Appeal Nos. 11-3234, 11-3262

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PACIFIC EMPLOYERS INSURANCE COMPANY,

Appellee/Cross-Appellant,

v.

GLOBAL REINSURANCE CORPORATION OF AMERICA,
formerly known as Constitution Reinsurance Corporation,

Appellant/Cross-Appellee.

Appeal from the United States District Court for the Eastern District of Pennsylvania, in Case No. 09-cv-6055, Judge Robert F. Kelly

---

APPELLEE/CROSS-APPELLANT PACIFIC EMPLOYERS INSURANCE COMPANY'S PETITION FOR REHEARING

Carter G. Phillips
William M. Sneed
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000
(312) 853-7036 (fax)

Pursuant to Fed. R. App. 40 and L.A.R. 40.0, Appellee/Cross-Appellant Pacific Employers Insurance Company ("PEIC") petitions this Court for Rehearing respecting the Opinion of the Court and Judgment dated September 7, 2012. (A copy of the Opinion of the Court and Judgment are attached hereto as Exhibits A and B, respectively.) This Petition seeks only Panel Rehearing and does not seek En Banc Rehearing under Fed. R. App. 35.

INTRODUCTION

PEIC seeks rehearing by the panel because under this Court's Opinion and Judgment a ceding company loses its reinsurance coverage for a delay in reporting claims, occurrences and lawsuits that do not involve the reinsurance contract. This untenable result cannot be reconciled with the reinsurance contract language at issue, New York law, industry custom and practice, or the basic principles governing summary judgment.

This Court construed a facultative reinsurance contract ("the Certificate") drafted and issued by Appellant/Cross-Appellee Global Reinsurance Corporation of American ("Global"). The parties disputed the meaning of Paragraph D of the Certificate, which calls for PEIC to

provide a definitive statement of loss to Global under certain circumstances. Departing from the Second Circuit's interpretation of identical language, this Court held that Paragraph D was unambiguous and that the only reasonable reading of the provision was that PEIC had to provide a definitive statement of loss as soon as it received notice of claims or occurrences involving death, serious injury or lawsuits, even if none of those claims or occurrences actually implicated Global's excess of loss reinsurance coverage. (Ex. A at 25.)

This Court further held that PEIC's compliance with the definitive statement of loss provision in Paragraph D was a "condition precedent" to Global's coverage under the Certificate, that New York law governed the Certificate, and that under New York law non-compliance with the definitive statement of loss provision in Paragraph D meant that PEIC would lose its reinsurance coverage from Global for the asbestos claims at issue. Finally, this Court rejected PEIC's contention that questions of fact exist under New York law respecting PEIC's compliance with the definitive statement of loss provision and PEIC's contention that Global had waived its definitive statement of loss arguments. Consequently, this Court reversed the Final Order and Judgment of the District Court

dated August 12, 2011, and remanded with instructions that the District Court enter a judgment of non-liability in Global's favor.

PEIC seeks rehearing with respect to the Court's finding that the Certificate is unambiguous, that Global's interpretation of the Certificate is correct, and that there are no questions of fact under New York law.

POINTS OF LAW AND FACT WHICH THE COURT OVERLOOKED OR MISAPPREHENDED

PEIC respectfully submits that the Court misapprehended or overlooked the following points of law and fact:

1. The Court misapprehended New York law governing contract ambiguity and construction, improperly rewriting the Certificate by dropping language and interpreting the Certificate in a way that renders compliance impossible: under Paragraph D, PEIC must promptly provide a definitive statement of loss to Global as soon as a claim involving a lawsuit is reported to it, even years before PEIC has to pay a single cent under its policy; yet under Paragraph E, Global shall promptly pay PEIC after receiving a definitive statement of loss.

2. The Court overlooked that there has been no determination that the claims, occurrences or asbestos-related lawsuits about which PEIC received notice on a precautionary basis in 2001 are the same claims, occurrences or asbestos-related lawsuits which Global was being asked to indemnify under the Certificate in 2009 and thereafter.

3. The Court misapprehended New York law respecting waiver of late notice defenses and faulted PEIC for not briefing an

argument that Global raised for the first time in its Reply Brief, notwithstanding the requirements of Fed. R. App. 28.1(c)(4).

DISCUSSION

A contract is ambiguous under New York law if its language "could suggest 'more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Alexander & Alexander Serv., Inc. v. These Certain Underwriters at Lloyd's*, 136 F.3d 82, 86 (2d Cir. 1998), quoting *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 906 (2d Cir. 1997). The reinsurance industry is steeped in custom and practice. *See*, *e.g.*, *Continental Cas. Co. v. Stronghold Ins. Co.*, 77 F.3d 16, 22 (2d Cir. 1996) ("custom and usage have established a gentility and unity of interest between the reinsured and its reinsurer").

Language is unambiguous when it has a "definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference in opinion." *Seiden Assoc., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992). Ambiguity can arise either from the

language itself or from inferences that can be drawn from such language. *Alexander & Alexander*, 136 F.3d at 86. Thus, only when the language *and* the inferences to be drawn from it are unambiguous can the contract be construed as a matter of law. *Id.*

This Court held that "Paragraph D unambiguously requires PEIC to provide Global with a [definitive statement of loss] on any claim or occurrence that involves a death, serious injury or lawsuit promptly after such a claim or occurrence is reported to it under the Excess Policy." (Ex. A at 25.)

This interpretation of Paragraph D excises the most important phrase appearing in Paragraph D: "as a condition precedent [PEIC] shall promptly provide [Global] with a definitive statement of loss on any claim or occurrence reported to [PEIC] **and brought under the Certificate** which involves a death, serious injury or lawsuit." (Ex. A at 17.)[1] The highlighted language leads to multiple reasonable interpretations respecting when a definitive statement of loss is due. *See Folksamerica Reinsurance Co. v. Republic Ins. Co.*, 182 Fed. Appx. 63, 64 (2d Cir. 2006). The record below included the testimony of a

[1] At times, Global's Initial Brief also omitted this language when discussing Paragraph D.

person knowledgeable about the customs, practices and usages in the insurance and reinsurance industry; and he opined that Paragraph D did not require a definitive statement of loss from PEIC before claims or occurrences involving death, serious injury or lawsuits actually implicated Global's reinsurance coverage. (PEIC Principal Brief at 40.)

This Court did discuss the "brought under the Certificate" phrase in its Opinion, noting Global's position that it means "within the general scope of the Certificate's reinsurance coverage" and PEIC's position that "brought under this Certificate" means just that – a claim or occurrence that it brings under the Certificate. (Ex. A at 18-19.) Effectively, the Court has found that no reasonably intelligent person cognizant of the customs, practices, usages and terminology in the insurance and reinsurance business could construe the "brought under this Certificate" language in the manner urged by PEIC. Respectfully, that finding is hard to fathom since PEIC's reading is natural ("brought under" denotes a party seeking coverage under the reinsurance contract) and Global's is strained ("within the general scope of coverage" disregards the word "brought"). New York law does not permit a court to rewrite the parties' agreement. *See Government Employers' Ins. Co.*

v. Kligler, 366 N.E.2d 865, 866 (N.Y. 1977). The "brought under this Certificate" language cannot be said to have a definite and precise meaning unattended by danger of misconception. *Seiden Assoc., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992).

As for Global's contention that "brought under the Certificate" means within the general scope of coverage of the Certificate, that is not the language used in Paragraph D. In fact, that language essentially appears in Paragraph E, which provides that loss settlements made by PEIC are binding on Global provided that they are "within the terms and conditions of this Certificate." This differs from the language in Paragraph D: "brought under this Certificate." Under New York law, when different language is used in the provisions of a contract, the presumption is that different meanings were intended. *McCarthy v. American Int'l Group, Inc.*, 283 F.3d 121, 126-127 (2d Cir. 2002).

This Court acknowledged that PEIC's interpretation could well be a reasonable one under the Paragraph D language itself, but the Court found that other provisions in the Contract led to the opposite conclusion. (Ex. A at 19.) Specifically, this Court found it difficult to reconcile PEIC's interpretation that a definitive statement of loss is due

when a claim or occurrence actually impacts the Certificate with the Certificate's definition of definitive statement of loss, which refers to Global's ability to set reserves for losses reported under the Certificate. This language presents no difficulties for PEIC's interpretation, however, because a loss is not reported *under the Certificate* until the loss implicates the Certificate's coverage, whether on a paid or reserved basis.

Far worse contradictions arise from Global's interpretation, which the Court accepted as the only reasonable interpretation. For example, Paragraph E states that Global "**shall promptly pay**" after receiving a definitive statement of loss. That language is mandatory, meaning that a definitive statement of loss triggers a payment obligation by Global, and cannot be reconciled with the interpretation that a definitive statement of loss could be due years before a loss involves the PEIC policy or the Certificate.

This Court's path to Global's interpretation of Paragraph D turns New York contract construction rules on their head, resolving doubts and ambiguities in favor of the reinsurer who drafted the doubtful and ambiguous language. *See McCarthy v. American Int'l Group, Inc.,* 283

F.3d 121, 127 (2d Cir. 2002) (doubts and ambiguities resolved against drafter); *Board of Education v. CNA Ins. Co.*, 839 F.2d 14, 17-18 (2d Cir. 1988) (same). Inconvenient phrases have been removed from Paragraph D (Ex. A at 25), the use of different language in different parts of the Certificate is ignored (*Id.* at 18-19), and illogical results from Global's interpretation are set aside (*Id.* at 23). Ambiguous reinsurance contracts should be construed against the reinsurer under New York law. *See Christiania Gen. Ins. Corp. v. Great Am. Ins. Co.*, 979 F.2d 268, 278 (2d Cir. 1992).

The end result is striking because the Court has essentially held that PEIC forfeited its reinsurance coverage from Global by failing to give notice *years* before there was any claim or occurrence involving the PEIC policy to its insured. Reinsurance is a contract of indemnity. *See Matter of Midland Ins. Co.*, 590 N.E.2d 1186 (N.Y. 1992). As a matter of common sense, it is illogical to find that a ceding company loses its reinsurance coverage years before there is anything for the cedent to indemnify, much less the reinsurer. As for the right to associate in the defense of claims that might give rise to an indemnity claim, reinsurers rarely exercise such rights when the cedent is actually defending

claims. *See Unigard Sec. Ins. Co. v. North River Ins. Co.*, 762 F. Supp. 566, 581 (S.D.N.Y. 1991), *aff'd in relevant part*, 4 F.3d 1049 (2d Cir. 1993). When the cedent has received only precautionary notice and is not defending claims, there is nothing to associate in. The Opinion and Judgment profoundly conflict with common sense and industry practice.

The Court also overlooked the questions of fact that surround the case, even under Global's interpretation of Paragraph D. The District Court never found a violation of Paragraph D, notwithstanding Global's unsupported claims to the contrary. This Court dismissed PEIC's argument on this point, suggesting that it was not possible for PEIC to demonstrate compliance with Paragraph D, given the fact that PEIC received precautionary notice of asbestos-related claims and lawsuits in 2001 and did not ask the broker to provide notice to reinsurers until 2005. (Ex. A at 44-45.) That conclusion presumes, however, that the asbestos-related claims, occurrences and lawsuits that PEIC was receiving precautionary notice of in 2001 are the same claims, occurrences and lawsuits it was asking Global to indemnify in 2009. (JA 476.) Under New York law, each individual asbestos bodily injury claim is a separate occurrence. *See Appalachian Ins. Co. v. General*

Elec. Co., 863 N.E.2d 994 (N.Y. 2007). Nothing in the record supports the presumption that the separate claims, occurrences and lawsuits notified in 2001 were the same as those for which PEIC sought recovery in 2009. In fact, PEIC did not begin paying asbestos-related claims or lawsuits under its policy until 2005, and it did not pay at a level that implicated the Certificate until 2009. (Ex. A at 12-13.) The actual application of Paragraph D as interpreted by this Court under New York law involves significant questions of fact that have never been addressed.

The same holds true for PEIC's waiver argument. Under certain circumstances, New York law requires an insurer to raise a late notice defense promptly, at the risk of waiving it as matter of law. *See Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 302 F.3d 83, 94-96 (2d Cir. 2002). This Court addressed waiver by referring to Paragraph L of the Certificate, which Global cited as a defense to waiver. (Ex. A at 44.) This Court went on to note that PEIC did not address Global's Paragraph L argument. *Id*. But Global raised Paragraph L *in its Reply Brief*. Under Fed. R. App. 28.1(c)(4), PEIC's own Reply Brief had "to be limited to the issues presented by the cross-appeal." PEIC's

cross-appeal concerned the *Bellefonte*/limits issue, not the definitive statement of loss issue.

As for Paragraph L, which is standard language providing that the terms of the Certificate are not to be waived or changed except by an endorsement issued by Global (*see Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 126 F. Supp. 2d 596, 623 (W.D.N.Y. 2001), *aff'd in part and rev'd in part*, 302 F.3d 83 (2d Cir. 2002)), courts applying New York law have found waiver or estoppel by conduct in the face of such language. *See*, *e.g.*, *Florio v. General Acc. Fire & Life Assurance Corp.*, 396 F.2d 510, 514 (2d Cir. 1968); *see also Nassau Tr. Co. v. Montrose Concrete Prod. Corp.*, 436 N.E.2d 1265 (N.Y. 1982) (language providing no oral changes to contract, triable issues of fact found respecting waiver of contract provision). Even if Paragraph D is to be construed in the way Global contends, this Court should have remanded to the District Court to consider all of the factual implications under New York law.

CONCLUSION

For the foregoing reasons, PEIC respectfully requests that this Court grant rehearing, withdraw the Opinion of the Court and Judgment, find the Paragraph D provision ambiguous under New York law, and remand to the District Court for further proceedings.

Respectfully submitted,

/s/ William M. Sneed
Carter G. Phillips
William M. Sneed
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7899

Dated: September 21, 2012

CERTIFICATE OF SERVICE

I, William M. Sneed, attorney admitted to the bar of this Court, certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

/s/ William M. Sneed

Dated: September 21, 2012