

At a Term of the Supreme Court of the State of New York, held in and for the County of Oneida at the Oneida County Courthouse, Rome, New York on August 15, 2016.

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF ONEIDA

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UTICA MUTUAL INSURANCE COMPANY,

Plaintiff,

vs.

ABEILLE GENERAL INSURANCE COMPANY,  
n/k/a 21<sup>ST</sup> CENTURY NATIONAL INSURANCE  
COMPANY,

AETNA CASUALTY AND SURETY COMPANY  
OF AMERICA, n/k/a TRAVELERS CASUALTY  
AND SURETY COMPANY OF AMERICA,

AETNA CASUALTY AND SURETY OF ILLINOIS,  
n/k/a TRAVELERS CASUALTY INSURANCE  
COMPANY OF AMERICA,

AETNA INSURANCE COMPANY n/k/a TRAVELERS  
PROPERTY CASUALTY INSURANCE COMPANY,

ALFA MUTUAL INSURANCE COMPANY,

ALLENDALE MUTUAL INSURANCE COMPANY  
n/k/a FACTORY MUTUAL INSURANCE COMPANY,

AMERICAN AGRICULTURAL INSURANCE COMPANY,

AMERICAN HOME ASSURANCE COMPANY,

AMERICAN MOTORISTS INSURANCE COMPANY,

ARKWRIGHT MUTUAL INSURANCE COMPANY  
n/k/a FACTORY MUTUAL,

**DECISION AND ORDER**

Index No.: CA2013-002320

RJI No.: 32-14-0261

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FILED  
ONEIDA COUNTY  
CLERK

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ATLAS ASSURANCE COMPANY OF AMERICA  
n/k/a PEERLESS INDEMNITY INSURANCE COMPANY,

ATLAS ASSURANCE COMPANY LIMITED,

AXA RE PROPERTY AND CASUALTY n/k/a  
MOSAIC INSURANCE COMPANY,

CINCINNATI INSURANCE COMPANY,

COMMERCIAL UNION INSURANCE COMPANY n/k/a  
ONEBEACON AMERICAN INSURANCE COMPANY,

CONTINENTAL CASUALTY COMPANY,

CONTINENTAL INSURANCE COMPANY,

DAI-TOKYO FIRE AND MARINE INSURANCE  
COMPANY LIMITED n/k/a AIOI NISSAY DOWA  
INSURANCE COMPANY LIMITED

DORINCO REINSURANCE COMPANY,

EAGLE STAR INSURANCE COMPANY LIMITED,

EMPLOYERS MUTUAL CASUALTY COMPANY,

EXCESS AND CASUALTY REINSURANCE  
ASSOCIATION,

EXCESS AND TREATY MANAGEMENT  
CORPORATION,

FARMERS HOME MUTUAL INSURANCE COMPANY  
n/k/a WESTERN NATIONAL MUTUAL INSURANCE  
GROUP,

FARMERS MUTUAL HAIL INSURANCE COMPANY  
OF IOWA,

FINANCIAL SECURITY ASSURANCE OF IOWA  
INCORPORATED n/k/a ADVANTAGE WORKERS  
COMPENSATION INSURANCE COMPANY,

FOLKSAMERICA REINSURANCE COMPANY

n/k/a SIRIUS AMERICA INSURANCE COMPANY,  
GENERAL ACCIDENT INS COMPANY OF AMERICA  
n/k/a ONEBEACON INSURANCE COMPANY,  
GENERAL INSURANCE COMPANY OF AMERICA,  
GREAT AMERICAN INSURANCE COMPANY,  
GREATER NEW YORK MUTUAL INSURANCE COMPANY,  
GUARANTEE INSURANCE COMPANY,  
HANNOVER RUCKVERSICHERUNG AG,  
HANOVER INSURANCE COMPANY,  
HARTFORD STEAM BOILER INSPECTION AND  
INSURANCE COMPANY,  
HASTINGS MUTUAL INS COMPANY,  
INSURANCE COMPANY OF NORTH AMERICA,  
INSURANCE CORPORATION OF HANNOVER  
n/k/a PRAETORIAN INSURANCE COMPANY,  
INTEGON GENERAL INSURANCE CORPORATION,  
LIBERTY MUTUAL INSURANCE COMPANY,  
MERASTAR INSURANCE COMPANY,  
MERCHANTS AND BUSINESS MEN'S MUTUAL  
n/k/a LIBERTY MUTUAL MID-ATLANTIC  
INSURANCE COMPANY,  
MERRIMACK MUTUAL FIRE INSURANCE COMPANY,  
METROPOLITAN REINSURANCE COMPANY  
n/k/a METROPOLITAN GROUP PROPERTY AND  
CASUALTY INSURANCE COMPANY,

MOTORISTS MUTUAL INSURANCE COMPANY,  
NATIONAL REINSURANCE CORPORATION,  
NEW ENGLAND REINSURANCE CORPORATION,  
REPUBLIC INSURANCE COMPANY n/k/a STARR  
INDEMNITY AND LIABILITY COMPANY,  
ROYAL INSURANCE COMPANY OF AMERICA  
n/k/a ARROWPOINT INDEMNITY COMPANY,  
SECURITY INSURANCE COMPANY OF  
HARTFORD n/k/a ARROWPOINT INDEMNITY  
COMPANY,  
SENTRY INSURANCE A MUTUAL COMPANY,  
SOREMA NORTH AMERICA REINSURANCE  
COMPANY n/k/a GENERAL SECURITY  
NATIONAL INSURANCE COMPANY,  
ST. PAUL FIRE AND MARINE INSURANCE COMPANY,  
STATE FARM FIRE AND CASUALTY COMPANY,  
SWISS RE UNDERWRITERS AGENCY INCORPORATED,  
SYDNEY REINSURANCE CORPORATION n/k/a  
QBE REINSURANCE CORPORATION,  
TAISHO MARINE AND FIRE INSURANCE COMPANY  
n/k/a MITSUI SUMITOMO INSURANCE USA  
INCORPORATED,  
TOKIO MARINE AND NICHIDO FIRE INSURANCE  
COMPANY, LIMITED,  
TRAVELERS INDEMNITY COMPANY,  
UNIGARD MUTUAL INSURANCE COMPANY  
n/k/a SEATON INSURANCE COMPANY,

UNITED FIRE AND CASUALTY COMPANY,

WAUSAU INSURANCE COMPANY n/k/a  
WAUSAU UNDERWRITERS INSURANCE  
COMPANY,

WESTPORT INSURANCE COMPANY,

WINTERTHUR REINSURANCE CORPORATION  
OF AMERICA n/k/a PARTNERRE INSURANCE  
COMPANY OF NEW YORK,

and

ZURICH AMERICAN INSURANCE COMPANY

Defendants.

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**APPEARANCES:**

HUNTON & WILLIAMS LLP

By: Syed S. Ahmad, Esq.

and

FELT EVANS, LLP

By: Kenneth L. Bobrow, Esq.  
Attorneys for Plaintiff

HOGAN LOVELLS US LLP

By: Sean Thomas Keely, Esq.  
Attorney for ECRA Defendants

O'MELVENY & MYERS, LLP

By: Tancred V. Schiavoni, Esq.  
Attorney for Aetna Defendants

SMITH, SOVIK, KENDRICK & SUGNET, P.C.

By: Kevin E. Hulslander, Esq./Matthew P. Germain, Esq.  
Attorneys for Defendant Financial Security Assurance of Iowa

**SAMUEL D. HESTER, J.**

**DECISION AND ORDER**

The group of defendants in this matter, known as the "former ECRA pool member defendants," bring a motion for partial summary judgment pursuant to CPLR 3212 with respect to their third affirmative defense "dismissing the complaint filed by plaintiff . . . insofar as it seeks amounts in addition to the stated limits of the applicable reinsurance certificates."

Papers

On behalf of the moving parties:

- notice of motion dated October 28, 2015;
- affirmation of Sean Thomas Keely dated October 28, 2015 with exhibits A-J;
- affidavit of Jay Burke sworn to January 6, 2016 with exhibits A and B;
- reply affirmation of Sean Thomas Keely dated January 7, 2016 with exhibits K-M;
- memorandum of law dated October 28, 2015;
- reply memorandum of law dated January 7, 2016;

On behalf of the plaintiff:

- affirmation of Syed Ahmad dated December 15, 2015 with exhibits 1-32;
- affirmation of Timothy Sydorin dated December 11, 2015 (note that affirmation does not state that he is an attorney – does not qualify as a sworn document); and

- memorandum of law dated December 15, 2015.

Plaintiff has brought an action against 65 named defendants. Thirty-one of these defendants were at some time or another members of a pool of insurers which provided reinsurance to plaintiff with respect to underlying liability policies issued by plaintiff to Goulds Pumps. The group, referred to as "Excess and Casualty Reinsurance Association" (ECRA), issued reinsurance certificates to plaintiff on behalf of its members. The certificates covered each of 5 years from 1978 - 1982, and were signed by Excess and Treaty Management Corporation on behalf of ECRA. The members of ECRA shared liability severally and upon an agreed pro rata share.

Plaintiff's claim involves billings to defendants for amounts plaintiff paid under the Goulds Pumps liability policies. Goulds Pumps became involved in significant litigation over the years, arising from claims for asbestos injuries. At some point, plaintiff settled the claim of Goulds Pumps for insurance coverage. The insurance payments by plaintiff to Goulds Pumps included loss amounts for injuries, expenses of claims adjustment, and for litigation expenses incurred by Goulds Pumps in defending claims against it. Plaintiff also incurred expenses for its claims adjustments process. Plaintiff's claim in this matter includes the expense of loss adjustment in excess of the coverage amount stated in the reinsurance certificates issued by defendants. The motion of ECRA defendants seeks a determination that they are not liable for expenses in excess of the face amount of coverage stated in the reinsurance certificates.

It is noted that at oral argument, counsel for other defendants, described as "Ace" (Aetna-IA) defendants, appeared and stated that his clients take a contrary position to that of the moving defendants. Counsel for another defendant, Financial Security Assurance of Iowa, appeared and stated that his client was not part of ECRA and was mistakenly sued.

The arrangement between plaintiff, the reinsured, and the moving defendants is fully explained in *Utica Mut. Ins. Co. v Clearwater Ins. Co.* (2014 WL 6610915 [Nov. 20, 2014]). For the sake of brevity, the court declines to repeat here the details of the reinsurance process.

This matter is a contractual dispute between the parties involving insurance agreements made during the period 1978 - 1982. The parties are unable to produce complete legible written agreements, in part, because records are no longer available due to the passage of time and, according to one party, the loss of records in the World Trade Center disaster. The only documents that have been produced by the parties are reinsurance certificates, some of which are illegible and some of which are only partially legible. The following is an example of the operative portion of the original certificates, the language of which is not disputed:

ITEM 1	ITEM 2	ITEM 3
Type of Insurance	Policy Limits and Application	Reinsurance Accepted
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Umbrella Liability	\$25,000,000 ea occ/ann. agg (where applicable excess of U/L &/or \$25,000 S/R	\$1,000,000 excess of U/L &/or \$25,000 S/R
ITEM 4	ITEM 5	
Reinsurance Accepted	A) Excess of Loss	
-----	B) Excess of Loss	
see end. #1		



A typical "change endorsement" is as follows:

Reinsurance Accepted

A) \$1,000,000 P/O \$4,000,000 ea. occ./ann. agg (where applicable) excess of U/L and/or \$25,000 S/R.

B) \$1,000,000 P/O \$5,000,000 ea. occ./ann. agg (where applicable) excess of U/L and/or \$25,000 S/R.

This appears to be the only documentary evidence for the court to consider on the motion. There has not been presented any document which deals specifically with the issue of whether coverage exists for costs and expenses above the amounts stated in the certificate. The certificates with the language set forth above are attached to plaintiff's complaint, and no additional documents have been presented by plaintiff. Thus, the analysis of this court is limited to the language of those certificates.

The position of the ECRA defendants on this motion is that the reinsurance certificates are unambiguous and provide that their total liability is limited to the amount of the coverage stated in the certificate and does not include expenses of loss adjustment and legal expenses in excess of the stated coverage amount.

Among other issues, the ECRA defendants contend that plaintiff should be collaterally estopped from seeking reimbursement for expenses in excess of the stated coverage by virtue of the decision in *Utica Mut. Ins. Co. v Clearwater Ins. Co.* (2014 WL 6610915 [Nov. 20, 2014], *reconsideration denied* 2015 WL 4496374 [July 23, 2015]). For a number of reasons, the doctrine of collateral estoppel does not apply with regard to the claim by plaintiff in the present matter. Among other things, the present motion involves a question of law as presented by the moving defendants and collateral estoppel does not preclude consideration of a question of law. Also, there is an issue as to whether the *Clearwater* case in the federal court is a final determination, and

whether the litigation has been completed. For these reasons, this court rejects a claim that the moving defendants are entitled to judgment as a matter of law based on collateral estoppel.

However, notwithstanding the foregoing, this court adopts the reasoning set forth in *Clearwater*. *Clearwater* involves reinsurance certificates similar to that in the present case. There the court concluded that the certificates as to the limit of liability are unambiguous, and therefore, extrinsic evidence should not be considered. The analysis in *Clearwater* is based on the decision by the New York Court of Appeals in *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.* (3 NY3d 577 [2004]) and a decision by the Court of Appeals for the Second Circuit in *Bellefonte Reins. Co. v Aetna Cas. & Sur. Co.* (903 F2d 910 [2d Cir 1990]).

Plaintiff has presented an impressive array of materials to show that the custom and practice in the insurance trade is contrary to the decision in *Clearwater* and the decision of the Court of Appeals in *Excess Insurance*. These cases hold, however, that evidence of custom and practice is extraneous evidence that may only be shown if a contract is ambiguous. This court is constrained by the decision in *Excess* to rule that the certificates of insurance in the present matter are unambiguous and, therefore, extraneous evidence may not be shown under these circumstances.

The court acknowledges that the exact language of "limit" used in the certificates considered in *Excess* is different than the language of the present case which is "reinsurance accepted." There does not, however, appear to be any meaningful distinction between the language of the certificates considered by the Court of Appeals in *Excess* and the language of the certificates that are in evidence in the present case. The Court of Appeals in *Excess* relied to a certain extent upon the decision by the Second Circuit Court of Appeals in *Bellefonte*, which also involves certificates with the same or similar language to that in the present case. Furthermore, the following language from *Excess*

supports a grant of partial summary judgment to the moving defendants:

"Of course, both parties were well aware of the type of product that was being reinsured. It would be far from unreasonable to expect that at the time of procuring reinsurance, [the reinsured] could anticipate the possibility of incurring loss adjustment expenses in settling a claim . . . . Certainly, nothing prevented [the reinsured] from insuring that risk either by expressly stating that the defense costs were excluded from the indemnification limit or otherwise negotiating an additional limit for loss adjustment expenses that would have been separate and apart from the reinsurers' liability on the insured property. Failing this, the reinsurers were entitled to rely on the policy limit as setting their maximum risk exposure." (*Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.* at 584-585.)

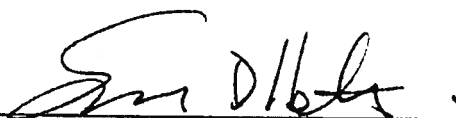
Therefore, the moving defendants are entitled to partial summary judgment on their third affirmative defense pertaining to a cap on liability "for both loss and expenses" in the face amount of the reinsurance certificates.

For the reasons set forth above, it is hereby

**ORDERED** that the moving defendants in this matter are granted partial summary judgment on their third affirmative defense; and it is further

**ORDERED** that moving defendants' counsel shall file this decision and order with the Oneida County clerk's office within ten days of the date of this decision and order, and shall serve a copy of the filed decision and order upon all other counsel, with notice of entry thereon, within ten days of the date of filing.

Dated: August 15, 2016  
at Rome, New York.



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Hon. Samuel D. Hester  
Justice of the Supreme Court