responses thereto as set forth below:

PEIC REQUEST NO. 18: All documents relating to Global's billings of asbestos-related loss or expense to reinsurers or retrocessionaires under any reinsurance contract containing terms or conditions identical to or similar to the terms and conditions of the Facultative Certificate.

RESPONSE: Global objects to this Request for the reasons stated in its General Objections 1, 2, 3, and 7.

PEIC REQUEST NO. 20: All documents representing or demonstrating how Global has presented asbestos related loss and expense to its reinsurers or retrocessionaires under reinsurance contracts containing terms and conditions that are the same or similar to those contained in the Facultative Certificate, specifically as they relate to the obligation to pay expense in addition to loss.

RESPONSE: Global objects to this Request for the reasons stated in its General Objections 1, 2, 3, and 7. Subject to and without waiving said objections, Global refers PEIC to Judge Kelly's Opinions and Orders issued in this matter pertaining to Global's Motion for Judgment on the Pleadings and all motion papers related thereto.

requests is not limited to that point.⁸ For example, in its October 6, 2009 letter to Judy Harnadek, attached as Exhibit “I” hereto, Global asserts that, based on the language of the facultative certificate, “there would be no coverage for expenses that are not associated with losses paid under the policy.” *Id.* at p. 3. Global also asserts that Declaratory Judgment expenses are not covered by the facultative certificate, *id.*, and that PEIC failed to provide a “Definitive Statement of Loss” as required by the certificate.⁹ The position Global, itself, takes with regard to whether that “expenses must be associated” with specific losses, or whether declaratory judgment expenses are covered, and what constitutes a “Definitive Statement of Loss” when it is submitting billings to *its* reinsurers under the same or substantially similar language to that which is at issue here, clearly is relevant to the proper application of such language. Accordingly, PEIC respectfully requests the Court to order Global to fully and completely respond to its Document Request Nos. 18 and 20.

E. PEIC’s 30(b)(6) Deposition Notice

On September 22, 2010, PEIC served a Notice of Deposition pursuant to Fed. R. Civ. P. 30(b)(6) including eight discrete matters of inquiry on which it has requested that a deponent be

⁸ PEIC acknowledges this Court’s April 23, 2010 ruling on the “expense in addition to limits” or “cap” issue, but respectfully asserts that it would further the interests of judicial economy to permit this discovery to proceed now. If discovery is precluded now, and if the Court’s ruling on the “cap” issue is reversed on appeal and remanded, a whole new round of document discovery on this issue would be required and many of the same people who will initially be deposed would be required to be deposed again. Completing all of the potentially relevant discovery now would be most efficient and would make eminent sense. To the extent such discovery may elucidate matters that are not currently at issue in the present litigation as the result of the Court’s April 23, 2010 Order, there is no harm or prejudice to Global because such information/documents simply would not be admitted as evidence in the initial trial of this matter. Further, given that this will be a bench trial, there is no risk of accidental contamination of or confusion by a jury. This Court would be able to decide whether proffered evidence is relevant to the claims and defenses still at issue and would simply exclude the rest.

⁹ *See*, Exhibit “B”, PEIC Interrogatory No. 14 and Global’s response thereto.

provided. Global has refused to provide a witness for two areas of discovery, has inappropriately limited the scope on which it will allow the witness to testify regarding another and, as discussed above, has refused to produce documents in response to PEIC's Document Requests that would be necessary to fully and fairly conduct the depositions. Specifically, Global has refused to provide a witness to address Global's reinsurance of the Buffalo Forge claims related to any policy other than the PEIC policy and has refused to provide the documents necessary to effectively question a witness regarding Global's alleged prejudice. *See* Global's objections to PEIC's 30(b)(6) deposition notice (Exhibit "G") at ¶¶ 4, 5. Likewise, while Global agreed to produce a deponent in response to PEIC's 30(b)(6) notice at paragraph 1 (relating to notice), it has refused to make the witness available to discuss notice received from any source *other than* PEIC. *Id.* at ¶1. These deposition topics are reasonable and proper for the reasons set forth in Sections III. A. and B.

Global, additionally has refused to make a deponent available to address the topics outlined in PEIC's 30(b)(6) notice at paragraph 6 -- facts related to how IBNR claims such as (allegedly) the PEIC/Buffalo Forge claims were accounted for in connection with Global's corporate acquisition of Constitution Re. *See* Exhibit "G" at ¶ 6. Given the fact that the certificate at issue was issued by Constitution Re, Global's benefits and responsibilities arising from that certificate would arise from the terms of the acquisition. Without discovery on the matters outlined in paragraph 6, therefore, it is impossible to tell what provisions were made in those contracts for IBNR claims and how, if at all, the timing of late notice of an IBNR claim would actually impact Global.

Accordingly, PEIC respectfully requests this Court to order Global to make full and complete discovery in accordance with PEIC's 30(b)(6) deposition notice.¹⁰

IV. CONCLUSION

For the reasons set forth above, PEIC respectfully requests this Court, pursuant to Fed. R. Civ. P. 26(b)(1), to order Global to fully and completely respond to PEIC's Interrogatory Nos. 7, 9, 10, 17 and 21 and Request for Production of Document Nos. 7, 8, 9, 15, 17, 18, 20 and 22, and to provide witnesses to respond fully and completely to each area of inquiry set forth in PEIC's 30(b)(6) Deposition Notice. PEIC further requests that this Court order Global to pay PEIC's fees and costs incurred in connection with this Motion pursuant to F. R. Civ. P. 37(a)(5).

Respectfully submitted

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¹⁰ The current discovery schedule in this matter contemplates a November 24, 2010 cut-off date. PEIC has advised Gobal that it is willing to go forward with depositions if, after this Motion to Compel is decided, Global will agree to bring the witnesses back (as and if necessary) to address questions on any documents that may be produced as a result of this motion. Global has taken the position that it will produce its witnesses only once. Accordingly, PEIC has sought agreement from Global to take the depositions (of three witnesses) after the court's ruling on this motion. Absent such an agreement, and depending on the timing and substance of the Court's ruling, it may be necessary for PEIC to seek leave of Court to either depose the witnesses outside of the discovery period or to bring them back for a limited deposition on matters subject to the Motion to Compel.