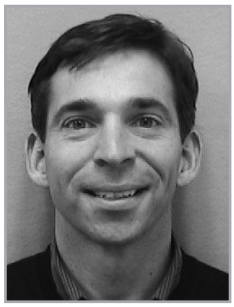
article

Bellefonte Twenty-Five Years Later: Developments in the Law of Reinsurers' Liability for Expenses in Excess of Certificate Limits

By Amy S. Kline, Amy L. Piccola, and James D. Scrimgeour[1]


Amy S. Kline


Amy L. Piccola


James D. Scrimgeour

Twenty-five years ago, the United States Court of Appeals for the Second Circuit decided *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*,[1] setting forth the controversial rule that reinsurers may cap their losses under facultative certificates at the stated amount on the face of a certificate. Despite widespread industry criticism, this rule – often referred to as the "*Bellefonte* Rule" – has been followed by the majority of courts to consider the issue, citing Bellefonte as persuasive, if not dispositive authority. Contrast this with the commonly held perception that arbitration panels do not follow the *Bellefonte* Rule - choosing instead to consider extrinsic evidence, including industry custom and practice from the time of contract formation - and there exists the phenomenon of potentially large discrepancies in the value of same share facultative reinsurance issued by competing carriers solely because one carrier's certificate included an arbitration clause.

While *Bellefonte* remains important to analysis of this issue under any certificate without an arbitration clause, recent decisions, including one by the Second Circuit, hint that courts may be increasingly agreeable to arguments that soften the inflexible application of the *Bellefonte* Rule. These cases signal a willingness to differentiate based upon examination of specific language of the certificate at issue, to find that a certificate is ambiguous, and to allow the parties to rely upon extrinsic evidence such as custom and practice to prove the meaning of the parties' agreement. Perhaps these cases signal a bridging of the value gap referenced above.

Thus, the debate about the so-called *Bellefonte* Rule continues. This article reviews *Bellefonte* and the cases that have followed, and discusses recent decisions that address the law of reinsurers' liability for expenses in excess of certificate limits. The article concludes by providing key takeaways from these cases.

Bellefonte

Bellefonte's roots are in the Dalkon Shield litigation. In settling that litigation (which included a dispute about whether Aetna's underlying policies were cost-inclusive), Aetna agreed to pay an amount substantially in excess of its position as to the amount of limits available under the underlying policies. Aetna then sought reimbursement from its reinsurers, including Bellefonte Insurance Company, for their respective shares of the settlement.

The reinsurance certificates at issue in *Bellefonte* provided, in relevant part:

> [Provision 1] [Reinsurer] . . . [d]oes hereby reinsure Aetna . . . (herein called the Company) in respect of the Company's contract hereinafter described, in

Amy Kline is a partner at Saul Ewing LLP and a member of the firm's Insurance Practice Group. She has extensive trial experience in federal and state courts, as well as before private arbitration panels. Her practice focuses on insurance and reinsurance litigation, where she represents both cedents and reinsurers. Ms. Kline is a member of the ARIAS Law Committee.

Amy Piccola is an associate at Saul Ewing LLP and a member of the firm's Insurance Practice Group. She focuses her practice on insurance litigation, representing insurers and reinsurers in federal and state courts and before private arbitration panels.

James D. Scrimgeour is Executive Counsel in the Claim Legal Group at Travelers Companies, Inc., where he advises a diverse client group on complex and appellate issues related to insurance and reinsurance coverage and serves as Chair of the Company's Internal Resolution Committee. Jamie has presented or facilitated at numerous industry conferences and seminars, including Mealey's. AIRROC, and ARIAS•U.S. He is also an ARIAS•U.S. Certified Arbitrator and a member of the ARIAS•U.S. Law Committee.

> consideration of the payment of the premium and subject to the terms, conditions and amount of liability set forth herein, as follows . . . .
>
> [Provision 2] Reinsurance Accepted $500,000 part of $5,000,000 excess of $10,000,000 excess of underlying limits . . . .
>
> [Provision 3] The Company warrants to retain for its own account . . . the amount of liability specified . . . above, and the liability of the Reinsurer specified . . . above [i.e., amount of reinsurance accepted] shall follow that of the Company . . . .
>
> [Provision 4] All claims involving this reinsurance, when settled by the Company, shall be binding on the Reinsurer, which shall be bound to pay its proportion 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 proportion of expenses . . . incurred by the Company in the investigation and settlement of claims or suits . . . .

The District Court framed the issue as follows: "The parties do not dispute the underlying facts nor do plaintiffs dispute their obligation to pay Aetna for approximately $31 million in liability on the policies. The central question is whether plaintiffs are obligated to pay additional monies for defense costs and claim expenses over and above the reinsurance policy limitations."[2] On cross-motions for summary judgment, the District Court entered judgment in favor of the plaintiff reinsurers, holding that they were not obligated to pay Aetna any additional sums for defense costs over and above the limits of liability stated in the reinsurance certificates.[3]

The Second Circuit affirmed. The Court noted, "[w]e are mindful that in interpreting the agreements, as with all contracts, they should be construed, if possible, so as to give effect to all of their material provisions." Applying these principles, the court concluded that:

> [T]he reinsurers' entire obligation is quantitatively limited by the dollar amount the reinsurers agreed to reinsure. Once the reinsurers have paid up to the certificate limits, they have no additional liability to Aetna for defense expenses or settlement contributions. Any other construction of the reinsurance certificates would negate the phrase "the reinsurer does hereby reinsure Aetna . . . *subject to the . . . amount of liability set forth herein*." (emphasis in original).

Aetna contended that that the certificates obligated the reinsurers to "follow the fortunes" and indemnify it for the excess defense costs it paid to the underlying insured. The Court rejected this argument, stating that "[t]he 'follow the fortunes' clauses in the certificates are structured so that they coexist with, rather than supplant, the liability cap. To construe the certificates otherwise would effectively eliminate the limitation on the reinsurers' liability to the stated amounts." Therefore, "the limitation is to be a cap on all payments by the reinsurer," and the 'follow the fortunes' doctrine does not allow Aetna to recover defense costs beyond the express cap stated in the certificates.

Aetna also argued that the phrase "in addition thereto" set forth in Provision 4 indicates that liability for defense costs is separate for liability from underlying losses. The Court disagreed:

> We read the phrase 'in addition thereto' merely to differentiate the obligations for losses and for expenses. The phrase in no way exempts defense costs from the overall monetary limitation in the certificate. This monetary limitation is a cap on all payments under the certificate. In our view, the 'in addition thereto' provision merely outlines the different components of potential liability under the certificate. It does not indicate that either component is not within the overall limitation.

In reaching its decision, the Court distinguished *Penn Re, Inc. v. Aetna Casualty & Surety* Co.,[4] a decision from the Eastern District of North Carolina that found the reinsurers liable for defense costs in excess of the face amount of the reinsurance certificates. The court held that the certificate addressed the reinsurer's "obligation for 'costs' incurred in settling claims brought by a third person alleging to have been injured by the insured's product covered by the reinsurance certificate" and therefore it "requires that, in addition [to indemnity], plaintiffs pay their proportion of suit costs and expenses."

The *Bellefonte* court noted that "[w]e are aware of the unreported opinion to the contrary in *Penn Re* . . . . There, the court read virtually identical reinsurance certificates to bind two reinsurers for an amount which exceeded the face amount of the reinsurance certificates. We decline to follow the reasoning of that opinion. There, the court did not consider the 'subject to' clause of the first provision, which makes the 'in addition thereto' language 'subject to' the cap on liability in the second provision."

Bellefonte's Progeny

Notwithstanding industry amicus briefing, the Second Circuit reconfirmed, and expanded, the *Bellefonte* analysis in *Unigard Security Insurance Co. v. North River Insurance Co.*[5] The Court began its analysis by summarizing its ruling in *Bellefonte* and noting that it "held that a virtually identical follow the fortunes clause did not 'override the limitation on liability' and that therefore the reinsurer was not liable for expenses in excess of the liability limit."

The Court then examined the impact of the certificate's follow the form clause, an issue that did not arise in *Bellefonte* (because there was uncertainty as to whether the reinsured policies provided supplemental expenses). The clause stated, in relevant part, that the liability of the reinsurers, "except as otherwise provided by this Certificate, shall be subject in all respects to all the terms and conditions of [XS–3672]." Notwithstanding this provision, the Court found that "Provision 1 of the Certificate, like the certificate in *Bellefonte*, provides that Unigard agreed to reinsure North

River 'in consideration of the payment of the reinsurance premium and subject to the terms, conditions, *limits of liability*, and Certificate provisions set forth herein.'" (emphasis in original). Therefore, the Court held that the limit of liability provision caps liability under the certificate.

The Court also rejected North River's argument that past practices demonstrate that Unigard expected to pay expenses under the Certificate, holding that "*Bellefonte*'s gloss upon the written agreement is conclusive. The efficiency of the reinsurance industry would not be enhanced by giving different meanings to identical standard contract provisions depending upon idiosyncratic factors in particular lawsuits. The meaning of such provisions is not an issue of fact to be litigated anew each time a dispute goes to court."

Bellefonte's impact continued to resonate throughout the 1990s and 2000s. In *Pacific Employers Ins. Co. v. Global Reinsurance Corp. of America*,[6] on the parties' cross-motions for summary judgment, the United States District Court for the Eastern District of Pennsylvania held that the "Reinsurance Accepted" in the certificate is indisputably "some type" of cap and that "[t]he Court finds that this broad and unambiguous language clearly encompasses expenses because it defines Global's maximum exposure under the Facultative Certificate."

PEIC also contended that language in the certificate created separate obligations and excluded the payment of expenses from the liability limit.[7] The court rejected this position, finding instead that it did not "outline limits of liability, but merely outline[d] the two separate proportions of losses and expenses that Global is obligated to pay pursuant to the Facultative Certificate." The court also looked to the preamble, which stated that "'In consideration . . . of the premium, and subject to the terms, conditions and limits of liability set forth herein and in the Declarations made apart thereof, the Reinsurer does hereby reinsure the ceding company named in the Declarations . . . in respect of the company's policy(ies) as follows.'" According to the court, "[t]his sentence makes clear that Global's reinsurance obligations, including those outlined in Paragraph E, are 'subject to' the 'terms, conditions, and ***limits of liability***' contained in the Declarations and on the 'Reinsuring Agreements and Conditions' page." (emphasis in original).

Finally, the court addressed *Bellefonte* directly. The court noted that while the contractual language of each certificate is different, *Bellefonte* and its progeny "are well-reasoned, persuasive authority." On that basis, the court also rejected the views of the "various commentators" who have criticized Bellefonte, stating instead that "the Court finds these secondary authorities unconvincing and agrees with the sound reasoning of the decision as described above."

Bellefonte: Now

Disputes over a reinsurer's liability for defense costs in excess of limits continue, and, twenty-five years later, the dispute over *Bellefonte* continues as well. As described below, courts continue to find *Bellefonte* to be at least persuasive, and reach the conclusion that expenses in excess of certificate limits are not recoverable. Three courts recently, however, have distinguished and declined to follow *Bellefonte* on the basis of the specific language of the certificate at issue.

The Illinois Court of Appeals, in *Continental Casualty Co. v. MidStates Reinsurance Corp.*,[8] found *Bellefonte* to be persuasive in holding that the certificate before it unambiguously limited both losses and expenses to the limits stated in the certificate. Applying the "four corners" approach, which presumes that the document speaks for itself and the intentions of the parties must be determined from the language used in drafting the agreement – the court held that "the certificates provided a clear policy limit, inclusive of expenses . . . ." Because the certificate was unambiguous, extrinsic evidence was not appropriate to be considered. The court also found that the contract terms in *Bellefonte* were similar to those before it and held that neither the follow the form nor the follow the fortunes clauses could be said to remove expenses from the overall liability cap in the reinsurance assumed.

The United States District Court for the Northern District of New York also addressed *Bellefonte* in *Utica Mutual Insurance Co. v. Clearwater Insurance Co.*[9] There, Clearwater reinsured certain umbrella policies issued by Utica. The court articulated the "sole issue" as "whether

Disputes over a reinsurer's liability for defense costs in excess of limits continue, and, twenty-five years later, the dispute over *Bellefonte* continues as well.

While *Bellefonte* remains important to analysis of this issue under any certificate without an arbitration clause, recent decisions, including one by the Second Circuit, hint that courts may be increasingly agreeable to arguments that soften the inflexible application of the *Bellefonte* Rule.

Utica can recover defense costs and/or other expense payments in excess of the sums stated in the Liability Clauses in the 1978 and 1979 Certificates -- $5 million and $2.5 million, respectively." The certificates at issue provided, in relevant part:

> [Preamble] [Clearwater], 2 in consideration of the payment of premiums, statements contained in the declarations, and subject to the terms and General Conditions of this certificate does hereby reinsure [Utica as follows]
>
> General Conditions
>
> Section D [Clearwater]'s Liability and Basis of Acceptance (the "Liability Clause"), which identifies the portion of Utica's exposure that Clearwater agreed to reinsure.

Utica contended that *Bellefonte* and its progeny were distinguishable because the certificates used the phrase "[Clearwater]'s Liability and Basis of Acceptance" and describe Clearwater's liability as a "share," rather than using the word "limit," as was the case in the certificates in *Bellefonte*, *Unigard* and *Excess Insurance Co., Ltd. v. Factory Mutual Insurance*.[10] Utica contended, in the alternative, that the court should deny or defer ruling on the motion pending further discovery, including introduction of custom and practice evidence.

The Court rejected Utica's arguments. With respect to the absence of the word "limit," the Court found that "Clearwater's liability is described as a percentage share *of the underlying policy limit*. Thus, it logically follows that a percentage share of a policy limit is itself a limit on liability, despite the absence of the word 'limit.'" (emphasis in original). With respect to extrinsic evidence, the Court noted that "when a contract is unambiguous, as the Certificates are here, extrinsic evidence generally cannot be considered in its interpretation." The Court continued by stating that "*Bellefonte*, *Unigard II*, and *Excess Insurance* did not consider evidence of custom or practice, thereby suggesting that, at least with respect to a limit-of-liability provision silent as to its coverage of expenses, such evidence should not be relied upon."

The Court further reasoned that "Utica's customs and practice evidence . . . purports to demonstrate that *Bellefonte*, *Unigard II*, and *Excess Insurance* were erroneously decided, because they established a presumption of cost-inclusiveness at odds with the reinsurance industry's customs and practices," but that "it is this court's obligation to follow, not second-guess, controlling precedent, which *Bellefonte*, *Unigard II*, and *Excess Insurance* undoubtedly are."[11]

On the other hand, the Second Circuit addressed *Bellefonte* in *Utica Mutual Insurance Co. v. Munich Reinsurance America, Inc.* and, for the first time, distinguished its holding.[12] There, Munich Re reinsured Utica for certain asbestos-related losses. Utica contended that Munich Re's liability for expenses was not subject to the certificate's liability limit. Following discovery, Munich Re moved for summary judgment, and Utica cross-moved to continue discovery asserting that Munich Re had failed to produce discovery related to choice of law and the interpretation of the certificate. The district court granted Munich Re's motion and denied Utica's motion. Utica appealed.

The certificate provided, in relevant part:

> [Paragraph 1] The Reinsurer [Munich] agrees to indemnify the Company [Utica] against losses or damages which the Company is legally obligated to pay under the policy reinsured, resulting from occurrences taking place during the period this Certificate is in effect, subject to the reinsurance limits shown in the Declarations. . . .
>
> [Paragraph 2] The Company shall settle all claims under its policy in accordance with the terms and conditions thereof. If the reinsurance hereunder is pro rata, the Reinsurer shall be liable for its pro rata proportion of settlements made by the Company. If the reinsurance hereunder is excess, the Reinsurer shall be liable for its excess proportion of settlements made by the Company after deduction of any recoveries from pro rata reinsurance inuring to the benefit of the Reinsurer.
>
> [Paragraph 3] The Reinsurer shall be liable for its proportion of allocated loss expenses incurred by the Company in the same ratio that the Reinsurer's share of the settlement or judgment bears to the total amount of each settlement or judgment under the policy reinsured. . . .

The "declarations" section of the certificate

provided, among other things, that the "limit of liability ceded to and accepted by" Munich Re is $5 million in excess of $5 million of Utica's liability under the underlying policy.

On appeal, Utica argued that the certificate could be read to exclude expenses from the limit of liability. On this, the Court stated that "[t]he fact that Munich's obligation to indemnify Utica against 'losses or damages' is expressly made 'subject to' the Certificate's limit of liability suggests that the parties intended to exclude Munich's liability for expenses -- which is not expressly made 'subject to' the limit of liability -- from that limit." However, the Court also stated that "Utica's interpretation is not obviously correct" because Munich Re's "liability for settlement payments is not expressly made 'subject to' the Certificate's $5 million limit of liability, yet Utica does not argue that the limit of liability excludes settlements."

Notably, the Second Circuit concluded that the certificate was "ambiguous as to whether its limit of liability includes expenses:"

> Paragraph 1 *could* "operate as a general provision that limits *all* of Munich's liability under the Certificate to $5 million, whereas the subsequent paragraphs describe Munich's obligations more specifically, without removing them from the limit. Although this latter reading is certainly plausible, we do not think the absence of 'subject to' language in the paragraphs describing settlements and expenses is fatal to Utica's position. If settlement payments are 'losses or damages,' then Munich's liability for settlements is separately limited to $5 million by virtue of the first paragraph's 'subject to' clause. The Certificate defines 'loss expenses' separately, so it is possible that settlements are 'losses or damages' while expenses are not."

In reaching its decision, the Court distinguished *Bellefonte*. According to the Second Circuit, *Bellefonte* and *Unigard* "turned on a provision in the policies at issue that expressly made all of the reinsurers' obligations 'subject to' the limit of liability; they did not hold that a limit of liability, without such 'subject to' language, is presumptively expense-inclusive." The Court also distinguished *Excess*. There, the Court stated that it did not read it "as holding that any presumption of expense-inclusiveness can be rebutted only through express language or a separate limit for expenses." Rather:

> [T]he Certificate's statement that 'losses or damages' are 'subject to' the limit of liability reasonably implies that expenses are not. Although this negative implication is not strong enough—in the context of the Certificate as a whole -- to demonstrate that expenses are unambiguously excluded from the limit of liability, we think it is sufficient to render the Certificate ambiguous, even in light of Excess."

The Court remanded the matter to the district court with the direction that extrinsic evidence must be considered in construing the certificate, and that further development of the record may be necessary.

Citing the Second Circuit's *Utica v. Munich Re* opinion as "instructive," the Northern District of New York concluded in *Utica Mutual Insurance Co. v. R&Q Reinsurance Co "R&Q"*).,[13] that the certificate before it was ambiguous. In *R&Q*, the Certificate provided that the reinsurer "in consideration of the payment of the premium and subject to the terms hereon and the general conditions set forth on the reverse side hereof, does hereby reinsure [Utica]." The court found this language to be "virtually identical" to that at issue in *Utica v. Munich Re*, and that like that case, the preamble "does not expressly make the reinsurer's obligations 'subject to' the reinsurer's 'amount of liability.'" Therefore, the "subject to" clause did not unambiguously cap R&Q's liability for expenses to that policy limit because it did not expressly refer to the liability limit.

The court also held that certain conditions in the certificate could be read to support the claim that R&Q is liable for expenses in excess of the policy limit. Condition 1 stated that "the Reinsurer agrees to indemnify the Company against loss or damage which the Company is legally obligated to pay under the Company's policy reinsured, . . . subject to the Reinsurance Accepted limits shown in the Declarations." The court found this provision to be "nearly identical" to that in *Utica v. Munich Re*, and that "R&Q's agreement to indemnify against 'loss or damage . . . subject to the Reinsurance Accepted limits' reasonably implies that expenses are not subject to those limits."[14] The court further held that because the certificate was ambiguous, interpreting it required the consideration of extrinsic evidence.

Extrinsic evidence was also permitted to be considered in *Century Indemnity Co. v. OneBeacon Ins. Co.*,[15] a recent decision from a Pennsylvania trial court. There, OneBeacon moved for summary judgment on the ground that the "Reinsurance Accepted" limit in the certificates placed a total cap on the reinsurers' liability, including expenses. The court noted that this was a case of first impression in Pennsylvania and that the principle rule of contract interpretation is to ascertain and give effect to the intent of the contracting parties. The court then went on to analyze, and reject, *Bellefonte*. Citing to the Second Circuit's decision in *Utica*, the court found that *Bellefonte* did not establish a blanket rule that all limits of liability are presumptively expense-inclusive. The court continued that the "Subject to" language is key in creating such a presumption, but that presumption can be overcome. Moreover, 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."

In analyzing the certificates, the court found that there were variations from the certificate in *Bellefonte*. Here, the reinsurance accepted provision stated: "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 Company's Insured]." According to the court:

> 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.

This was a difference that "cannot be ignored." The court further stated that "*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*." The court opined that even if the certificates were analogous to *Bellefonte*, the Court would still have denied the motions on the grounds that a latent ambiguity exists.

Finally, the court held that extrinsic evidence was necessary to construe the terms of the contract in its entirety. "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."[16]

Bellefonte: Where Are We Now?

The *Bellefonte* debate continues with courts reaching different conclusions on the issue. Those courts that follow *Bellefonte* have held, to some degree notwithstanding variations in the certificate language, that the certificates at issue were unambiguous. As such, extrinsic evidence has not been considered, or permitted to be considered, in interpreting the certificates.

Other courts, however, have shown a willingness to break from *Bellefonte*. Those courts that have distinguished *Bellefonte* have done so largely on the basis of the certificate language, finding them to be ambiguous, missing or inverting the critical "subject to" provision, and/or holding that the "subject to" language is not necessarily dispositive. Both *Utica v. Munich Re* and *Utica v. R&Q* directed the consideration of extrinsic evidence to ascertain the parties' intent. *OneBeacon* also identified the significance of custom and practice evidence to this analysis.

Therefore, when faced with *Bellefonte*-related issues, the following bear consideration in determining the value of facultative reinsurance:

> The existence of an arbitration clause;
>
> The language of the certificate at issue: To the extent that *Bellefonte* has not been followed, it has been because the language was distinguishable from the critical "subject to" language contained in the Bellefonte certificate;
>
> The applicable law: Although it has not yet been the basis for a reported *Bellefonte* decision, some jurisdictions allow extrinsic evidence even without a showing of ambiguity; and
>
> The types of extrinsic evidence considered: Where a certificate is determined to be ambiguous, courts look to extrinsic evidence, including evidence of the parties' intent at underwriting and evidence of industry custom and practice.

Recent decisions may signal a willingness of courts to soften, or even distinguish, the *Bellefonte* Rule. Of note to this analysis will be the resolution of the *Clearwater* case which may present the Second Circuit with another opportunity to address this issue. Regardless of that result, however, further parsing of certificate language is expected as cedents continue to assault the *Bellefonte* Rule in the courts. ▼

ENDNOTES

1. 903 F.2d 910 (2d Cir. 1990).
2. *Bellefonte Reins. Co. v. Aetna Cas. & Sur. Co.*, No. 85 CIV 2706 (JFK), 1989 WL 106469 (S.D.N.Y. Sept. 5, 1989).
3. Interestingly, both parties argued that the facultative certificates were unambiguous and therefore neither attempted to introduce custom and practice evidence at this stage of the proceedings.
4. No. 85–385–Civ.–5 (E.D.N.C. June 24, 1987).
5. 4 F.3d 1049 (2d Cir. July 31, 1993).
6. No. 09-6055, 2010 WL 1659760 (E.D. Pa. Apr. 23, 2010).
7. The certificate provided:
8. E. All loss settlements made by the Company, provided they are within the terms and conditions of this Certificate of Reinsurance, shall be binding on the Reinsurer. *Upon receipt of a definitive statement of loss, the Reinsurer shall promptly pay its proportion of such loss as set forth in the Declarations. In addition thereto, the Reinsurer shall pay its proportion of expenses (other than office expenses and payments to any salaried employee) incurred by the Company in the investigation and its proportion of court costs and interest on any judgment or award, in the ratio that the Reinsurer's loss payment bears to the Company's gross loss payment* **....** (emphasis in original).
9. 24 N.E.3d 122 (Ill. App. Ct. 2014).
10. No. 6:13–cv–1178, 2014 WL 6610915 (N.D.N.Y. Nov. 20, 2014).
11. 3 N.Y.3d 577 (N.Y. Ct. App. 2004) (following *Bellefonte* and *Unigard* and holding "that "[o]nce the reinsurers have paid the maximum amount stated in the policy, they have no further obligation to pay Factory Mutual any costs related to loss adjustment expenses" and that reinsurers "cannot be required to pay loss adjustment expenses in excess of the stated limit in the reinsurance policy").
12. On April 20, 2015, Utica filed a Motion for Reconsideration arguing that, in light of the Second Circuit's decision in *Utica Mutual Insurance Co. v. Munich Reinsurance America, Inc.*, No. 13-4170-CV, 2014 WL 6804553 (2d Cir. Dec. 4, 2014), the certificates were ambiguous. The United States District Court for the Southern District of New York recently denied a similar motion for reconsideration filed by the cedent in *Global Reinsurance Corp. of America v. Century Indemnity Co.*, 13 Civ. 06577 (LGS) (S.D.N.Y. Apr. 15, 2015). The court had held, on Global's motion for summary judgment, that *Bellefonte* and *Unigard* were controlling and that the dollar amount indicated on the certificates was the maximum that Global could be obligated to pay for loss and expenses combined. 2014 WL 4054260 at *6-7. On the motion for reconsideration, the court rejected the argument that Utica constituted an intervening change in controlling law and held that, in any event, the language of the certificates was such that Utica did not counsel a different result.
13. No. 13-4170-CV, 2014 WL 6804553 (2d Cir. Dec. 4, 2014).
14. No. 6:13-cv-1332 (BKS/ATB) (N.D.N.Y. June 4, 2015).

continued on page 22

herein, shall be subject in all respects to all the terms and conditions of the Company's policy . . . ." General Condition 3 provided: "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 . . . ."

In its motion for summary judgment, OneBeacon sought a ruling that the limit stated in "Reinsurance Accepted" places a total cap on OneBeacon's liability, which includes expense payments.

The court first noted that the issue of whether the calculation of expenses are included in, or separate and apart from, the stated limit is a case of first impression in Pennsylvania. The court described relevant cases published by federal courts and neighboring state courts as "persuasive authority," but noted that it must conduct its own analysis under Pennsylvania law without the guidance of binding authority.

OneBeacon argued that the court should adopt the reasoning of *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*, 903 F.2d 910 (2d Cir. 1990) and its progeny, which limit expense payments to the certificate's overall liability cap. Judge Glazer discussed the *Bellefonte* case, but noted that the Second Circuit in *Bellefonte* focused on a clause in the certificate that made the expense provision "subject to" the amount of liability to reach its conclusion. Judge Glazer also relied upon the Second Circuit's recent decision in *Utica Mutual Insurance Co. v. Munich Reinsurance Am., Inc.*, No. 13-4170-CV, 2014 WL 6804553, at *4 (2d Cir. Dec. 4, 2014), observing that Utica clarified the holding in *Bellefonte* that there was no blanket rule that all limits of liability are presumptively expense-inclusive. Citing *Utica*, Judge Glazer concluded that "[e]ven 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."

Judge Glazer compared the language in the facultative certificates at issue in this case with the language in *Bellefonte* and held that "while similar to *Bellefonte*, [the language] contains slight variations which leads to a different conclusion." Specifically, the language on the front side of the certificates states that premium is "subject to the general conditions set forth on the reverse side hereof...." General Condition 1 states that "[t]he liability ... shall be subject ... to all the terms and conditions of the Company's policy." Judge Glazer distinguished the language in the certificates at issue with those in *Bellefonte* because the certificates at issue made the liability subject to the terms and conditions rather than the terms being subject to the liability, as in *Bellefonte*. Judge Glazer reasoned that this language places greater emphasis on the conditions themselves. "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." Denying OneBeacon's motion for summary judgment, Judge Glazer concluded that, if anything, the terms of the certificates may have created a presumption of "expense-exclusiveness."

The court also determined that the facultative certificates contained a latent ambiguity and that extrinsic evidence was required to discern the intent of the parties: "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." ▼

continued from Bellefonte, *page 10*

15. Condition 4 of the certificate also provided that "should the [reinsured's] policy limit include expenses, the Reinsurer's maximum limit of liability shall be as stated in Item 4 of the Declaration [i.e., $1 million]." R&Q did not seek summary judgment on whether this language applied to limit its liability to $1 million, but the court considered it further to its analysis of whether the certificate was ambiguous. Relying on the principle that "when certain persons or categories are specific in a contract, an intention to exclude all others may be inferred," the court held that "the fact that the Certificate states one particular instance in which R&Q's liability limit includes expenses implies that its liability limit does not include expenses in other instances." The court also held that to read the liability limit as an absolute cap on loss and expense would render this provision superfluous, which is a disfavored result.

16. No. 02928 (Pa. C.C.P., Phila. Cty. Mar. 27, 2015).

17. In *OneBeacon*, the broker industry, as *amici*, urged the court to "consider the longstanding reinsurance industry practice and custom treating the loss limits in facultative certificates as expense-exclusive, in accordance with industry expectation that the reinsurance coverage with be concurrent with the underlying insurance policy."