

## Facultative Certificate's Stated Dollar Amount Only Caps Indemnity or Expenses When No Losses, But Does Not Cap Expenses When There Are Losses

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This week, the latest shoe dropped on the [\*Bellefonte\*](#) saga in New York federal court. Following the New York Court of Appeals' decision in [\*Global Reinsurance Corp. of America v. Century Indemnity Co.\*](#), 30 N.Y.3d 508 (2017), which disposed of any notion that a rule or strong presumption existed in interpreting the meaning of the stated limit in a facultative certificate, the federal district court, after 5 major opinions in the case, finally held an evidentiary hearing to resolve this long-standing declaratory judgment action.

In *Global Reinsurance Corp. of America v. Century Indemnity Co.*, No. 13 Civ. 6577 (LGS) (S.D.N.Y. Mar. 2, 2020) (ECF # 230), the court denied the reinsurer's request for declaratory relief and held that the plain and unambiguous meaning of the facultative certificates was that the stated limit capped losses and also capped expenses where there are no losses, but did not cap expenses where there are losses. The opinion goes through the history of this case and its travels to the Second Circuit, New York Court of Appeals and back, with a bit of *Bellefonte* background and a discussion of other similar cases. But most importantly, the court, following the New York Court of Appeals directive, looked at traditional rules of contract interpretation and construed the facultative certificate solely in light of its language and context.

The evidentiary hearing was to determine (1) whether the language in the facultative certificates was ambiguous and (2) whether and how industry specific context helped interpret the certificates. The relevant terms, which many of you are familiar with, include the preamble to the certificates and Item 4 of the Declarations, the Reinsurance Accepted dollar amount. The certificates also had a following form clause and a payments provision. Expert witness statements were submitted to the court, which the court discussed in detail.

In reaching its conclusions of law, the court stated that to determine whether the certificates were ambiguous, it first had to identify the fully integrated contract. In doing so, the court held that the cedent's underlying reinsured policies issued to its insured were integral to their respective reinsurance contracts. This was because the certificates referenced and incorporated the underlying policies they cover. Accordingly, the court held that it could review the underlying contracts together with the certificates to determine, as a whole, whether the certificates were ambiguous.

To determine ambiguity, the court stated that the relevant inquiry was whether the reinsurance contract's terms could suggest more than one meaning to 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 reinsurance and insurance industries during the applicable time (citation omitted). Interestingly, the parties, according to the opinion, agreed that the certificates were unambiguous, but disagreed as to their meaning. The court found that each party overstated their arguments, as both ignored or misconstrued the explicit text in the certificates.

The court found that "[t]he plain and unambiguous meaning of the reinsurance contracts is that the dollar amount stated in Item 4 caps [the reinsurer's] obligation to pay losses and also caps [the reinsurer's] obligation to pay expenses when there are no losses, but does not cap [the reinsurer's] obligation to pay expenses when there are losses." The court's interpretation was based on the language of the certificate, after having read the certificate as a whole and with reference to the customs, practices, usages and terminology understood in the industry in the 1970s. The opinion details the court's analysis.

The court focused on the Following Form Clause, which the court held refers not only to the types of risks covered, but instead to all the terms and conditions, including the Supplementary Payments provisions in the underlying policies, which are costs-in-addition provisions. The court also noted that the Payments Provision provided that the reinsurer must pay all loss settlements in proportion of expenses. Based on its parsing of the relevant provisions, and with consideration of expert testimony, the court concluded that the amount the reinsurer must pay is limited when there are no loss payments, with the cap being the same as the cap on indemnity payments, but when there are losses the reinsurer must pay for expenses based on a proportionate share of the losses.

The opinion distinguishes other similar cases, especially those with different certificate language. The analysis is deep and thorough, although one can anticipate yet another appeal to the Second Circuit.

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