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COURT OF APPEALS

STATE OF NEW YORK

GLOBAL REINSURANCE CORPORATION OF
AMERICA,

Respondent,

-against-

NO. 124

CENTURY INDEMNITY COMPANY,

Appellant.

20 Eagle Street
Albany, New York
November 15, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar is appeal number 124, Global
3 Reinsurance v. Century Indemnity. Counsel?

4 MR. HACKER: Good afternoon, Your Honors. John
5 Hacker for Century. I'd like to reserve two minutes, if I
6 may, for rebuttal?

7 CHIEF JUDGE DIFIORE: Two minutes, sir?

8 MR. HACKER: Thank you.

9 CHIEF JUDGE DIFIORE: You may.

10 MR. HACKER: Your Honors, Century issued policies
11 to Caterpillar that paid defense costs in addition to their
12 indemnity limits. The reinsurance Century obtained on
13 those policies does the same. The plain language of the
14 certificate says so without ambiguity. And you can find
15 the relevant provision at page A-89 of the appendix for
16 certificate X.

17 JUDGE GARCIA: Counsel, the Second Circuit's
18 asked us a relatively narrow question in this case, right?
19 It's does Excess - - - our Excess case create this
20 presumption or this rule? And do we need to overrule
21 Excess in order to get out of a presumption or a rule here?

22 MR. HACKER: We don't think so.

23 JUDGE GARCIA: Why not?

24 MR. HACKER: We don't - - - we don't think Excess
25 on its face establishes the kind of presumption that would



1 be at odds with and contrary to the presumption of
2 concurrence that the plain language of the certificate here
3 and in other certificates creates. That - - - the - - -
4 the focus - - -

5 JUDGE GARCIA: But what's the difference between
6 the facts in Excess and the facts here that would make us -
7 - - you know - - - seems like create a different rule - - -

8 MR. HACKER: So - - -

9 JUDGE GARCIA: - - - or a different application,
10 at least.

11 MR. HACKER: The - - - the key difference is the
12 fundamental facts. Excess presented a different question
13 presented, which was about an insurer's own coverage costs
14 that it incurred in litigating coverage with the insured,
15 and the question was whether or not those insurers' own
16 coverage costs were - - - were within the - - - the limit
17 of the reinsurance certificate.

18 That has nothing - - - the answer to that
19 question, which the court said was that you couldn't rely
20 on the follow the settlements provision to override what
21 the parties stipulated to be the limit. That has nothing
22 to do with whether or not when you're talking about the
23 underlying policy, which does cover defense costs, does
24 provide for the insurer to pay those defense costs, and the
25 certificate says and instructs the parties that the



1 certificate is going to provide this - - - follow the form
2 of the underlying policy.

3 If the underlying policy pays defense costs
4 outside indemnity limits, then the following form provision
5 instructs you to do that. Here's what the provision says.
6 It's so key to - - -

7 JUDGE STEIN: Can I - - - just before you get
8 into this provision, I - - - I just have a question about
9 the certificates, which will help me.

10 So in the appendix you have all the certificates.
11 But were they before the Appellate Division, or was it just
12 certificate X or just certificate X and some other
13 certificates? Because there are some of them that have
14 these check-the-boxes - - -

15 MR. HACKER: Yes.

16 JUDGE STEIN: - - - which certificate X doesn't
17 have, and which may or may not make any difference.

18 MR. HACKER: I - - - I don't think it does make a
19 difference. They were all before the District Court and
20 the Second Circuit.

21 JUDGE STEIN: They were.

22 MR. HACKER: And the parties agree that - - -

23 JUDGE STEIN: Okay.

24 MR. HACKER: - - - for all intents and purposes,
25 in all material respects, they work the same, even though



1 there are various differences - - -

2 JUDGE STEIN: Okay.

3 MR. HACKER: - - - amongst the language.

4 JUDGE STEIN: Thank you.

5 MR. HACKER: And let me focus, because - - -

6 JUDGE STEIN: Sorry for interrupting.

7 MR. HACKER: - - - I do think it's important.

8 Excess - - - the other thing Excess does is instruct the
9 court to look at specific contracts. Here's what this one
10 says: "The liability of the reinsurer specified in Item 4,
11 shall follow that of the company, and except as otherwise
12 specifically provided herein, shall be subject in all
13 respects to all terms and conditions of the company's
14 policy."

15 So under that following form provision, the
16 reinsurance simply does whatever the Century policy does.

17 JUDGE GARCIA: Would your answer be the same,
18 putting Excess aside, under the two Circuit cases, Uniguard
19 and - - - would your answer be the same? Did those - - -
20 if we apply those cases - - - I mean, they're not our
21 rules, they're Circuit cases, obviously. But if we were to
22 apply those cases, what would the outcome be here?

23 MR. HACKER: It would definitely be the same
24 under Bellefonte, which reached - - - is - - - is sort of
25 similar to Excess. It didn't have to - - -



1 JUDGE GARCIA: Right.

2 MR. HACKER: - - - it reached its result in
3 dealing with coverage that wasn't provided for in the
4 underlying policy. And the question there, as in Excess,
5 was whether a follow the settlements clause allowed you to
6 override the limit. Uniguard, yes, extended it to a follow
7 the form provision. But I'll emphasize that in Uniguard,
8 the - - - the language there didn't have the word
9 "specifically". It may be a technical distinction, but
10 "specifically" has to mean something.

11 But we don't think Uniguard was correctly
12 decided. And Bellefonte can be defended on a different
13 ground.

14 JUDGE GARCIA: And does that create a problem for
15 you with Excess, because it seems like in our decision in
16 Excess we're citing favorably Uniguard.

17 MR. HACKER: The answer is no, because in the
18 passage in Excess in which the court cited Bellefonte and
19 Uniguard, it's describing both of them as follow the
20 settlements cases, not dealing at all with the question in
21 this case, which is, when you have a follow the form
22 provision, it requires you - - -

23 JUDGE FAHEY: So then - - - so then you're not
24 really advocating that we adopt Judge Read's dissent in
25 Excess?



1 MR. HACKER: Not necessarily. As - - - as - - -
2 so far as Excess is concerned, the only question is whether
3 it creates a presumption that is effectively the opposite
4 of the language in the certificate and the tradition of
5 reinsurance law. And the answer to that clearly is no,
6 because the question was never presented.

7 There was no issue in Excess as to whether or not
8 when you have a provision that says do what ever the
9 underlying policy does, unless there's specific language
10 that tells you not to. That's the question here. And
11 Excess just didn't address that.

12 JUDGE RIVERA: So - - - so is your position the
13 presumption can be overcome or the presumption never
14 applies?

15 MR. HACKER: It - - - it absolutely can be
16 rebutted. As this provisions says, if there's language
17 that specifically provides that the certificate is going to
18 do something different from the underlying policy, you have
19 to find specific language. And everybody essentially
20 agrees with that.

21 Now, Global tries to resist the idea of the
22 presumption, but they can't resist the plain language of
23 that provision. So what they do is say we've got language;
24 there is language in the certificate that specifically
25 provides that the defense costs are - - - are inside the



1 limits. They point at only two provisions. One is the
2 preamble which says in very general terms, the reinsurance
3 is "subject to the terms, conditions" - - - that's the
4 following form provision, that's the first thing it refers
5 to - - - "and amount of liability set forth herein." And
6 this at page A-88.

7 That preamble on its face doesn't address whether
8 the "amount of liability" includes defense expenses or
9 treats them outward - - - outside the - - - the indemnity
10 limits. It just doesn't say anything about that question.

11 And if you think it - - - if you take it
12 seriously and think that "amount of liability" really does
13 mean something in that particular passage, then it's
14 contradicted by the following form provision itself which
15 says that Item 4 liability is "subject to the terms and
16 conditions of the company policy."

17 So at - - - at best, what you've got is a
18 contradiction there, which has to create at least an
19 ambiguity, which means that Global's position cannot stand.

20 We think it's easily reconciled, because neither
21 provision is telling you what the "amount of liability"
22 refers to. That is established by the plain language of
23 Item 4 read in context on the declarations page. What that
24 says - - - first of all, Item 2, which you see at A-88,
25 Item 2 sets forth the "policy limits" of the Caterpillar



1 policy, and refers to one million dollars, which is - - -
2 everybody has to agree, is indemnity loss only. The one-
3 million-dollar policy limit - - - that's the word - - -
4 limit - - - is indemnity loss only.

5 Then Item 3, the company retention, Century's
6 retention. The primary policy is 500,000 dollars of - - -
7 of the liability in Item 2. So Item 3 is referring only to
8 indemnity loss, not including defense expenses. Then we
9 get into item - - -

10 JUDGE FAHEY: Well, the - - - the problem - - -
11 the indemnity loss argument is predicated upon extrinsic
12 evidence that you would say that the custom and practice in
13 the industry is this is the way it's read, correct?

14 MR. HACKER: Not quite.

15 JUDGE FAHEY: Okay, tell me why.

16 MR. HACKER: I haven't referred to any extrinsic
17 evidence in describing what it is that Item - - -

18 JUDGE FAHEY: No, but for you to be ultimately
19 successful, don't you have to reach - - - doesn't this
20 court have to really guide you to that conclusion? Don't
21 you have to say that we - - - we analyze this under the
22 ordinary rules of contract, and if we do that, we create an
23 ambiguity here, and therefore we're allowed to get the
24 assertions of covenants in, custom and practice? This is
25 what happens in the insurance industry.



1 MR. HACKER: We're happy to be thrown in the
2 briar patch of ambiguity - - -

3 JUDGE FAHEY: Um-hum.

4 MR. HACKER: - - - because there's only going to
5 be one result when you actually see the custom and - - -

6 JUDGE FAHEY: Policy implications are - - - could
7 be kind of frightening in the insurance industry if we
8 start characterizing each one of these contracts as
9 ambiguous.

10 MR. HACKER: Well, I - I - - I don't quite agree.
11 Because when there's been ambiguity, for example, in the
12 Munich Re case, they abandoned the defense. When everybody
13 gets into custom and usage, one side prevails.

14 But I want to be very clear. There isn't
15 ambiguity here. You don't need extrinsic evidence to
16 understand what Items 2, 3, and 4 are doing when read
17 together. Items 2 - - - Item 2 refers to a million dollars
18 in indemnity loss. That's just on its face, it does, and
19 nobody disagrees. Item 3, 500,000 of that being retained;
20 indemnity loss. Nobody disagrees.

21 Then we get to Item 4. It says the other 500,000
22 dollars, the excess policy, is - - - what it says is two -
23 - - says that - - -

24 JUDGE GARCIA: 250 of that one million - - -

25 JUDGE STEIN: 250 - - -



1 JUDGE GARCIA: - - - is covered by the reinsurer.

2 MR. HACKER: - - - the reinsurance accepted is
3 250,000 of the 500,000. Part of the 500,000. That 500,000
4 is indemnity loss, so the 250,000 is part of the same
5 500,000, which is indemnity loss. The 250,000 dollars does
6 not and cannot include defense expenses.

7 It would be like saying if you have a gallon of
8 milk, and they're going to take part of the gallon of milk,
9 it's got to be milk. What their argument is, is we're
10 taking half the gallon, but we're taking - - - what we're
11 taking is milk and orange juice. It has to be the same
12 thing. And the 500,000 dollars is unambiguously indemnity
13 loss only. It doesn't include defense expenses.

14 JUDGE FEINMAN: But - - -

15 MR. HACKER: That's provided for elsewhere.

16 JUDGE FEINMAN: - - - let me ask you a quick
17 hypothetical, if I may?

18 CHIEF JUDGE DIFIORE: Yes, you may.

19 JUDGE FEINMAN: So if the insurer litigates the
20 underlying dispute and wins, and therefore zero dollars
21 have been paid out of the one million, all right, how do
22 you figure out the proportion of those expenses that are
23 going to be covered by the reinsurer?

24 MR. HACKER: So that's a litigated question in
25 other cases that's not presented here. Nobody's disputing



1 that issue. But it - - - it's - - - you know, when the
2 insurer in core - - - incurs costs to prevent
3 indemnification, liability, so the reinsurer gets - - -
4 ends up having no liability whatsoever, the insurers argue
5 that you should bear part of that.

6 Most reinsurance certificates include a way of
7 calculating that. Certificate X does not. That's true.
8 It provides a different formula that as Your Honor points
9 out, doesn't exactly work in the zero liability situation.
10 But the insurers' position in that situation is you
11 basically apply the same proportion as between the amount
12 of liability assumed of indemnity loss. So in this case it
13 would be fifty percent. Each of the reinsurers would bear
14 fifty percent of the - - - of the coverage cost.

15 But that's a completely separate question that
16 isn't - - - isn't addressed here.

17 CHIEF JUDGE DIFIORE: Thank you, Mr. Hacker.

18 MR. HACKER: Thank you, Your Honors.

19 CHIEF JUDGE DIFIORE: Counsel?

20 MR. FREDERICK: Thank you, Your Honors. David
21 Frederick for Global Re. Judge Feinman, if I could start
22 with your question. The answer is - - - proves that there
23 is no concurrency over expenses. And that's because if
24 there's no loss, there are no expenses that are paid by the
25 reinsurer. And that is set forth clearly in the



1 terminology on page A-89. There's a case on that point
2 called Seneca, which we cite and quote in our case.

3 And so if it is the case that the insured, the
4 cedent, has to incur expenses in defending a loss, but if
5 it wins those costs and expenses are not then chargeable to
6 the reinsurer, the entire theory of concurrency proposed by
7 my friend goes away completely. And that is one of the
8 reasons why you should answer the certified question: yes.

9 There is a well-established settled construction
10 of these reinsurance certificates so that there's a cap on
11 the loss and expenses that are chargeable to the
12 reinsurers. Excess - - -

13 JUDGE FEINMAN: Okay, so - - -

14 CHIEF JUDGE DIFIORE: Is that under Excess?

15 JUDGE FEINMAN: - - - if you're - - - I'm sorry.

16 CHIEF JUDGE DIFIORE: Under Excess?

17 MR. FREDERICK: Under Excess.

18 JUDGE WILSON: So can Excess - - -

19 MR. FREDERICK: Excess actually considers - - -

20 JUDGE WILSON: - - - can it be distinguished, as
21 Mr. Hacker suggested?

22 MR. FREDERICK: It's not distinguishable because
23 although - - -

24 JUDGE WILSON: Why?

25 MR. FREDERICK: - - - because although the way



1 that the form - - - the follow form and follow settlements
2 were constructed, they're actually - - - they were in that
3 agreement. And this court, in fact, held that in Excess
4 that the same principle applies in property as it does in
5 liability, which were the insurance policies that were at
6 issue in Uniguard and Bellefonte.

7 And I would point out that this court, three
8 years before the Excess decision, considered the
9 applicability of Bellefonte under New York law and
10 reaffirmed it. That's the Travelers decision. And in
11 Travelers, what the court held is that for reinsurance
12 certificates, you take these terms and you do not read them
13 - - - these follow the fortunes, follow form clauses - - -
14 to nullify other terms. That is exactly what Century is
15 arguing here.

16 They want you to nullify the amount of liability
17 provision which creates the cap for precisely the reason
18 that this court recognized and the Second Circuit
19 recognized in the trio of well-settled cases.

20 JUDGE FEINMAN: But let - - - let's go back a
21 step. And I - - - I guess my concern is whether - - - and
22 it's something that has been alluded to by two of my
23 colleagues already - - - is whether Excess is really
24 decided properly in the first place. And it seems to me,
25 you know, based on a lot of the reading that you provided



1 us, that certainly in arbitration decisions, nobody's
2 following any of this, whether it's Bellefonte, whether
3 it's Excess. And if that's the case, did we maybe make a
4 wrong turn?

5 MR. FREDERICK: No, you did not make a wrong
6 turn. And I would posit that there's no evidence other
7 than the suggestion that one arbitrator in one case with
8 one unspecified contract language, assessed the expenses
9 and said that Bellefonte - - -

10 JUDGE FEINMAN: That - - - that would be - - -

11 MR. FREDERICK: - - - didn't apply.

12 JUDGE FEINMAN: - - - Gerling?

13 MR. FREDERICK: This is a - - - that is a made-up
14 fact, Judge Feinman, if I could use that term and strong
15 language. The cases, in fact, have followed Bellefonte.
16 This court has followed Bellefonte. This is the third time
17 the Bellefonte rule has been before you. And the first two
18 times you ruled that that was an appropriate way to view
19 reinsurance caps.

20 So Judge Rivera to your question - - -

21 JUDGE GARCIA: Garcia.

22 MR. FREDERICK: - - - absolutely, Excess has to -
23 - - sorry, my apologies. Yes, you would have to overrule
24 Excess in order to rule in their favor.

25 JUDGE GARCIA: Right. But isn't the Circuit



1 itself suggesting in their decision sending us this
2 question that they, themselves are questioning Bellefonte
3 and Uniguard?

4 MR. FREDERICK: They are questioning it. But I
5 would posit that the reason why they're doing it is that
6 they would like an end to the challenges that are being
7 brought by the cedents to this rule. And the reason why
8 the cedents are challenging this rule, is that there has
9 been a change in economic circumstances for this entire
10 market for long tail.

11 So the reason that you're being asked to
12 reconsider this question is because the cedents want to get
13 a windfall. They bought these loss portfolio transfers on
14 the basis of prices that factored in the Bellefonte rule.
15 If you overturn the Bellefonte rule, they get a windfall.

16 JUDGE WILSON: So does the fact that these are
17 long-tail contracts make stare decisis more important?

18 MR. FREDERICK: Yes. Because the contract - - -
19 considerations for stare decisis are at their acme.
20 Parties can contract around the Bellefonte rule for future
21 contracts if they want to. The parties that are all
22 applicable here and the amici, all made economic decisions
23 on the basis of the Bellefonte rule - - -

24 JUDGE STEIN: Well, doesn't that make it even
25 more important, then, for some court to have the benefit of



1 some evidence of what the understanding was at the time
2 that these policies were entered into?

3 MR. FREDERICK: Well, the courts that have looked
4 at this have relied on the New York law principle that one
5 looks at the plain language of the contract in resolving it
6 and not follow the California practice of allowing
7 extrinsic evidence that would lead to the interpretation of
8 these terms.

9 JUDGE GARCIA: Well, you could make it a lot
10 plainer, right? I mean, everybody seems to complain and
11 have views on how the courts are interpreting it. Why
12 don't just say what you mean in the contract?

13 MR. FREDERICK: Well, these - - - I think that as
14 the modern practices are - - - are evolving, there are
15 changes to these terms. But I would say that the courts
16 that have looked at this from Excess, which was before
17 Judge Scheindlin, before it came over to the state court
18 system - - - she did not find there to be ambiguity. And
19 she said that even to the extent that there is a little bit
20 of ambiguity, it's for the court to resolve. So Your Honor
21 - - -

22 JUDGE GARCIA: On a factual question, there seems
23 to be some conflict in the record, although maybe I'm
24 reading it wrong. One position seems to be, let's say you
25 - - - you're taking fifty percent of the reinsurance - - -



1 fifty percent of the risk, you get fifty percent of the
2 original premium or some variation of that based on cost.
3 There's another part of the briefing that seems to suggest
4 these premiums are renegotiated every year. What is it?

5 MR. FREDERICK: They were renegotiated. These
6 particular premiums were renegotiated, and they were not
7 fifty percent, for the reasons that we've set out in our
8 brief. In fact, this is another reason why these are not
9 concurrent terms.

10 The underlying policy was for a three-year term.
11 The insurance certificates, however, were only for one
12 year. So if the asbestos problem had arisen in the first
13 year, the reinsurers would have been free not to re-up in
14 year two or year three. And when they did re-up, the facts
15 are very clear.

16 Here, they did so on the basis of different
17 premiums. And so you can't use the premium argument as a
18 basis for implying a judge-made doctrine or spin on these
19 provisions. In fact, in Uniguard, the court made very
20 clear - - -

21 JUDGE GARCIA: Is the renegotiated premium in
22 some way tied to the risk percentage?

23 MR. FREDERICK: Well, it is tied to the
24 perception that the reinsuring underwriters have of what
25 the risks are. And that's why you have to separate



1 reinsurance risk from the underlying policy risk. That's a
2 way - - -

3 JUDGE GARCIA: That's a little bit confusing to
4 me. But let's put it in simpler terms. You have a
5 million-dollar policy and you're reinsuring 500,000 of
6 that. Now, you're renegotiating the rates here. Is your
7 premium passed through to the reinsurer in some way, based
8 on the fifty percent risk assumption?

9 MR. FREDERICK: It is based on the risk that the
10 reinsurance is going to be pierced. And so to that extent,
11 it goes to which layer the reinsurance is going to be
12 pierced. So if you take the first 500,000, there's a risk
13 that that first 500,000 will be risked - - - will be
14 pierced. Then you take the next layer, the 250-; what is
15 the risk to that 250-? And there are actuarial analyses
16 that go into that. And so that is why this type of excess
17 of loss, the treatise writers say, is nonproportional,
18 because you have to look at what the reinsurance risk is
19 that a particular layer is going to be pierced at a
20 particular point in time.

21 JUDGE GARCIA: So that the last 250,000 in the
22 hypothetical, if you split it, would be a lower premium
23 than the first 250?

24 MR. FREDERICK: That's correct. And that's why
25 what this court and what the Second Circuit recognized in



1 the trio of cases is that the reinsurer has an interest in
2 capping its exposure. That's why these terms: amount of
3 liability, limit of liability, are put in the reinsurance
4 clause preamble, because they want to make clear to the
5 world in the very first opening lines of this certificate -
6 - -

7 JUDGE STEIN: Yeah, but - - -

8 MR. FREDERICK: - - - that's the limit.

9 JUDGE STEIN: - - - but isn't that sort of - - -
10 you know, on the other hand the - - - the cedent insurer
11 has an interest in - - - in sharing their - - - their
12 insurance costs. So that's what they're looking to have in
13 their agreement, which is why it's maybe not so clear.

14 MR. FREDERICK: No, but Judge Stein, here the
15 sharing goes to what the indemnity loss is, but the problem
16 here - - -

17 JUDGE STEIN: Not for them, it doesn't. It - - -
18 the expenses come right out of their pocket.

19 MR. FREDERICK: The expenses - - - and if you
20 look at the language on page A-177 of the appendix - - -
21 are explicitly "in addition to". They are supplementary
22 payments. So they are not - - - they are separate and
23 apart from the indemnity loss numbers. This is a
24 separately contracted-for provision.

25 Had the reinsurer wanted to have that in parallel



1 or concurrence, it would have written it that way. And it
2 did not. Instead what it did was it wrote "except as
3 specifically provided herein". And that's why the Second
4 Circuit in Bellefonte and Uniguard, and this court in
5 Excess, said we're going to honor the reinsurer's desire to
6 keep a cap or limit on their policy exposure, precisely
7 because they don't have an ability to control those
8 underlying costs. And this case is a perfect example of
9 that.

10 Ninety percent of what Century is seeking to pass
11 on to Global is insure - - - is costs and expenses from
12 litigation where they conducted malfeasance, according to
13 the Illinois courts, and did not defend Caterpillar.

14 And so it would be odd to suppose that you would
15 read a contract overriding a limit of liability so that the
16 reinsurer now is tagged with paying for their malfeasance.

17 CHIEF JUDGE DIFIORE: Thank you, Mr. Frederick.

18 Mr. Hacker?

19 MR. HACKER: So the made-up fact here is that the
20 net premiums were not proportional. They were exactly
21 symmetrical. A-150 is the only evidence in the case, and
22 it's undisputed - - - it was never contested, not once by
23 Global anywhere in the federal litigation. They're
24 completely net proportional.

25 If they had raised an issue, we would have shown



1 exactly how it actually plays out. That first policy was
2 changed after four months to an annual policy. There's
3 much more story there.

4 But the bottom line fact is the net premiums were
5 always follow the risk, which is just as it should be.

6 Mr. Frederick, I think, gives away the case when
7 he says correctly that expenses are in addition thereto.
8 They're separate from the indemnity losses. That's
9 correct.

10 Items 2, 3, and 4 are talking about the amount
11 the indemnity loss that's being shared. Defense expenses
12 are in addition thereto. How do you do that? How do you
13 treat that with a certificate? The answer is: the
14 following form provision says you just do whatever the
15 underlying policy does. Because why wouldn't you?
16 Especially when the net premium is following the amount of
17 risk that you assume.

18 JUDGE GARCIA: I'm sorry to harp on the net
19 premium, but doesn't that make sense that if you - - -
20 let's say with the hypothetical five - - - a million-dollar
21 policy; they retain 500-, and it's 250-250. Wouldn't the
22 premium for the last 250- be less than the first 250-
23 because of the likelihood you're going to reach that amount
24 in a settlement or a verdict?

25 MR. HACKER: The separate premiums might be, but



1 that has nothing to do with the defense cost obligation,
2 because within each layer, it's always the same. Look at
3 certificate X. It's an excess policy. It's not actually
4 one policy; it's an excess policy that is one hundred
5 percent reinsured.

6 They split the premium equally between the two
7 reinsurers. There's nothing left. We didn't have anything
8 left other than the net amount, the ceding commission,
9 which compensates for other costs.

10 We gave away the entire premium on the excess
11 policy, and their theory is, unbelievably, we kept all the
12 liability for defense costs exceeding the amount of
13 indemnity loss. That's a separate provision, as Mr.
14 Frederick provides - - -

15 JUDGE GARCIA: So again, forgive me the - - -

16 MR. HACKER: - - - forgets.

17 JUDGE GARCIA: - - - basic question. So you're
18 saying that the premium for the excess policy, let's say we
19 split it 250-250, that entire premium, whatever way you cut
20 it up, goes to those two reinsurers, minus whatever cost?

21 MR. HACKER: Yes, all of it.

22 JUDGE GARCIA: I see.

23 MR. HACKER: One hundred percent of it. And yet
24 we are being stuck with all of the defense cost liability
25 in excess of the indemnity loss, which is a separate



1 liability.

2 JUDGE FAHEY: On the defense costs - - - the
3 expense costs, are you - - - are you arguing that they
4 should be prorated, that they should be broken up in the
5 same way that your - - - that your liability costs are, or
6 that - - - are you - - - are you arguing that they assume
7 all defense costs over that amount?

8 MR. HACKER: The - - - the - - - in addition,
9 there are two clause - - - yes. Yes. Under this policy,
10 since we gave away - - -

11 JUDGE FAHEY: So - - -

12 MR. HACKER: - - - under the excess policy, yes.
13 The defense costs are borne by the reinsurers. That
14 wouldn't always be true in different kinds of excess of
15 loss policies. But here it is.

16 JUDGE FAHEY: And that amount, in this case,
17 would be somewhere - - - ninety percent of ninety million
18 dollars. Is that right?

19 MR. HACKER: Whatever the amount is, it's shared
20 equally with all of the reinsurers.

21 JUDGE FAHEY: I see.

22 MR. HACKER: That's - - - that's - - - that was
23 the deal that we took. They - - - they took all of the
24 premium. We didn't keep any premium to cover any defense
25 costs, zero. So we wouldn't accept any defense cost



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liability. It wouldn't make sense to do that.

JUDGE FAHEY: Thank you.

MR. HACKER: Thank you.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Global Reinsurance Corporation of America v. Century Indemnity Company, No. 124 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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