IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CENTURY INDEMNITY COMPANY, et al	:	**JULY TERM, 2012**
Plaintiffs	:	**NO. 02928**
v.	:	**COMMERCE PROGRAM**
ONEBEACON INSURANCE COMPANY	:	**CONTROL NO. 15012312**
Defendant	:	

DOCKETED
MAR 27 2015
R. POSTELL
DAY FORWARD

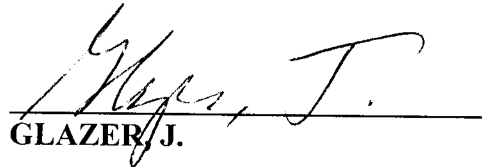
ORDER

AND NOW, this 27th day of March, 2015, upon consideration of the motion for summary judgment of defendant, OneBeacon Insurance Company, and any response thereto, it is hereby

ORDERED

that the said motion is **DENIED**.

BY THE COURT:



GLAZER, J.

Century Indemnity Compa-ORDOP

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OPINION

GLAZER, J.

March 27, 2015

Before the court is the motion for summary judgment of defendant, OneBeacon Insurance Company

I. PROCEDURAL AND FACTUAL HISTORY

Defendant, OneBeacon Insurance Company ("OneBeacon), has filed the instant motion for summary judgment against plaintiffs, Century Indemnity Company ("Century") and Pacific Employers Insurance Company ("PEIC"). The heart of this case involves facultative reinsurance certificates—whereby insurance companies shift all or a part of its risk from the underlying policy to other insurance companies. It is insurance for insurance companies. The parties entered into the following three certificates:

> 1. Century's predecessor-in-interest, Insurance Company of North America ("INA"), issued a liability policy (number X153672) to J-M Manufacturing Company, Inc., a subsidiary of Formosa Plastics Corporation ("Formosa"), which was subsequently renewed (number XBC 540715).

> 2. OneBeacon's predecessor, General Accident, issued to INA a Certificate of Facultative Reinsurance FC 4513 reinsuring Formosa Policy XBC 153672. The certificate was renewed by endorsement to cover Formosa Policy XBC 540715.
>
> 3. PEIC issued a liability policy (number XMO 014527) to Gould Pumps, Inc. General Accident issued Certificate of Facultative Reinsurance FC 4233 to PEIC, reinsuring the Gould Policy. General Accident also issued a second issued Certificate of Facultative Reinsurance to PEIC, FC 6025, reinsuring the renewal of the Gould Policy.

Plaintiff's Response to Defendant's Motion for Summary Judgment, at 4-8; Defendant's Motion for Summary Judgment, Ex. 1-3. In essence, these policies stipulate that plaintiffs agreed to defend the underlying policy holders up to a certain amount, and defendant would then reinsure a portion of plaintiffs' losses. See id.

Essentially, the relevant provisions of the aforementioned facultative reinsurance certificates (hereinafter collectively referred to as "facultative certificates" or "certificates") are identical. The only differences among the certificates, which do not impact the court's decision, include the amounts of the Reinsurance Accepted, the names of the insured and reinsured, the reinsurance premiums, the dates of the reinsurance and details regarding the underlying insurance policies and underlying reinsurance. Since the language in question is identical in each certificate, the three certificates shall be analyzed together.

The front page of the facultative certificates provide the amount of "Reinsurance Accepted" in Section IV, and further states: "In consideration of the payment of the net premium and subject to the general conditions set forth on the reverse side hereof, the reinsurer does

hereby reinsure [Name of the Company's Insured]."[1] Defendant's Motion for Summary Judgment, Ex. 1-3. The relevant portions of the "general conditions" on the back page of the certificates convey the following terms:

> General Condition 1
>
> [T]he liability of the Reinsurer specified in Section IV shall follow that of the Company and, except as otherwise specifically provided herein, shall be subject in all respects to all the terms and conditions of the Company's policy....
>
> General Condition 3
>
> All claims involving this reinsurance, when settled by the Company, shall be binding on the Reinsurer, who shall be bound to pay its proportionate share of such settlements, and in addition thereto, in the ratio that the Reinsurer's loss payment bears to the Company's gross loss payment, its proportionate share of expenses ... incurred by the Company in the investigation and settlement of claims or suits....

Id. Defendant filed the instant motion for summary judgment on two grounds: (1) that the limit stated in Section IV "Reinsurance Accepted" places a total cap on defendant's liability, which includes in its calculation the expenses referred to in Condition 3, and (2) that plaintiffs are not entitled to an award of interest on payments. Conversely, plaintiffs contend that it is entitled to recover its expenses in addition to the stated "Reinsurance Accepted" limits and is entitled to an award of interest on the payments received. For the reasons stated herein, defendant's motion is denied.

II. DISCUSSION

A. Standard of Law

Once the relevant pleadings have closed, any party may move for summary judgment "in cases where there are no genuine issues of material fact and the moving party is entitled to

[1] Again, while the amount of "Reinsurance Accepted" varies between the certificates, the specific figures are irrelevant for purposes of deciding the instant motion.

judgment as a matter of law." Lance v. Wyeth, 85 A.3d 434, 449 (Pa. 2014) (citations omitted); Pa.R.C.P. No. 1035.2. When considering the merits of the motion, a court shall view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Fine v. Checcio, 870 A.2d 850, 857 (2005). Summary judgment may be granted only when the judgment is "clear and free from doubt." Id. at 857 (citations omitted).

B. Interpreting the Terms Governing Expenses

Defendant first requests the court to grant summary judgment on the issue that it does not owe payments—including expenses—in excess of the stated Reinsurance Accepted limits provided in the facultative certificates. Terms and conditions of facultative certificates incorporated within Reinsurance Accepted limits and whether the calculation of expenses are included, or separate and apart, from the stated limit has been interpreted by our federal courts and neighboring states. However, this is a case of first impression for Pennsylvania courts.[2] The court has examined relevant cases published by other courts as persuasive authority, but is left to conduct its own analysis under Pennsylvania law without the guidance of binding authority.

When tasked with interpreting the meaning of a contract, the principle rule is to ascertain and give effect to the intent of the contracting parties. Murphy v. Duquesne Univ. Of The Holy Ghost, 777 A.2d 418, 429 (Pa. 2001). A provision in a contract is ambiguous "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." Id. at 430.

1. Distinguishing Bellefonte case

[2] Defendant conducted a choice of law analysis in its motion for summary judgment, but the parties do not dispute that the Reinsurance Accepted limits shall be governed by Pennsylvania law. The court agrees that Pennsylvania law applies.

Defendant suggests that this court adopt the reasoning of Bellefonte Reinsurance Co v. Aetna Cas. & Sur. Co., 903 F.2d 910 (2d Cir. 1990) and its progeny as controlling in the case at bar. In Bellefonte, the Second Circuit Court of Appeals held that the "in addition thereto" language for expenses remained limited to the reinsurers' overall liability cap. The court specifically focused on a clause in the certificate that stated, "in consideration of the payment of the premium and ***subject to the*** terms, conditions and ***amount of liability*** set forth herein..." (emphasis added). Because the "in addition thereto" provision governing expenses was a term "subject to" the amount of liability, the court reasoned that defense costs were not exempt from the limitation. See id. at 913-14. However, the Second Circuit recently clarified that Bellefonte did not establish a blanket rule that all limits of liability are presumptively expense-inclusive. See Utica Mut. Ins. Co. v. Munich Reinsurance Am., Inc., No. 13-4170-CV, 2014 WL 6804553, at *4 (2d Cir. Dec. 4, 2014). The court emphasized that the wording of a "subject to" clause plays a key role in creating such a presumption. Id. This presumption can still be overcome. Even if a condition mirrors the language used in Bellefonte, a court must still analyze the certificate as a whole in order to discern its meaning and conclude whether expenses are included, or in addition, to the limit of liability. Id. (noting the ability to overcome a presumption of expense-inclusiveness by means other than explicit language or the presence of a separate limit for expenses).

The language of the certificates in this case, while similar to Bellefonte, contains slight variations which leads to a different conclusion. First, language on the front side of the certificates states the premium is "subject to the general conditions set forth on the reverse side hereof...." General Condition 1 reinforces this premise as it states that "[t]he liability ... shall be subject ...to all the terms and conditions of the Company's policy." The difference between this

language and that of Bellefonte cannot be ignored. Instead of the terms being subject to the liability as in Bellefonte, the liability is subject to the terms and conditions. This places greater emphasis on the conditions themselves, which may trump other aspects of the certificates. As a result, a condition that excludes expenses in calculating the total loss limit holds more weight than the amount of "Reinsurance Accepted" when interpreting these certificates.

Bellefonte highlighted the importance of the "subject to" clause, and Utica demonstrated the ability of a court to reach a different interpretation. If anything, the terms of the certificates may have created a presumption of expense-*exclusiveness*. Having scrutinized the precise terms on their own, and then viewing the certificate as a whole, this court finds that defendant is not entitled to summary judgment on this issue.

2. Use of Extrinsic Evidence

Assuming arguendo this court interpreted the certificate as being analogous to Bellefonte, the court would still have denied defendant's motion on the grounds that a latent ambiguity exists. In order to fully discern the intent of the parties, courts should not wear blinders and analyze the document in a vacuum. Id. An ambiguity may appear in the form of a "latent ambiguity" which "arises from extraneous or collateral facts which make the meaning of a written agreement uncertain although the language thereof, on its face, appears clear and unambiguous." Steuart v. McChesney, 444 A.2d 659, 663 (Pa. 1982).

Defendant claims that it is inappropriate to use extrinsic evidence when interpreting the certificates because they are facially unambiguous. In general, unless a contract explicitly prohibits its use, "custom or usage, once established, is considered a part of a contract and binding on the parties though not mentioned therein, the presumption being that they know of and contracted with reference to it." Resolution Trust Corp. v. Urban Redevelopment Auth. of

Pittsburgh, 638 A.2d 972, 976 (Pa. 1994); See also Sunbeam Corp. v. Liberty Mut. Ins. Co., 781 A.2d 1189, 1193 (Pa. 2001) (asserting that "custom in the industry or usage in the trade is always relevant and admissible in construing commercial contracts and does not depend on any obvious ambiguity in the words of the contract."). Such evidence would be particularly useful for facultative certificates, which consist of bare-bone terms—far from the exhaustive nature of typical insurance policies. See Koken v. Legion Ins. Co., 831 A.2d 1196, 1209-10 & n. 25 (Pa. Commw. Ct. 2003) (describing the agreements between ceding companies and their reinsurers as casual in nature and operating on "the handshake rather than the 'get in writing' principle."); see also Utica Mut. Ins. Co. v. Munich Reinsurance Am., Inc., No. 13-4170-CV, 2014 WL 6804553, at *4 (2d Cir. Dec. 4, 2014) (holding the conditions regarding the limit of loss liability was ambiguous, which required the consideration of extrinsic evidence).

Plaintiffs argue that extrinsic evidence is not only permitted, but necessary, in order to construe the terms of the contract in its entirety, and use of such evidence permits reasonable minds to interpret the terms in a different manner than defendant. This court agrees. The application of industry custom and usage influences the meaning of the certificates, and highlights the existence of genuine issues of material fact which are to be determined by the finder of fact.

C. Collateral Estoppel

Defendant also moves for summary judgment on the grounds that plaintiffs are collaterally stopped from arguing their case due to the holdings in Pacific Employers Ins. Co. v. Global Reinsurance Corp., No. Civ. A. 09-6055, 2010 WL 1659760 (E.D. Pa. Apr. 23, 2010), and Global Reinsurance Corp. v. Century Indemnity Co., No. 13 Civ. 06577, 2014 WL 4054260 (S.D.N.Y. Aug. 15, 2014). However, these cases do not hold the necessary weight of final

judgments at this juncture in order to apply collateral estoppel against plaintiffs.[3] Also, this court shall not apply collateral estoppel on the basis that the slightly different wording of the "subject to" clause may prove to be an influential factor in the interpretation of the certificate.

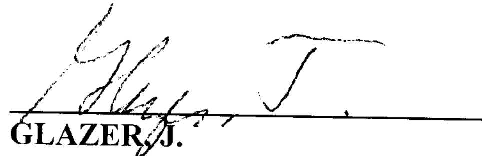
D. Defendant's Motion on Payments of Interest

Finally, defendant has sought summary judgment on the same issue that plaintiffs filed their own partial motion for summary judgment on—payments of interest. This court granted plaintiffs' motion (Control No. 15012313), and for the reasons provided therein, defendant's motion is denied.

III. CONCLUSION

Based on the foregoing, defendant's motion for summary judgment is denied in whole.

BY THE COURT:



GLAZER, J.

[3] In PEIC v. Global, due to its finding on another issue, the Third Circuit chose not to consider the "limit-of-liability" issue and dismissed it as moot. PEIC, 693 F.3d at 425 n. 3. The court in Global v. Century referred the matter to a Magistrate judge so the parties could negotiate the terms of a final order. Global, 2014 WL 4054260; see also Defendant's Motion for Summary Judgment, at 27. Since the finding remains subject to a motion for reconsideration and has not been appealed, it does not qualify as a final judgment.