IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PACIFIC EMPLOYERS INSURANCE COMPANY,	)	
Plaintiff/Counterclaim Defendant,	)	CIVIL ACTION
v.	)	No. 2:09-CV-6055-RK
GLOBAL REINSURANCE CORPORATION OF AMERICA (FORMERLY KNOWN AS CONSTITUTION REINSURANCE CORPORATION),	)	
Defendant/Counterclaim Plaintiff.	)	

GLOBAL'S OPPOSITION TO PEIC'S MOTION TO COMPEL

Defendant/Counterclaim Plaintiff Global Reinsurance Corporation of America, formerly known as Constitution Reinsurance Corporation ("Global"), for its Opposition to Pacific Employers Reinsurance Company's ("PEIC") Motion to Compel, states as follows:

I. INTRODUCTION

Despite Global's production of all relevant and non-privileged information and documents responsive to PEIC's First Set of Interrogatories and Requests for Production of Documents, PEIC brings this Motion to Compel demanding a slew of irrelevant discovery from Global. The irrelevant discovery sought by PEIC relates to the following broad categories:

(1) Global's potential notice of the underlying Buffalo Forge claims from any source other than PEIC, which bears no relevance to PEIC's obligation to provide Global with prompt notice under the Reinsurance Certificate[1] at issue here;

[1] The "Reinsurance Certificate" is defined as facultative reinsurance certificate number 68224 entered between Global as the reinsurer and PEIC as the reinsured, for the reinsurance policy period of June 1, 1980 to June 1, 1981.

(2) documents pertaining to Global's claim that it was prejudiced by PEIC's late notice, which is no longer at issue in this litigation as discussed in Section B. below;

(3) Global's retrocessional information, which is irrelevant to the current dispute as well as confidential and proprietary in nature; and

(4) discovery on issues previously (twice) adjudicated by this Court, which are clearly no longer at issue in this litigation. For all of the reasons discussed below, PEIC's overreaching demands should be rejected.

II. LEGAL STANDARD - SCOPE OF DISCOVERY

Under Fed.R.Civ.P. 26(b)(1), discovery is limited to relevant matters. Specifically, a court may limit discovery if it is determined that the discovery is not relevant and will not lead to the discovery of admissible evidence. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351-52, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978) ("Discovery of matter not 'reasonably calculated to lead to the discovery of admissible evidence' is not within the scope of Rule 26(b)(1)."); Fed.R.Civ.P. 26(b)(1) (discovery permitted if it is "reasonably calculated to lead to the discovery of admissible evidence"). Additionally, if the burden or expense of proposed discovery likely outweighs its benefit, a court "must" prevent or limit that discovery. Fed.R.Civ.P. 26(b)(2)(C)(i).

III.. PEIC HAS NOT IDENTIFIED ANY VALID BASIS TO SUPPORT AN ORDER COMPELLING ITS IRRELEVANT AND OVERBROAD DISCOVERY REQUESTS

A. Global's Potential Notice Of The Underlying Buffalo Forge Claims From A Source Other Than PEIC Bears No Relevance To PEIC's Obligation To Provide Global Prompt Notice Under The Reinsurance Certificate.

As an initial matter, in its moving brief, PEIC falsely alleges that Global has "refused" to respond to its requests regarding Global's first notice of the underlying Buffalo Forge asbestos

claims[2], and perplexedly uses as an example Global's response to PEIC's Interrogatory No. 10. In that Interrogatory, PEIC asked how Global first received notice of the underlying claims, and Global responded by referring PEIC to Count I of Global's Counterclaim filed in this matter, which sets forth the date and manner of Global's first notice, as well as Exhibit B of its Counterclaim, which was the "initial report" from PEIC to Global first notifying Global of the underlying Buffalo Forge claims. The fact that PEIC may not like Global's response certainly does not transform Global's response into a "refusal" to respond.

With regard to PEIC Interrogatory Nos. 17 and 21 and Request Nos. 7, 8, 9, and 17, Global has provided all relevant documents and information pertaining to whether PEIC timely notified Global of the underlying claims under the Reinsurance Certificate at issue. The Reinsurance Certificate issued to PEIC requires:

> As a condition precedent, the Company [PEIC] shall promptly provide the Reinsurer [Global] with a definitive statement of loss on any claim or occurrence reported to the Company **<u>and brought under this Certificate</u>** which involves a death, serious injury or lawsuit.

See Reinsurance Certificate at p. 3 of 20, ¶ D, (emphasis added), a true and correct copy of which is attached hereto as Exhibit 1.

PEIC failed to comply with this notice requirement of the Reinsurance Certificate. In an effort to circumvent its breach of the notice condition, PEIC argues that it has some unspecified "good faith basis" to believe that Global had notice of the underlying Buffalo Forge claims from some "source other than PEIC" prior to PEIC's late notice. However, Global's receipt of documents or information from some "other source" does not excuse, or have any bearing on, *PEIC's* failure to comply with *PEIC's* obligation to provide Global with notice of claims

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[2] Specifically, PEIC asserts that Global refused to respond to PEIC Interrogatory Nos. 10, 17, and 21, and PEIC Document Request Nos. 7, 8, 9, and 17. The full text of PEIC's requests and Global's responses are set forth on pages 4-5 of PEIC's moving brief, as well as Exhibits B and C attached thereto.

"*brought under this Certificate*" between *PEIC and Global*. Only PEIC can bring a claim under the Reinsurance Certificate, not some other cedent or source unrelated to the Reinsurance Certificate at issue. Thus, whether Global may have become aware through some source other than PEIC that a company called Buffalo Forge was sued or liable for asbestos claims bears absolutely no relevance to whether Global was on notice that PEIC would bring an indemnity claim in connection with the Buffalo Forge liabilities against Global under this Reinsurance Certificate. And tellingly, PEIC does not cite a single case to support its position.

In Asbeka Industries v. Travelers Indemnity Co., 831 F. Supp. 74 (E.D.N.Y. 1993), an insured that failed to provide its insurer with timely notice of underlying asbestos claims argued that its insurers were nevertheless placed on notice of the underlying claims or lawsuits by "other sources," including communications with other insurance companies. The Asbeka court flatly rejected this argument as "patently frivolous," stating:

> The salutary purposes underlying prompt notice of claim are to enable insurers to investigate claims timely before evidence becomes stale, to exercise early control over a claim including assessing settlement potential, and to adjust its insurance reserves to account for the insured's claim.3 These purposes are not furthered by intercompany communications, which, quite clearly, do not provide those insurers whom the insured has not notified directly of the specific facts surrounding the "occurrence" or to whom the insured has not forwarded copies of every demand, summons or complaint which relates to a pending suit.

Asbeka, 831 F. Supp. at fn. 13 (internal citations omitted); see also, Mount Vernon Fire Ins. Co. v. Creative Housing Ltd., 797 F. Supp. 176, 184 (E.D.N.Y. 1992), citing Heydt Contracting Corp. v. American Home Assurance Co., 146 A.D.2d 497, 499, 536 N.Y.S.2d 770, 773 (1st

[3] Prompt notice conditions of a reinsurance contract, similar to direct insurance, are designed to: (1) apprise the reinsurer of potential liabilities to enable it to set proper reserves; (2) enable the reinsurer to decide whether it wishes to exercise its right to associate in the defense of a particular claim; and (3) enable the reinsurer to establish premiums that accurately reflect its past loss experience. See Christiana General Ins. Corp. of New York v. Great American Ins. Co., 979 F.2d 268, 274 (2d Cir. 1992).

Dept. 1989) (fact that insurer obtained independent knowledge of the occurrence does not excuse insured's late notice of claim); Sphere Drake Ins. Co., P.L.C. v. YL Realty Co., 1999 WL 681387 (S.D.N.Y. Aug. 31, 1999) (notice to other source does not constitute notice to insurer).

In addition, as a practical reality, when Global, a large reinsurer, receives notice of claims against a particular insured from a particular cedent under a particular facultative certificate, Global does not go through or review all of the other thousands of facultative certificates that it issued to ascertain whether it reinsures other cedents who also may have issued policies to the same underlying insured. It would be a ludicrous exercise, not to mention a practical impossibility, to check and cross-reference all of its facultative certificates every time Global receives a notice of claim under a particular certificate. Yet, that is the relevance argument that PEIC makes to argue for the discovery of information regarding Global's "notice" of the underlying Buffalo Forge claims from another source. See Affidavit of Dennis Annecchino, a true and correct copy of which is attached hereto as Exhibit 2.

As demonstrated by the foregoing, any potential knowledge that Global may have had regarding the existence of the underlying Buffalo Forge claims from a source other than PEIC is simply not relevant to Global's late notice defense under the Reinsurance Certificate at issue. It is PEIC's obligation to provide prompt notice to Global.[4] Thus, Global requests that the Court deny PEIC's motion to compel this information.

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[4] See Unigard Security Ins. Co. v. North River Ins. Co., 4 F.3d 1049, 1065 (2d Cir. 1993) (reinsurers are dependent on their ceding insurers for prompt and full disclosure of information concerning pertinent risks to enable reinsurers to set premiums and adequate reserves and to determine whether to associate in defense of claims).

B. Global Has Withdrawn Its Prejudice Claim and Discovery Relating To That Withdrawn Claim Is No Longer Relevant to This Action.

By letter to PEIC's counsel dated November 1, 2010, Global withdrew its prejudice claim in this litigation because the notice condition contained in the Reinsurance Certificate simply does not require Global to demonstrate prejudice. A true and correct copy of Global's November 1, 2010 letter is attached hereto as Exhibit 3. Specifically, the notice condition of the Reinsurance Certificate provides in relevant part:

> **As a condition precedent**, the Company [PEIC] shall promptly provide the Reinsurer [Global] with a definitive statement of loss on any claim or occurrence reported to the Company and brought under this Certificate which involves a death, serious injury or lawsuit.

See Exhibit 1 at p. 3 of 20, ¶ D (emphasis added). When, as here, a reinsurance contract contains an express provision making prompt notice a condition precedent to a reinsurer's obligations, a reinsured's failure to comply with the notice provision serves as a complete bar to coverage under the reinsurance contract, regardless of prejudice to the reinsurer. See Christiana General Ins. Corp. of New York v. Great American Ins. Co., 979 F.2d 268, 274 (2d Cir. 1992); Global Reinsurance Corp. v. Argonaut Ins. Co., 548 F. Supp.2d 104, 111 (S.D.N.Y. 2008); Constitution Reinsurance Corp. v. Stonewall Ins. Co., 980 F. Supp. 124, 130-131 (S.D.N.Y. 1997).

Section B. of PEIC's brief relating to "Global's Apparent Claim of Prejudice" sets forth PEIC's arguments for the production of information and documents concerning Global's prejudice claim. As Global is no longer asserting that claim, PEIC's motion to compel in that regard is moot and need not be addressed further.

C. Global's Retrocessional Information Is Not Relevant To This Litigation And It Is Confidential and Proprietary In Nature.

In its Interrogatory No. 9 and Document Request No. 15, PEIC seeks information and documents pertaining to Global's retrocessional coverage and Global's communications with its

retrocessionaires.[5] Contrary to PEIC's assertion on page 11 of its moving brief, PEIC's requests are not "clearly limited" to retrocessional coverage and communications "regarding the [underlying Buffalo Forge] claims at issue in the litigation," but rather PEIC goes as far to seek such information with regard to "any claim or potential claim for asbestos products bodily injury against the Buffalo Forge Company" and relating to reinsurance contracts between Global and other entities that are not at issue here. In addition to being overbroad and unduly burdensome, the information sought by PEIC is not discoverable because it is not relevant to the current dispute nor is it reasonably calculated to lead to relevant information, and it is confidential and proprietary in nature.

It is generally accepted that reinsurance or retrocessional information is not discoverable because it is irrelevant. See, e.g., Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 139 F.R.D. 609, 611-612 (E.D. Pa. 1991) ("Rhone-Poulenc I") (court rejected policyholder's efforts to discover either the reinsurance agreements or communications with reinsurers because they were irrelevant to the dispute at issue – "discovery concerning reinsurance agreements to which the plaintiffs were not parties would not assist in the determining of the mutual intent of the parties" to the reinsurance contract at issue in the litigation)[6]; Medmarc Cas. Ins. Co. v. Arrow

[5] A retrocessional contract is simply a reinsurance contract between a reinsurer, such as Global, and another reinsurer, called a retrocessionaire, by which the retrocessionaire agrees to indemnify the reinsurer, wholly or partially, against loss or liability sustained under its reinsurance contracts. Basically, it is reinsurance for the reinsurer. Like any reinsurance contract, a retrocessional contract is separate and distinct from the policy that the cedent [PEIC] issued to its insured [Buffalo Forge], as well as from the reinsurance contract that the reinsurer [Global] issued to its cedent [PEIC]. There is no privity of contract between PEIC and Global's reinsurer/retrocessionaire. See General Reinsurance Corp. v. Missouri Gen. Ins. Co., 596 F.2d 330, 332 (8th Cir. 1979); Donaldson v. United Community Ins. Co., 741 So.2d 676, 679-80 (La.App.3 1999), writ denied, 740 So.2d 1285 (La. 1999); In re Liquidation of Reserve Ins. Co., 524 N.E.2d 538, 541 (Ill. 1988) ("a reinsurance agreement is distinct from and unconnected with the original insurance policy; the original policyholder – the entity whose loss is insured – is not a party to the reinsurance agreement").

[6] The court in Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 1991 WL 237636, *2 (E.D. Pa. Nov. 7, 1991) (Rhone-Poulenc II), confirmed that reinsurance communications are irrelevant to determine

International, Inc., 2002 WL 1870452 (E.D. Pa. July 29, 2002) (reinsurance communications irrelevant to the dispute at hand and not discoverable); Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co., 117 F.R.D. 283, 288 (D.D.C. 1987) (denying motion to compel reinsurance information "as seeking information of very tenuous relevance, if any relevance at all"); American Med. Sys. v. National Union Fire Ins. Co., 1999 WL 781495 (E.D. La. 1999) (after researching authority from multiple jurisdictions, court held that reinsurance information is not relevant to insurer's late notice defense because method of providing notice is set forth in the insurance policy that is the subject of the litigation); Leksi, Inc. v. Federal Ins. Co., 129 F.R.D. 99, 106 (D. N.J. 1989) ("Reinsurance is a business decision and is not based on the insurers' interpretation of particular policy language. It is not information which is reasonably calculated to lead to admissible evidence").

Even PEIC recognizes that the information it seeks is potentially relevant for only two reasons, only one of which is still at issue here[7] – and that is, to Global's late notice defense "to demonstrate what and when Global knew about the [Buffalo Forge] claims." In other words, PEIC seeks this information to ascertain whether Global informed any of its retrocessionaires about the underlying Buffalo Forge claims **prior** to Global's asserted first notice of these claims from PEIC in April 2008, thereby supposedly undercutting Global's late notice defense. Global disagrees that this information is discoverable. However, in the interest of resolving this conflict

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the intent of the parties, but further stated that such information could potentially have a limited relevance to a late notice defense if such communications are inconsistent with the insurer's assertion of late notice, i.e., if Global had any such communications with a retrocessionaire about the underlying claims or reinsurance claim at issue prior to the date that Global first received notice from PEIC. As discussed below, any such potential limited relevance is mooted by the Affidavit of Dennis Annecchino, attached hereto as Exhibit 2.

[7] PEIC also argues that these retrocessional documents are relevant to Global's prejudice claim regarding Global's commutation of certain retrocessional agreements based on PEIC's late notice. As noted in Section B. above, Global's prejudice claim is no longer at issue in this litigation.

in a practical and efficient manner, Global previously offered to provide PEIC with an affidavit "that it had no communications with any of its retrocessionaires covering the relevant facultative certificate issued to PEIC prior to receiving notice [of the underlying Buffalo Forge claims] from PEIC in April 2008." See Exhibit F to PEIC's moving brief, Oct. 19, 2010 Letter from B. Garcha to C. Russell at 2. PEIC ignored Global's offer.

In this respect, Global attaches hereto the Affidavit of Dennis Annecchino as Exhibit 2. In this Affidavit, Global confirms that it had no communications or contacts with any retrocessionaire reinsuring the Reinsurance Certificate in connection with the underlying Buffalo Forge claims prior to PEIC's notice to Global in April 2008. This affidavit therefore moots the only potential relevance that this retrocessional information could even arguably have to this litigation. In light of the foregoing, this Court should reject PEIC's efforts to obtain this information.

In addition to the fact that Global's reinsurance or retrocessional information is not discoverable because it is not relevant, this information is also not discoverable because it contains confidential and proprietary information. Reinsurance is a critical aspect of an insurance company's financial stability, reducing the impact that an insurer will suffer in the event of catastrophic loss. See Christiana Gen. Ins. Corp. v. Great Am. Ins. Co., 745 F. Supp. 150, 152 (S.D.N.Y. 1990), aff'd in relevant part, 979 F.2d 268 (2d Cir. 1992). Insurers use reinsurance to distribute risks, allowing the insurer to provide insurance for risks that otherwise would be beyond its underwriting capacity. See Leff v. NAC Agency, Inc., 639 F. Supp. 1426, 1428-29 (E.D. Mich. 1986). Courts recognize that reinsurance documents contain confidential commercial information, such as pricing information, for which a qualified privilege is available, unless the party requesting discovery demonstrates a basis for overcoming such privilege. See

Lipton v. Superior Court, 48 Cal. App.4th 1599, 1618, 56 Cal. Rptr.2d 341, 352 (1996). PEIC makes no such showing here.[8] Thus, Global's reinsurance or retrocessional information is also not discoverable because it is confidential and proprietary in nature.

D. PEIC's Attempt To Obtain Discovery On Issues Previously Adjudicated By This Court Should Be Rejected.

The Court has twice ruled on, and twice rejected, PEIC's position with regard to the "expense in addition to loss" issue in this litigation. See Court's Memoranda and Orders entered April 23, 2010 and June 9, 2010. Ignoring the Court's rulings, PEIC nevertheless still demands (and moves to compel) discovery on this issue, as though the Court had not already resolved it. In its Document Request No. 20, PEIC seeks:

> 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**.

(Emphasis added).

As stated, the Court already granted Global's Motion for Judgment on the Pleadings on this issue and denied PEIC's Motion for Judgment on the Pleadings and Motion for Reconsideration, ruling that Global has no obligation to pay amounts in addition to the $1 million limit of liability stated in the Reinsurance Certificate. The Court found that the stated limit in the Reinsurance Certificate clearly and unambiguously encompasses expenses as a

[8] In a single sentence on page 11 of its opening brief, PEIC summarily makes the statement that retrocessional communications are not privileged, but the three cases that PEIC cites for its proposition remarkably have nothing to with reinsurance or retrocessional communications or any privilege attached thereto. In fact, only one of the three cases that PEIC cites even relates to insurance or reinsurance, and in that case, North River Ins. Co. v. Columbia, the court held that a reinsured and its reinsurer do not necessarily share a common interest, and thus the reinsurer was not entitled to the reinsured's privileged documents. Thus, at best, this case could stand for the idea that Global may not be entitled to PEIC's privileged documents, or that Global's retrocessionaire may not be entitled to Global's privileged documents, which are not issues here.

matter of law and held that no extrinsic evidence is allowed or necessary to interpret the clear and unambiguous policy language. In contravention of the Court's holding, PEIC is still demanding the production of precisely the type of extrinsic evidence that the Court already rejected as irrelevant in this litigation. Enough is enough. The "expense in addition to limits" issue is no longer an issue in dispute in this litigation. Any discovery on the issue is simply not relevant, and PEIC's attempts to skirt around the Court's Orders should be rejected.

In addition to seeking discovery on the "expense in addition to loss issue," in its Document Request No. 18, PEIC also seeks "**all** documents relating to Global's billing 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." (emphasis added). This request for all of Global's documents relating to any asbestos billing to any retrocessionaire under any reinsurance contract containing similar wording is so overbroad as to make a search for responsive documents unduly burdensome, if not impossible.

In addition, PEIC seeks documents that bear no relevance to the present matter. PEIC argues that information regarding *different* reinsurance contracts, involving *different* claims and *different* facts and *different* parties is somehow relevant to resolve the very specific dispute of whether PEIC breached the notice condition of the Reinsurance Certificate, i.e., the only remaining dispute in this action. Again, PEIC does not cite a single case to support its contention that this overbroad and irrelevant information is discoverable. In fact, Pennsylvania and other courts have squarely rejected this notion. As discussed in Section C. above, Global's reinsurance or retrocessional information between Global and other entities is not relevant to the interpretation of the Reinsurance Certificate at issue between Global and PEIC here. In this

regard, the Eastern District of Pennsylvania has specifically held that "discovery concerning reinsurance agreements to which the plaintiffs were not parties would not assist in the determining of the mutual intent of the parties" to the reinsurance contract at issue in the litigation, and thus such information was not discoverable. Rhone-Poulenc Rorer, Inc., 139 F.R.D. at 611-612. Here, PEIC seeks precisely the type of discovery deemed irrelevant and undiscoverable by this District, i.e., discovery concerning other reinsurance agreements to which PEIC was not a party in an attempt to demonstrate Global's intent or interpretation of the Reinsurance Certificate at issue in this litigation. PEIC's attempt to obtain this discovery should be rejected.

E. The Additional 30(b)(6) Discovery That PEIC Seeks Is Subsumed Within Categories A. Through D. Above.

In addition to the production of additional documents and interrogatory responses regarding the foregoing categories, PEIC also moves to compel 30(b)(6) deposition testimony pertaining to these categories. For all of the same reasons stated above, the testimony sought by PEIC is irrelevant and undiscoverable.

IV. CONCLUSION

For all of the foregoing reasons, Global respectfully requests that this Court deny PEIC's Motion to Compel.

Respectfully submitted,

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