Global v. Century: Bellefonte Stops Tolling

By Peter R. Chaffetz, Steven C. Schwartz, and Gretta L. Walters

For nearly 30 years, the ruling of the Court of Appeals for the Second Circuit in Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co. was a source of uncertainty in the interpretation of facultative certificates. That has now changed. Although the New York Court of Appeals’ December 14, 2017, ruling in Global Reinsurance Corp. of America v. Century Indemnity Co. does not mention the Bellefonte case by name, it squarely addresses the debate that case has caused.

A brief review of the Second Circuit’s 1991 ruling in Bellefonte and the case law that followed will provide context. In Bellefonte, the court held that the Reinsurance Accepted provision of a facultative certificate was an absolute cap on the reinsurer’s liability, inclusive of losses and expenses. For one of the certificates at issue, the Reinsurance Accepted was “$500,000 part of $5,000,000 excess of $10,000,000 excess of underlying limits.” Thus, the ruling meant that the limit of that certificate, for both losses and expenses, was $500,000.

The first major ruling to reaffirm Bellefonte came three years later, in Unigard Security Insurance Co. v. North River Insurance Co. Concluding that “Bellefonte’s gloss upon the written agreement is conclusive,” the Unigard court refused to consider whether the following form clause or evidence of industry custom and practice, which the Bellefonte court had not considered, might change the analysis. Some have interpreted Bellefonte and Unigard to create a per se rule under which facultative reinsurers are not liable for defense costs in addition to limits, even where the underlying policy clearly covers such costs.

More than a decade later, the New York Court of Appeals weighed in. In Excess Insurance Co. v. Factory Mutual Insurance Co., the court was presented with a somewhat different form of facultative certificate—covering a property rather than a casualty policy—but still followed Bellefonte. The court granted summary judgment to the reinsurer, holding that “[o]nce the reinsurers have paid the maximum amount stated in the policy, they have no further obligation to pay . . . any costs related to loss adjustment expenses” (id. At 583).

The Bellefonte line of cases has been controversial. As the late Eugene Wollan put it, Bellefonte and its progeny “shocked” many in the reinsurance community “because they ran in the face of long-standing industry practice.” Indeed, it has been reported that reinsurance arbitrators often rejected Bellefonte. It has also been difficult to predict the results of litigation, as in recent years courts both inside and outside of New York have split. Some have continued to follow Bellefonte’s rationale, while others have rejected or distinguished it.

The Global Case
The facts in Global squarely raised the Bellefonte issue. Between 1971 and 1980, Global facultatively reinsured several general liability insurance policies that Century had issued to Caterpillar Tractor Company. In the late 1980s, Caterpillar began to face massive liability

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for asbestos-related claims. Century ultimately paid Caterpillar not only the full indemnity limits of the insurance policies, but also for defense costs in addition to those limits. In fact, Century ultimately paid Caterpillar more than $90 million, of which 90 percent represented expenses.

Century billed Global under the facultative certificates for both indemnity and defense costs. Global denied liability for defense costs, arguing that its liability was capped by the “Reinsurance Accepted” provisions of the facultative certificates. Century obviously disagreed.

Global commenced a declaratory judgment action against Century. The district court granted Global partial summary judgment, concluding based on Bellefonte and Unigard that the certificates “unambiguously capped Global’s liability for both losses and expenses.”

Century appealed to the Second Circuit. Century was supported by four large reinsurance brokers, who filed an amicus curiae brief arguing that industry custom and practice require that, where the underlying policy covers defense costs in addition to limits, the corresponding facultative certificate does, too.

Surprisingly, the Second Circuit expressed doubt about its own Bellefonte and Unigard decisions. Although it had held in those cases that Reinsurance Accepted provisions are an “explicit limitation on liability,” the Second Circuit now observed that it had “never explained why this is so.” The court also acknowledged that the argument that Bellefonte and Unigard were wrongly decided is “not without force.” Indeed, the court admitted that its Bellefonte holding is “difficult to understand.”

Nonetheless, the Second Circuit still had to contend with Excess. Because Excess was decided by New York’s highest court, it is authoritative as to New York law. Recognizing that the interpretation of Excess is best left to New York’s highest court, the Second Circuit certified to the Court of Appeals the following question: Does the decision of the New York Court of Appeals in Excess Insurance Co. v. Factory Mutual Insurance Co., 3 N.Y.3d 577 (2004) impose either a rule of construction or a strong presumption that a per-occurrence liability cap in a reinsurance contract limits the total reinsurance available under the contract to the amount of the cap, regardless of whether the underlying policy is understood to cover expenses such as, for instance, defense costs?

The Ruling of the Court of Appeals
The Court of Appeals’ concise decision, issued less than four weeks after argument, focused narrowly on the question that the Second Circuit had certified. And that, in turn, required the court to determine precisely what had actually been decided in Excess back in 2004.
emphasizing the critical difference between a case’s dicta and holding: “[i]t is basic that principles of law ‘are not established by what was said, but by what was decided . . .’ [citations omitted].” Accordingly, the court’s holding comprises only those ‘statements of law which address issues which were presented to the [court] for determination’” (bracketed word in original).

The court then applied that principle to read Excess narrowly and to make clear that its ruling in Excess did no more than interpret the meaning of the phrase, “LIMIT: US$ 7,000,000” in light of the entirety of the agreement that was then before it. Thus, it observed, “[t]he Excess Court was simply not faced with the question presently before the Second Circuit: whether there is a blanket ‘presumption’ or ‘rule of construction’ that a limitation-on-liability clause applies to all payments by a reinsurer whatsoever.”

Therefore, the court concluded: “[w]e hold definitively that Excess did not supersede the standard rules of contract interpretation otherwise applicable to facultative reinsurance contracts.” It then proceeded to review the New York rules of contract interpretation that it considered relevant to the New York rules of contract interpretation otherwise applicable to facultative reinsurance contracts. “The foregoing principles do not permit a court to disregard the precise terminology that the parties used and simply assume, based on its own familiar notions of economic efficiency, that any clause bearing the generic marker of a ‘limitation on liability’ or ‘reinsurance accepted’ clause was intended to be cost-inclusive. Therefore, New York law does not impose either a rule or a presumption, that a limitation on liability clause necessarily caps all obligations owed by a reinsurer, such as defense costs, without regard to the specific language employed therein.”

The Global case now returns to the Second Circuit. Going forward, parties will need to interpret facultative certificates based on their language and context, without resort to purported per se rules.

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2. 903 F.2d 910 (2d Cir. 1990).

3. Id. at 914.

4. Id. at 911.

5. 4 F.3d 1049 (2d Cir. 1993).

6. Id. at 1071.

7. 3 N.Y.3d 577 (2009).

8. Id. at 584-85.


11. Compare Century Indemnity Co. v. OneBeacon Insurance Co., 173 A.3d 784 (Pa. Super. 2017) (rejecting the reinsurer’s reliance on Bellefonte and finding that a facultative reinsurance was liable for defense costs in addition to the amount stated in the Reinsurance Accepted provision) to Continental Casualty Co. v. Midstates Reinsurance Co., 24 N.E.3d 122, 126-27 (Ill. App. 2014) (adopting Bellefonte to cap a reinsurer’s expense obligations despite the certificate’s following form provision).

12. See Global, 843 F.3d at 122 (2d Cir. 2016).

13. Id.

14. Id.

15. Id.


17. Global, 843 F.3d at 123.


20. Id. at 126.

21. Id.

22. See Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938) (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”).

23. See Global Reinsurance Corp. of America v. Century Indemnity Co., 843 F.3d 120, 128 (2d Cir. 2016), certified question accepted, 28 N.Y.3d 1129, 91 N.E.3d 950 (2016) (“Because this is ultimately a determination to be made by New York, we certify the . . . question to the New York Court of Appeals.”); see also N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a) (“Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals.”).

24. Global, 843 F.3d at 128.