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COURT OF APPEALS

STATE OF NEW YORK

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UNITED STATES FIDELITY AND GUARANTY COMPANY,

Respondent,

-against-

No. 1

AMERICAN RE-INSURANCE COMPANY,

Appellant.  
-----

20 Eagle Street  
Albany, New York 12207  
January 2, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start  
2 with number 1, United States Fidelity and Guaranty v.  
3 American Re-Insurance.

4 Counselor?

5 MS. SULLIVAN: May it please the court,  
6 Kathleen Sullivan for the ECRA appellants in the  
7 USF&G case. I'd like to reserve two minutes for  
8 rebuttal.

9 CHIEF JUDGE LIPPMAN: Two minutes out of  
10 your seven. You have it. Go ahead.

11 MS. SULLIVAN: Thank you, Your Honor.

12 The issue in this case is whether follow-  
13 the-fortunes requires a reinsurer to pay a  
14 reinsurance bill despite objective evidence that the  
15 ceding occurred - - -

16 CHIEF JUDGE LIPPMAN: What about your - - -  
17 what about - - - counsel, what about the allocations?  
18 How does that play into this? The allocation that  
19 went into the settlement, how does it affect your  
20 argument in terms of what you should be responsible  
21 for? Can you challenge that, or does it matter?

22 MS. SULLIVAN: Yes, we can challenge it.  
23 And the reason we can challenge it is that follow-  
24 the-fortunes depends upon a reciprocal duty on the  
25 ceding insurer to act in good faith. Good faith - -

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JUDGE SMITH: Is there a difference between allocation and the settlement itself?

MS. SULLIVAN: Good faith applies to both, Judge Smith; and you could challenge both. But - - -

JUDGE SMITH: Isn't - - - go ahead.

MS. SULLIVAN: Excuse me. In the allocation context, it's all the more important for the reinsurer to be able to tell, because - - -

CHIEF JUDGE LIPPMAN: Can you win - - - can you win without upsetting the allocation?

MS. SULLIVAN: What we're asking for here is that it return for a trial on whether - - -

CHIEF JUDGE LIPPMAN: Does it affect the allocation that's in the settlement?

MS. SULLIVAN: Yes, yes. What we're - - -

CHIEF JUDGE LIPPMAN: Or is it - - - or is it about - - - not about where those monies are going to there, but where they came from? You follow what I'm saying? Is there a distinction - - - I think that's the same question Judge Smith - - -

MS. SULLIVAN: Your Honor, we're not challenging here the amount that USF&G paid to Western. What we're challenging - - -

JUDGE SMITH: Aren't - - -

1 MS. SULLIVAN: - - - is as between USF&G  
2 and the reinsurers, who bears that cost.

3 JUDGE GRAFFEO: This - - -

4 MS. SULLIVAN: And our argument is - - -

5 JUDGE GRAFFEO: - - - this is the issue of  
6 the bad-faith claims? Is that what - - -

7 MS. SULLIVAN: That's one of them, Your  
8 Honor.

9 JUDGE GRAFFEO: - - - you're raising? Do  
10 we have to find that there's sufficient evidence that  
11 there may have been bad-faith claims embraced in that  
12 alloc - - - in the trust monies, I guess you'd call  
13 it? Do we have to make that determination?

14 MS. SULLIVAN: You do not, Your Honor. We  
15 would argue that what you need to do is reverse the  
16 summary judgment that was granted to USF&G in this  
17 case - - -

18 JUDGE READ: So what happens - - -

19 MS. SULLIVAN: - - - and send it back to  
20 the trial court. When it - - -

21 JUDGE READ: So it goes back to the trial  
22 court - - -

23 MS. SULLIVAN: It does, Your Honor.

24 JUDGE READ: - - - and they look at the  
25 allocation - - - zero was allocated, right?

1 MS. SULLIVAN: Zero was allocated to bad  
2 faith - - -

3 JUDGE READ: And that's what you object to.

4 MS. SULLIVAN: Yes, that's one of the  
5 things we object to. But let me say the key point -  
6 - -

7 CHIEF JUDGE LIPPMAN: But do they have to  
8 upset the allocation, or they just have to change the  
9 amount that you pay?

10 MS. SULLIVAN: Just the amount we pay.

11 CHIEF JUDGE LIPPMAN: So the allocation  
12 could remain?

13 MS. SULLIVAN: Let's be clear - - -

14 CHIEF JUDGE LIPPMAN: Or it couldn't?

15 MS. SULLIVAN: - - - Chief Judge Lippman,  
16 what I mean by allocation - - -

17 CHIEF JUDGE LIPPMAN: Yes.

18 MS. SULLIVAN: - - - is as between USF&G  
19 and our clients, the reinsurers; who pays what.  
20 We're not - - -

21 CHIEF JUDGE LIPPMAN: Yes, but - - -

22 MS. SULLIVAN: - - - trying to upset the  
23 settlement.

24 CHIEF JUDGE LIPPMAN: - - - but as the  
25 settlement that was approved by the court, that

1 stands the way it is?

2 MS. SULLIVAN: It - - -

3 CHIEF JUDGE LIPPMAN: It's just what you  
4 pay that you're - - -

5 MS. SULLIVAN: Absolutely, Your Honor.

6 CHIEF JUDGE LIPPMAN: - - - you're looking  
7 towards. Okay.

8 MS. SULLIVAN: The dispute here is over the  
9 - - - the dispute here is - - -

10 JUDGE SMITH: None of the plaintiffs are  
11 going to have to give back any of their money.

12 MS. SULLIVAN: That's exactly right.

13 JUDGE SMITH: MacArthur doesn't have to  
14 give you anything.

15 MS. SULLIVAN: Yes - - -

16 JUDGE SMITH: But isn't - - - but you are  
17 saying part of your claim is that MacArthur paid too  
18 much - - - or I'm sorry, that the insurance company -  
19 - - that the insurer paid too much.

20 MS. SULLIVAN: But Your - - -

21 JUDGE SMITH: You're not - - - they can't  
22 get it back, but you're saying they paid too much.

23 MS. SULLIVAN: Not at all, Your Honor.

24 We're saying that what they paid was up to them, but  
25 we shouldn't have to pay for their bad faith toward

1           their policy owner - - -

2                         JUDGE SMITH: Well, I under - - - I mean,  
3           isn't it - - - I guess that's what I'm getting at  
4           when I say isn't there a differen - - - I mean, I  
5           understand - - - on the bad faith claim, I  
6           understand. And that looks to me like an allocation  
7           issue. But you're talking about what I guess is the  
8           continuous trigger issue, or the accident issue. You  
9           say they should have settled on an, I guess, an  
10          accident rather than an occurrence basis. Am I  
11          making sense?

12                        MS. SULLIVAN: Your Honor, they can settle  
13          on whatever basis they wish. But they can't  
14          attribute to the reinsurers - - - they can't bill us  
15          - - -

16                        JUDGE SMITH: Well, you're saying - - -

17                        MS. SULLIVAN: - - - for amounts that were  
18          beyond - - -

19                        JUDGE SMITH: - - - you're saying - - -

20                        MS. SULLIVAN: - - - the policy's - - -

21                        JUDGE SMITH: - - - you're saying they - -  
22          - aren't you saying that their decision to settle on  
23          an accident basis, or an occurrence, whichever it is,  
24          was imprudent and that therefore you shouldn't have  
25          to pay for their imprudence?

1 MS. SULLIVAN: Your Honor, we're saying the  
2 reinsurers pay for only what is in the policies, in  
3 the treaty and - - -

4 CHIEF JUDGE LIPPMAN: Are you saying they -  
5 - -

6 MS. SULLIVAN: - - - in - - -

7 CHIEF JUDGE LIPPMAN: - - - viol - - - is  
8 your point - - -

9 MS. SULLIVAN: - - - in good faith.

10 CHIEF JUDGE LIPPMAN: - - - that they  
11 violated the treaty with you?

12 MS. SULLIVAN: Both points. They violated  
13 the treaty, and they departed from the settlement.

14 You've already held in the Travelers case  
15 in 2001, that they can't depart from the treaty.  
16 We're saying they also can't depart from the  
17 settlement. If they settle a billion dollars, the  
18 billion dollars goes. But they can't charge us for  
19 the part of that that was for their bad faith. They  
20 can't foist off their intentional tortious conduct  
21 toward their insured on us, because we didn't bargain  
22 to pay - - -

23 CHIEF JUDGE LIPPMAN: But that's because  
24 they - - -

25 MS. SULLIVAN: - - - for their bad faith.

1 CHIEF JUDGE LIPPMAN: - - - isn't that  
2 because they violated the treaty with you?

3 MS. SULLIVAN: You could - - - yes, they  
4 violated the treaty. The treaty - - - and Justice  
5 Abdus-Salaam focuses on the bad-faith claims by the  
6 insured in her dissent. And I think she's absolutely  
7 - - -

8 CHIEF JUDGE LIPPMAN: So you're saying  
9 that's one point.

10 MS. SULLIVAN: That's one point. She - - -  
11 that the treaty doesn't cover bad-faith claims. We  
12 can't be made to pay for them. And at a minimum,  
13 Judge Read, it has to go back to the trial court for  
14 us to try the amount that went to bad-faith claims.

15 JUDGE PIGOTT: Before you go, then, what  
16 we're talking about here, the USF&G is entitled to  
17 summary judgment and liability; that's not an issue  
18 at all. The only issue is damages, and you're  
19 raising several issues with respect to damages. But  
20 the - - - but in terms of a 3212, they're entitled to  
21 judgment as a matter of law on liability, and now  
22 we're going to determine how much is owed to them.

23 MS. SULLIVAN: Well, Your Honor, we don't  
24 concede that we owe them anything, because if we're  
25 right on accident/occurrence, that it's not - - -

1           that it was an accident policy, and not an occurrence  
2           policy, if we're right on bad-faith claims, and if  
3           bad-faith claims take up the entirety of the  
4           judgment, then we would have no - - -

5                         JUDGE SMITH:   Suppose - - -

6                         MS. SULLIVAN:   - - - obligation.   So we  
7           don't concede we owe - - -

8                         JUDGE SMITH:   - - -- suppose what we have  
9           here is a policy that some might say is an accident  
10          policy and some might say is an occurrence policy.  
11          Suppose you're right; it's an accident pol - - - is  
12          that what you say it is - - - an accident policy.  
13          And suppose USF&G either made a mistake or made a  
14          judgment that they - - - that it was prudent to  
15          settle on an occurrence basis, can they charge you  
16          for that?

17                        MS. SULLIVAN:   No, because that departs  
18          from the policy.   They can't depart from the policy  
19          in the treaty - - -

20                        JUDGE SMITH:   But if even if it was  
21          reasonable - - - even if was reasonable for them to  
22          say, look, we have exposure on an occurrence basis,  
23          and we've got to buy our way out of it?

24                        MS. SULLIVAN:   They can settle on whatever  
25          basis they want, but they can charge the reinsurers

1           only for what the treaty and the policies provide.

2                   JUDGE SMITH:  Even if it's - - - even if  
3           it's a prudent settlement?  Even - - - they may not  
4           have had liability, but under the circumstances, it's  
5           prudent to settle; you say they can't come back to  
6           you?

7                   MS. SULLIVAN:  Your Honor, the key issue  
8           here is, did they act in good faith?  Did they - - -

9                   JUDGE SMITH:  Well, but can you try to  
10          answer my question.  Assume it's a prudent  
11          settlement, that it was reasonable from their point  
12          of view to pay this much money.  Then they paid more,  
13          obviously, on an occurrence basis than they would on  
14          an accident basis.  Assume that that was a reasonable  
15          judgment.  Doesn't that end the discussion?

16                  MS. SULLIVAN:  It does not, Your Honor,  
17          because the issue would be - - -

18                  JUDGE SMITH:  On that issue?

19                  MS. SULLIVAN:  What we're arguing is you  
20          can't settle on one set of rules and then charge us  
21          on another set of rules.  They have a lot of latitude  
22          to settle in a way that's prudent.  And we can't  
23          challenge the amount.  We can challenge what part can  
24          be billed to us.  And just to go back to the bad-  
25          faith claims, the clearest evidence in the case - - -

1 JUDGE SMITH: Well, stick - - - no. I  
2 think I understand the bad-faith claim. I'm having  
3 more trouble understanding what you're saying about  
4 accident/occurrence. What did they do wrong?

5 MS. SULLIVAN: Your Honor, I see that my  
6 time has expired - - -

7 CHIEF JUDGE LIPPMAN: Go ahead, answer the  
8 question, counsel, sure.

9 MS. SULLIVAN: So what they did wrong was  
10 twofold. First, the policy specifies accident, not  
11 occurrence. And the settlement specifies accident as  
12 opposed to occurrence. You can't settle a case based  
13 on accident as opposed to occurrence. That's A-413.  
14 You can't settle it on that basis and then turn  
15 around and bill the insurer as if it was really an  
16 occurrence case.

17 JUDGE PIGOTT: Look - - -

18 MS. SULLIVAN: That's a violation of two  
19 sets of rules.

20 JUDGE PIGOTT: Well, looking at it from a  
21 different angle, I mean, here's Western - - - whether  
22 you call it Asbestos or MacArthur - - - getting  
23 overrun by asbestos claims. And they have a carrier.  
24 And at some point, they make a determination, we  
25 can't handle these one at a time. I mean, they just

1 keep coming, and they may keep coming forever.

2 So what we're going to do is what they did.  
3 In other words, they bundled them all, and they  
4 handled it as a class. They did the bankruptcy  
5 thing. At what point do you think you had a right to  
6 intervene in any of that, if at all; and what role  
7 you could have played in that?

8 MS. SULLIVAN: So, Judge Pigott, we could  
9 have participated. But the last thing you want for  
10 the poor asbestos victims and the insureds who are  
11 supposed to be paying them, is to complicate the  
12 settlement process still further by having the  
13 reinsurers involved in a three-way ballgame.

14 For centuries, this court and other courts  
15 have all held that follow-the-fortunes depends on the  
16 ceding insurer's duty of good faith. We relied on  
17 them to represent us there. They're not allowed to  
18 settle a billion dollars' worth of bad-faith claims  
19 and then turn around and call them - - -

20 CHIEF JUDGE LIPPMAN: Okay.

21 MS. SULLIVAN: - - - asbestos claims.

22 CHIEF JUDGE LIPPMAN: Okay. Judge Pigott.

23 JUDGE PIGOTT: Just to pick up - - - I'm  
24 sorry, Judge - - -

25 CHIEF JUDGE LIPPMAN: Go ahead.

1 JUDGE PIGOTT: - - - but on Judge Smith's  
2 point, the difference between bad faith and  
3 imprudence is significant here, wouldn't you agree?

4 MS. SULLIVAN: That's right, Your Honor.  
5 And what we - - - the most important thing I wanted  
6 to leave you with on this standard is, we're asking  
7 you take Travelers, which is well established, and  
8 says of course the Appellate Division is wrong that  
9 judicial review is precluded here. You have to look  
10 and see if the reinsurance bill is within the treaty.

11 What we're asking you to do is also make  
12 clear that the reinsurance bill has to be satisfying  
13 the duty of good faith on the ceding insurer's part,  
14 and that it's not good faith if there's objective  
15 evidence - - -

16 CHIEF JUDGE LIPPMAN: Okay.

17 MS. SULLIVAN: - - - now we - - - and the  
18 key - - -

19 CHIEF JUDGE LIPPMAN: Okay, counselor - - -

20 MS. SULLIVAN: - - - point is the  
21 bankruptcy court opinion. That's the - - -

22 CHIEF JUDGE LIPPMAN: You'll - - -

23 MS. SULLIVAN: - - - objective evidence.

24 CHIEF JUDGE LIPPMAN: - - - you'll have  
25 your rebuttal time.

1 MS. SULLIVAN: Thank you, Your Honor.

2 CHIEF JUDGE LIPPMAN: Okay. Counselor?

3 MR. WACHTELL: Good morning, Your Honors.

4 Herbert M. Wachtell for appellant American Re.

5 Let me go back to what - - -

6 CHIEF JUDGE LIPPMAN: Counselor, let me ask  
7 you, do you want any rebuttal time?

8 MR. WACHTELL: Yes, two minutes. I'm  
9 sorry, Your Honor.

10 CHIEF JUDGE LIPPMAN: Two minutes. You've  
11 got it. Go ahead.

12 MR. WACHTELL: Going back to, I think, one  
13 of the first questions, without upsetting allocation,  
14 can we win? The answer is yes. First place, we're  
15 entitled to summary judgment.

16 CHIEF JUDGE LIPPMAN: How does that work?

17 MR. WACHTELL: We're entitled to summary  
18 judgment, which is one way of winning - - -

19 CHIEF JUDGE LIPPMAN: Right.

20 MR. WACHTELL: - - - because on the "other  
21 insurance" clause, in the underlying policy, they  
22 could not start off with thirteen years or thirty  
23 years of coverage, under continuous trigger, and then  
24 say all the claims arose in one year. So that's the  
25 first thing. And that was - - -

1 JUDGE SMITH: Well, why isn't that a  
2 perfectly reasonable bargained-for settlement?

3 MR. WACHTELL: I'm sorry, Your Honor?

4 JUDGE SMITH: Why isn't that a perfectly  
5 reasonable bargained-for settlement?

6 MR. WACHTELL: Because they have no right  
7 to make the designation in the first place. It's  
8 only the insured, under California law, that can make  
9 an all-sums designation in a single year. And second  
10 place - - -

11 CHIEF JUDGE LIPPMAN: Isn't it a compro - -  
12 - counselor, isn't it a compromise? Isn't that how  
13 that - - -

14 MR. WACHTELL: No.

15 CHIEF JUDGE LIPPMAN: - - - came about with  
16 the different parties pursuing a certain slant to the  
17 settlement?

18 MR. WACHTELL: No.

19 CHIEF JUDGE LIPPMAN: Why not?

20 MR. WACHTELL: The settlement agreement  
21 says thirteen years. They cannot turn around and say  
22 one. But even if that were not - - -

23 JUDGE SMITH: But could they - - -

24 MR. WACHTELL: - - - the case - - -

25 JUDGE SMITH: - - -- could they have agreed

1 that the thirteen years all stacked together - - -

2 MR. WACHTELL: No.

3 JUDGE SMITH: - - - and paid four billion  
4 dollars instead of one?

5 MR. WACHTELL: No.

6 JUDGE SMITH: Why not?

7 MR. WACHTELL: There was no stacking at  
8 that time. And the testimony is, nobody agreed on  
9 stacking. Under the FMC, when they anticipated - - -

10 JUDGE SMITH: Suppose they had agreed on  
11 stacking. Would you be - - -

12 MR. WACHTELL: The testimony is that they  
13 did not.

14 JUDGE SMITH: I understand that. I'm  
15 asking a hypothetical - - -

16 MR. WACHTELL: Under California law - - -

17 JUDGE SMITH: - - - question.

18 MR. WACHTELL: - - - at the time - - -  
19 under California law FMC, they could not at that  
20 time. It's since changed.

21 JUDGE SMITH: Well, they could agree - - -  
22 just like the party that ultimately prevailed in the  
23 California Supreme Court on that issue, the  
24 plaintiffs could have argued for stacking. And what  
25 if they - - - what if the insurer had said, you know,

1           you've got a shot at prevailing on stacking; I'll  
2           give you forty cents on the dollar?

3                       MR. WACHTELL:   In a sense, it's irrelevant.  
4           Whether or not - - - so even if the settlement  
5           agreement had not said thirteen years, even if it  
6           were not the case that only the insured can make the  
7           designation, the "other insurance" clause says that  
8           the 1959 policy and each of the other policies, are  
9           only responsible for a pro rata share.

10                      So once they've gone to thirty years or  
11           thirteen years, they could not, then, turn around and  
12           defy the "other insurance" clause.

13                      JUDGE SMITH:   But doesn't "other insurance"  
14           - - - isn't it usually applied in the context of  
15           where there's another insurer in the picture?

16                      MR. WACHTELL:   It typically comes up in  
17           that context.   Because not - - -

18                      JUDGE SMITH:   Do you have a case where  
19           "other insurance" has been applied as between two  
20           policies - - -

21                      MR. WACHTELL:   It is not - - -

22                      JUDGE SMITH:   - - - issued by the same - -  
23           -

24                      MR. WACHTELL:   - - - limited to that.

25                      JUDGE SMITH:   - - - insurer in successive

1 years?

2 MR. WACHTELL: It does not say "other  
3 insurer", Your Honor. It says - - -

4 JUDGE SMITH: I understand.

5 MR. WACHTELL: - - - "other insurance".

6 JUDGE SMITH: My question is, do you have a  
7 case in which an "other insurance" clause has been  
8 applied to a policy written by the same insurer - - -

9 MR. WACHTELL: Yes, essentially - - -

10 JUDGE SMITH: - - - in successive years?

11 MR. WACHTELL: - - - you do. Because in  
12 all of these cases, where there are multiple  
13 insurers, and they do a pro ration, they don't just  
14 pro rate to one year of the same insurance company's  
15 coverage, they pro rate if it has three years or five  
16 years. So yes, you are pro rating to more than one  
17 year of the same insurance coverage. And Staring is  
18 very, very explicit that you have to have it this  
19 way, because otherwise, you are loading an improper  
20 burden on reinsurers. You do not necessarily have  
21 the same reinsurers over the thirteen years. So - -  
22 -

23 JUDGE PIGOTT: When you say - - - I'm  
24 sorry. When you say that it's the insured who make  
25 the call as to designating to - - - in this case 1959

1 as opposed to the others, why would they -- why would  
2 they do that and why would they not do that? I get  
3 your point, if that's true - - -

4 MR. WACHTELL: Because if you have multiple  
5 insurers, the insurer is entitled to designate under  
6 the continuous trigger any one, all sums against full  
7 recovery, and then leave it to the insurers to sort  
8 it out, pro rata, among themselves.

9 JUDGE PIGOTT: All right. So and - - -

10 MR. WACHTELL: That's what the California  
11 law says.

12 JUDGE PIGOTT: - - - I guess I now get  
13 Judge Smith's question. So in the event that there's  
14 only one insurer, in this case USF&G, there's nothing  
15 to designate.

16 MR. WACHTELL: Well, you have a clause that  
17 says that there is, that it's express and  
18 unambiguous. It says other insurance - - - each  
19 policy is only liable for its pro rata share. And as  
20 I say, as Staring points out, because of the impact  
21 on different groups of reinsurers, even if you have  
22 the same insurer underlying, it must mean that.

23 CHIEF JUDGE LIPPMAN: What happened here,  
24 in practice, counselor? Why do you think it was  
25 decided on the - - -

1 MR. WACHTELL: In fact, one other thing.

2 CHIEF JUDGE LIPPMAN: - - - 1959?

3 MR. WACHTELL: If I may, Your Honor, one  
4 other thing. The other reason why we can prevail  
5 here on this appeal, regardless of allocation or  
6 anything else, is that we have a triable issue of  
7 fact here as to whether the retention was 100,000  
8 dollars or 3 million dollars.

9 And the Appellate Division conceded that  
10 there was a triable issue of fact. They cited four  
11 different documents which categorically say that the  
12 agreement did not just go back twenty years, but went  
13 back without limit. And then they said well, there's  
14 one affidavit which is determinative, which says  
15 well, why would anybody enter into such a deal.  
16 There're not only four documents, there are ten  
17 different documents which unequivocally say here, as  
18 to both insurers - - - ECRA and Am-Re - - -

19 JUDGE SMITH: None of those - - - none of  
20 those ten, of course, is a signed document amending  
21 the policy?

22 MR. WACHTELL: Excuse me, Your Honor?

23 JUDGE SMITH: None of those ten is a signed  
24 document amending the - - - usually, when you amend a  
25 policy between two insurance companies, you endorse

1 it.

2 MR. WACHTELL: Except we're talking about  
3 documents, at that point, which were twenty-five  
4 years old, and people didn't necessarily have them.  
5 And therefore, you have a document that says we can  
6 do it either way, either endorse it or you write a  
7 letter to your principal confirming that it's all  
8 years. And that letter was then written.

9 The documentary evidence here - - - and I'm  
10 not saying it's not a triable issue - - - I'm not  
11 saying we win summary judgment on that particular  
12 issue. I'm saying it is a clear triable issue of  
13 fact - - -

14 JUDGE PIGOTT: Is the - - - is the - - -

15 JUDGE SMITH: I'm not sure you ever got  
16 back to the Chief Judge's question.

17 CHIEF JUDGE LIPPMAN: How did it happen  
18 that 1959 was picked as the way to - - -

19 MR. WACHTELL: Purely arbitrary. Their own  
20 brief - - -

21 CHIEF JUDGE LIPPMAN: Was it arbitrary - -  
22 -

23 MR. WACHTELL: They did it.

24 CHIEF JUDGE LIPPMAN: - - - or do you  
25 think the victims were pushing for that?

1 MR. WACHTELL: No.

2 CHIEF JUDGE LIPPMAN: Do you think that  
3 there was a compromise, again, that it came about - -  
4 -

5 MR. WACHTELL: Neither. Neither. The  
6 testimony is, in their very brief, I think - - -

7 CHIEF JUDGE LIPPMAN: So it just - - -

8 MR. WACHTELL: - - - page 71, says we  
9 decided to do that. They're proud of it. We  
10 decided. It's incontrovertible. There's no - - -

11 JUDGE READ: Well, what was unreas - - -

12 MR. WACHTELL: - - - negotiation on this.  
13 There was no agreement - - -

14 CHIEF JUDGE LIPPMAN: Judge Read?

15 JUDGE READ: What was unreasonable about  
16 that? What was imprudent about that?

17 MR. WACHTELL: There was no reason other  
18 than the fact that they wanted to pierce the  
19 retention. This is exactly the same as the situation  
20 - - -

21 JUDGE SMITH: Well, wasn't it to the  
22 advantage of the asbestos claimants to do it that way  
23 - - -

24 MR. WACHTELL: No.

25 JUDGE SMITH: - - - because you got the

1 years with the biggest - - - the biggest - - -

2 MR. WACHTELL: The asbestos claimants - - -

3 JUDGE SMITH: - - - biggest retention.

4 MR. WACHTELL: - - - had nothing to do with  
5 this. The asbestos claimants said, in case this  
6 settlement doesn't go through, the case isn't  
7 approved by the bankruptcy court, we want it clear  
8 we're claiming under all thirteen years.

9 CHIEF JUDGE LIPPMAN: Yes, but wouldn't  
10 they have benefitted, is Judge Smith's question,  
11 wouldn't the claimants have benefited by this 1959 -  
12 - -

13 MR. WACHTELL: This has nothing to do with  
14 the claimants.

15 JUDGE SMITH: But can't - - -

16 MR. WACHTELL: This is all after the fact -  
17 - -

18 JUDGE SMITH: - - - you can get more money  
19 - - -

20 MR. WACHTELL: - - - of the settlement.

21 JUDGE SMITH: - - - it looks to me as they  
22 can get more money under the 1959 policy than the  
23 1948 policy.

24 MR. WACHTELL: No.

25 JUDGE SMITH: You've got higher limits.

1 MR. WACHTELL: No. Under the continuous  
2 trigger, they get the same dollars. It doesn't make  
3 any difference.

4 Your Honor, you had exactly the same  
5 situation - - -

6 JUDGE SMITH: No, wait a minute. Wait a  
7 minute. A 1948 policy has a limit of 50,000 per  
8 occurrence - - - I'm making it up. The 1959 policy  
9 has a limit of 200,000 per occurrence.

10 MR. WACHTELL: You have - - -

11 JUDGE SMITH: I'm a plaintiff. I've got  
12 250,000 dollars of injuries. Why don't I want to be  
13 under the '59 policy?

14 MR. WACHTELL: Because you had 200,000  
15 dollars for many years. It was not just - - - many,  
16 many years. But - - - fifteen years, you had a  
17 200,000-dollar limit.

18 JUDGE SMITH: There were policies with  
19 lower limits, weren't there?

20 MR. WACHTELL: Your Honor, this is exactly  
21 the same situation you essentially had - - - Your  
22 Honor, Judge Graffeo - - - that you had in Travelers.  
23 There you had people saying your multiple  
24 environmental things, but in order to pierce the  
25 retention, what we're going to do is we're to say,

1 they all occurred in a single year.

2 Here you have multiple years of asbestos  
3 claimants, and these people are coming in and saying  
4 in order to pierce the retention, we're going to  
5 claim that they're all in a single year. It is no  
6 different. And it was impermissible.

7 So first place, I think we get summary  
8 judgment, because there was absolutely no right in  
9 them to put it in a single year, and it was  
10 prohibited by the underlying policy. And  
11 furthermore, we get triable issue of fact, at a  
12 minimum, on this three-million-dollar issue. Where -  
13 - -

14 JUDGE GRAFFEO: If they did what you're  
15 suggesting, they didn't use the 1959 year, would they  
16 have pierced the retention any of those years?

17 MR. WACHTELL: No. If you - - - the minute  
18 you start spreading it - - -

19 JUDGE GRAFFEO: So - - -

20 MR. WACHTELL: - - - you could not pierce  
21 the retention here.

22 JUDGE GRAFFEO: - - - you folks would be  
23 completely - - -

24 MR. WACHTELL: Even at the 100,000 - - -

25 JUDGE GRAFFEO: - - - off. There'd be no -

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MR. WACHTELL: - - - dollar level.

JUDGE GRAFFEO: - - - reinsurance proceeds?

MR. WACHTELL: Even at the 100,000-dollar level, you could not pierce the retention. The most we could find was one single plaintiff on their list who would fall without that. One plaintiff. Because otherwise, the minute you start spreading, given the disease values and given the cap and given the retention, there's no claims whatsoever.

And the Appellate Division so acknowledged. The Appellate Division said we recognize that if you - - - we follow that your argument on this there'd be no reinsurance. And that can't be. This is the constant theme of the Appellate Division decision, both on that and on the three million dollars.

JUDGE SMITH: What - - - was the insurer, the cedant, required to make all the - - - to call all the decisions in your favor, to avoid piercing the retention - - -

MR. WACHTELL: No.

JUDGE SMITH: - - - where it could?

MR. WACHTELL: No. Well, they're entitled to act in - - -

JUDGE SMITH: What should be the - - -

1 MR. WACHTELL: - - - good faith - - -

2 JUDGE SMITH: - - - what's the guiding - -

3 -

4 MR. WACHTELL: - - - and reasonable - - -

5 JUDGE SMITH: - - - what's the principle  
6 that should guide it in its allocation?

7 MR. WACHTELL: This is - - - what drives  
8 the allocation is you have to act reasonably and in  
9 good faith. You cannot violate the treaty;  
10 Travelers. You cannot violate the underlying policy.  
11 You cannot violate, as they did here, orders from the  
12 courts in the proceeding below.

13 The bankruptcy court, which explicitly  
14 found that these were substantial claims, the bad-  
15 faith claims, that they had serious settlement value,  
16 and that some portion of the money must be  
17 attributed. And they sat there; they got the benefit  
18 of that ruling. They got an injunction in their  
19 favor based on that essential ruling. And then they  
20 say, no, we don't have to pay any attention to that.  
21 It's zero.

22 JUDGE PIGOTT: What was the basis for the  
23 bad faith of the bankruptcy court - - -

24 MR. WACHTELL: The basis for the bad faith  
25 was for nine years they lied and knowingly - - - as

1 the court - - - as the California court found, in  
2 denying them summary adjudication.

3 JUDGE PIGOTT: Did the bankruptcy court  
4 find that or did they - - -

5 MR. WACHTELL: The underlying California  
6 court first found, and the bankruptcy court adopted  
7 it, that they lied for nine years by denying policy  
8 coverage which they knew that they had.

9 JUDGE SMITH: But at that same time, didn't  
10 they also have a pretty good defense under that  
11 California decision that said they - - - they weren't  
12 on the hook at all, because it wasn't their - - -

13 MR. WACHTELL: No.

14 JUDGE SMITH: - - - their policy was the  
15 different insurer?

16 MR. WACHTELL: No. Quite to the contrary.  
17 If you think through what they argue, it defeats  
18 everything here. First place, the California court,  
19 the Appellate - - - Intermediate Appellate Court said  
20 you don't inherit the obligation as a matter of law,  
21 but you can inherit it by assignment.

22 JUDGE SMITH: An assignment did not - - -  
23 it did not - - -

24 MR. WACHTELL: And there was an assignment.

25 JUDGE SMITH: - - - it did not exist until

1 - - -

2 MR. WACHTELL: But follow the logic, Your  
3 Honor.

4 JUDGE SMITH: - - - 1997.

5 MR. WACHTELL: If I may? Follow the logic.  
6 If there was no assignment, then I suppose they could  
7 say - - -

8 JUDGE SMITH: Well, until nineteen-ninety -  
9 - - until 1997, there was no assignment.

10 MR. WACHTELL: At that point there - - -

11 JUDGE SMITH: Didn't - - - until that time,  
12 didn't they have an ironclad defense? How could they  
13 be - - - how can they be refusing in bad faith until  
14 1997?

15 MR. WACHTELL: Because they knew that the  
16 policy existed. They weren't talking about an  
17 assignment. They said - - -

18 JUDGE SMITH: The policy existed.

19 MR. WACHTELL: - - - they said Western  
20 Asbestos - - -

21 JUDGE SMITH: The policy existed. But it  
22 was also - - -

23 MR. WACHTELL: No.

24 JUDGE SMITH: - - - the law of California  
25 that they were not liable on it.

1 MR. WACHTELL: Except, Your Honor - - - no.  
2 They said Western Asbestos never had a policy. If  
3 Your Honor will recall - - -

4 JUDGE SMITH: I understand what you're  
5 saying, Mr. Wachtell. I understand that you're  
6 saying - - -

7 MR. WACHTELL: - - - Your Honor.

8 JUDGE SMITH: - - - that they denied the  
9 existence of the policy at a time when they  
10 shouldn't. And you have a fair point.

11 MR. WACHTELL: And they destroyed the  
12 documents.

13 JUDGE SMITH: I'm suggest - - - wait, just  
14 a minute, please. I'm suggesting to you, that at the  
15 same time they were doing that, they had another  
16 cold, unbeatable defense until 1997. Isn't that  
17 correct?

18 MR. WACHTELL: No, it's not correct,  
19 because if there's any glimmer of a possibility of  
20 liability, under California law and New York law, you  
21 have an obligation to defend.

22 And the other thing is, their argument - -  
23 -

24 CHIEF JUDGE LIPPMAN: Okay, counselor - - -

25 MR. WACHTELL: - - - proves too much.

1 CHIEF JUDGE LIPPMAN: - - - finish up. Go  
2 ahead.

3 MR. WACHTELL: If there was no assignment  
4 here - - - just think of what I'm saying now - - - if  
5 there was no assignment, and if they never inherited  
6 Western Asbestos' claims, they don't have a single  
7 asbestos claim to settle. Forget about bad faith.

8 CHIEF JUDGE LIPPMAN: Okay, counselor.

9 MR. WACHTELL: Their argument proves too  
10 much.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.  
12 You'll have your rebuttal.

13 MR. WACHTELL: Thank you very much, Your  
14 Honor.

15 CHIEF JUDGE LIPPMAN: Thank you.  
16 You're just switching. Musical chairs. Okay.

17 MS. SULLIVAN: Sorry, Your Honor.

18 CHIEF JUDGE LIPPMAN: It's all right.  
19 Counsel, proceed.

20 MS. VYSKOCIL: Good afternoon, Your Honors.  
21 I'm Mary Kay Vyskocil, counsel for the respondent,  
22 USF&G.

23 CHIEF JUDGE LIPPMAN: Counsel, what are we  
24 doing here? What does the allocation have to do with  
25 the claim of the reinsurers? Does that stand no

1 matter what happens?

2 MS. VYSKOCIL: Yes, Your Honor, it does  
3 stand. And these reinsurers are obligated, under the  
4 follow-the-fortunes doctrine, which this court  
5 reaffirmed ten years ago in the Koppers case, to  
6 follow the fortunes of - - -

7 CHIEF JUDGE LIPPMAN: Yes, but their point  
8 is they're not responsible for bad faith of your  
9 client that broke the treaty, is at least one of  
10 their main points.

11 MS. VYSKOCIL: That's their argument, Your  
12 Honor.

13 CHIEF JUDGE LIPPMAN: Right, what - - -

14 MS. VYSKOCIL: But - - -

15 CHIEF JUDGE LIPPMAN: - - - what's your  
16 answer?

17 MS. VYSKOCIL: Two things. First of all,  
18 follow-the-fortunes, every single court that has  
19 looked at this issue - - - and this question about  
20 whether follow-the-fortunes extends to allocation is  
21 going to come up more and more and more, as we have  
22 complex, complicated cases. It didn't come back - -  
23 -

24 CHIEF JUDGE LIPPMAN: But can't they still  
25 win even if it does apply to allocation?

1 MS. VYSKOCIL: No, they really can't, Your  
2 Honor.

3 CHIEF JUDGE LIPPMAN: Why not?

4 MS. VYSKOCIL: They can't still win.

5 CHIEF JUDGE LIPPMAN: Why not?

6 JUDGE READ: Even though you allocated - -

7 -

8 MS. VYSKOCIL: What they're arguing - - -

9 JUDGE READ: - - - even though you  
10 allocated zero?

11 MS. VYSKOCIL: We allocated zero dollars to  
12 bad faith, Your Honor, because every single  
13 participant, every single one, including people who  
14 had no interest in supporting our position - - -  
15 counsel for the asbestos plaintiffs, counsel for the  
16 policy holders - - -

17 JUDGE SMITH: Well, wait a minute. Wait a  
18 - - - isn't it - - - wait a minute. Isn't it always  
19 to the plaintiff's interest to maximize the insurance  
20 proceeds available? Wouldn't you always - - - if  
21 you're a plaintiff, wouldn't you always rather settle  
22 on the reinsured claim than the one that's not  
23 reinsured, just because you know you're more like - -  
24 - the guy's spending other people's money, and  
25 they'll give you more of it?

1 MS. VYSKOCIL: That may be true for the  
2 asbestos plaintiffs, Your Honor, but Judge Smith, it  
3 certainly wasn't true for Western MacArthur.

4 JUDGE PIGOTT: Yes, but you - - -

5 MS. VYSKOCIL: Western MacArthur had no  
6 incentive for money - - -

7 JUDGE PIGOTT: - - - your problem - - -  
8 your problem there, though, it seems to me, is that  
9 there's no question there's a bad-faith element in  
10 the bankruptcy court. And but for that, you could  
11 not have settled in the bankruptcy court, because as  
12 I understand it, when Western files for bankruptcy,  
13 there's a lift stay that would have been automatic  
14 from every one of the plaintiffs' lawyers, saying  
15 we're out of this bankruptcy, because we're insured.

16 And the only way Western could handle this  
17 with a trust out of the bankruptcy under that  
18 Manville thing, is to say there's an element of this  
19 that is substantive to us, because if it's not us,  
20 then you're right, Judge, you ought to grant a stay;  
21 let USF&G handle all of these things in their  
22 insurance, and let Western do what it can do. So  
23 there's a bad-faith element - - -

24 MS. VYSKOCIL: Yes.

25 JUDGE PIGOTT: - - - that has to be there.

1 Now, on top of that, maybe you can answer this for  
2 me. An argument could be made that you drove Western  
3 to bankruptcy. You allowed all of these plaintiffs  
4 to take default judgments in substantial sums that  
5 then continued. And but for that - - - and if Mr.  
6 Wachtell's argument applies - - - there was enough  
7 insurance to cover all of these.

8 MS. VYSKOCIL: Right.

9 JUDGE PIGOTT: And Western could still be  
10 alive today.

11 MS. VYSKOCIL: Well, there's a - - -  
12 there're a couple questions inherent, Your Honor, in  
13 what you've just asked me. So first of all, as Judge  
14 Smith pointed out a few minutes ago, we had - - - and  
15 the Appellate Division panel credited this and so did  
16 the bankruptcy court - - - the bankruptcy court noted  
17 that we had a dispositive, good-faith defense based  
18 on standing. And it wasn't 1997, Judge Smith; it was  
19 2002, when the trial court, in the middle of the  
20 trial, said that the assignment which had been made  
21 to resurrect this previously defunct company - - -

22 JUDGE SMITH: Okay, the assignment got made  
23 in 1997.

24 MS. VYSKOCIL: That's right. And it got -  
25 - -

1 JUDGE SMITH: But you were - - -

2 MS. VYSKOCIL: - - - upheld - - -

3 JUDGE SMITH: - - - but you were litigating  
4 its validity until - - -

5 MS. VYSKOCIL: Correct.

6 JUDGE SMITH: - - - 2002.

7 MS. VYSKOCIL: And it was only in 2002,  
8 weeks before we ultimately settled, that the trial  
9 court in California said the assignment was valid,  
10 and therefore, for the very first time, that standing  
11 defense was gone.

12 Now, it's - - - I'd ask - - -

13 JUDGE SMITH: Still, isn't it - - -

14 MS. VYSKOCIL: - - - this court - - -

15 JUDGE SMITH: - - - isn't it - - - I mean,  
16 I understand that you might have had defenses on the  
17 bad-faith claim, but you also had problems, didn't  
18 you? I mean, all those years of saying "what  
19 policy", that doesn't look so good?

20 MS. VYSKOCIL: Well, Your Honor, they were  
21 lost policies. And by the way, the same thing - - -

22 JUDGE SMITH: Yeah, but - - - yeah, but it  
23 did look to me as though you were claiming - - - you  
24 were claiming to doubt their existence at a point  
25 when there wasn't much doubt they existed.

1 MS. VYSKOCIL: The same thing, Your Honor,  
2 that ECRA is doing here today, by the way.

3 JUDGE PIGOTT: Well, that - - -

4 MS. VYSKOCIL: Telling you - - -

5 JUDGE PIGOTT: - - - the other side of that  
6 coin is, that as long as - - - whether it's bad faith  
7 or not, as long as you were able to dodge this thing,  
8 it was fine with your reinsurers. I mean, they - - -  
9 you know, they - - -

10 MS. VYSKOCIL: Yes, that's - - -

11 JUDGE PIGOTT: - - - were with you whether  
12 you won or tied.

13 MS. VYSKOCIL: Yes. Now, the other - - -

14 JUDGE PIGOTT: But when you lost - - -

15 MS. VYSKOCIL: - - - point, Your Honor, on  
16 this, is every participant, every single one,  
17 testified in this case. We came forward with  
18 competent admissible evidence from every single  
19 participant, that not one dollar was paid - - -

20 JUDGE PIGOTT: But isn't it a little  
21 different - - -

22 MS. VYSKOCIL: - - - two weeks - - - six  
23 weeks - - -

24 JUDGE PIGOTT: - - - I get that. But isn't  
25 it a little different, you know, if you've got a

1 plaintiff who's trying to settle a case, and follow-  
2 the-fortunes says there's 100,000 dollars on the  
3 table from USF&G. Your claim is for 250; American  
4 Re, you've got to pay a hundred and a half. That's  
5 easy.

6 Now that's over. You now have an insured  
7 who's - - - you know, who's in the - - - this  
8 argument is between the insured and the insurance  
9 companies, not the plaintiffs. And they're all gone  
10 - - -

11 MS. VYSKOCIL: Well - - -

12 JUDGE PIGOTT: - - - and the insured is  
13 bankrupt. And the argument then is, how does - - -  
14 it just seems to me, it's a different point of view  
15 when the injured parties are gone, and they've been  
16 satisfied, and then we see how, as we get back to the  
17 allocation, that happens.

18 MS. VYSKOCIL: Well, first of all, Your  
19 Honors, the affidavits that we came forward with  
20 competent evidence, made clear, that's not the way  
21 this settlement was negotiated.

22 JUDGE PIGOTT: No, but you had - - -

23 MS. VYSKOCIL: It was a - - -

24 JUDGE PIGOTT: - - - you had letters - - -

25 MS. VYSKOCIL: - - - tripartite

1 negotiation.

2 JUDGE PIGOTT: - - - excuse me. But you  
3 had letters from the home office telling your  
4 middleman there, under no circumstances are you to  
5 admit that there's insurance. I mean, it was pretty  
6 strong stuff early on that said we are going to - - -

7 MS. VYSKOCIL: Yes.

8 JUDGE PIGOTT: - - - play deaf, dumb, and  
9 blind on this.

10 MS. VYSKOCIL: Your Honors, I would ask you  
11 to take a very careful look at what the bankruptcy  
12 court was doing. The bankruptcy judge explained in a  
13 lot of detail, what she was doing - - -

14 CHIEF JUDGE LIPPMAN: Counsel, but do you  
15 agree that if you violated the treaty, that they're  
16 not responsible for monies that come as a result of  
17 that?

18 MS. VYSKOCIL: If we violated - - -

19 CHIEF JUDGE LIPPMAN: You don't contest  
20 that?

21 MS. VYSKOCIL: - - - if we violate the  
22 treaties, they're not on the hook. But we do not - -  
23 - positively, we do not concede we violated the  
24 treaties.

25 JUDGE GRAFFEO: You want us to ignore that

1 part of the bankruptcy decision that addresses the  
2 fact that the bankruptcy judge thought there were  
3 bad-faith - - -

4 MS. VYSKOCIL: What the bankruptcy judge -  
5 - -

6 JUDGE GRAFFEO: - - - claims?

7 MS. VYSKOCIL: - - - said is there are  
8 potential bad-faith claims.

9 CHIEF JUDGE LIPPMAN: Don't you think - - -

10 MS. VYSKOCIL: There are - - -

11 CHIEF JUDGE LIPPMAN: - - - by granting the  
12 injunction, it said something as to what the judge  
13 was saying.

14 MS. VYSKOCIL: It said nothing more - - -

15 JUDGE GRAFFEO: Why isn't that an issue of  
16 fact - - -

17 MS. VYSKOCIL: - - - than that there was  
18 value - - -

19 JUDGE GRAFFEO: - - - then?

20 MS. VYSKOCIL: - - - contributed.

21 JUDGE GRAFFEO: We're not to consider that  
22 in determining whether there's an issue of fact?

23 MS. VYSKOCIL: No, Your Honors. Because as  
24 you wrote, Judge Graffeo, in the Koppers case,  
25 Travelers v. Certain Underwriters at Lloyds, if the

1 settlement amount includes the claims that are  
2 reasonably, arguably, within the scope of the  
3 reinsurance contract, even if it includes components  
4 that are technically not covered, reinsurers have to  
5 follow. They cannot turn around and put us on trial  
6 for the very bad-faith claims that we compromised - -  
7 -

8 JUDGE PIGOTT: No, no - - -

9 MS. VYSKOCIL: - - - with our policy  
10 holder.

11 JUDGE PIGOTT: - - - but the argument - - -

12 MS. VYSKOCIL: That's the whole - - -

13 JUDGE PIGOTT: - - - as I understand - - -  
14 you're right. I mean, if there's a 100,000-dollar  
15 policy, and the plaintiff is demanding 150,000; and  
16 you say, I'm only going to offer 90-, and you're  
17 going to be - - - being accused of bad faith, that's  
18 - - - that happens in every case.

19 MS. VYSKOCIL: Correct.

20 JUDGE PIGOTT: That's no big deal. All  
21 right. But in this one - - - that's why I think  
22 there's a difference between that and when you have  
23 an insured versus the carriers - - - you denied  
24 coverage. You allowed default judgments to be  
25 entered that you ultimately ended up being

1 responsible for.

2           They went into bankruptcy mostly because of  
3 the conduct that went on here with respect to this  
4 asbestos; good or bad. I mean, asbestos claims  
5 overwhelmed this company, as near as I can tell. And  
6 a bankruptcy court found - - - we can't say well, she  
7 was winking at it - - - she had to find that there  
8 was something to keep it in bankruptcy. Otherwise,  
9 you would have been on your own with all of these.  
10 And I just don't know how you get around the fact  
11 that the bankruptcy court said there was something  
12 about Western that is a part of this that I can then  
13 keep it in bankruptcy and set up this trust.

14           MS. VYSKOCIL: What she said, Your Honor,  
15 if you take a look at her very specific statement - -  
16 - because she addressed this exact issue that you're  
17 raising, and she made it very, very clear that what  
18 I'm saying is that the potential inchoate claims for  
19 bad faith - - -

20           JUDGE READ: Well, didn't she say - - -

21           MS. VYSKOCIL: - - - had sufficient value  
22 to justify an injunction against the debtor - - -

23           JUDGE PIGOTT: Right.

24           MS. VYSKOCIL: - - - not against us. But  
25 she went on - - -

1 JUDGE READ: Well - - -

2 MS. VYSKOCIL: - - - and she said, I am  
3 making - - - I'm sorry, Your Honor - - - I'm making  
4 very clear, I am not deciding the merits.

5 JUDGE READ: But she said it was at least  
6 seventeen million dollars - - - it was at least equal  
7 to the liquidation value.

8 MS. VYSKOCIL: First of all, when she said  
9 that, Your Honor, she was talking about the potential  
10 bad-faith claims against a group of insurers, not  
11 just against - - -

12 JUDGE PIGOTT: We're bound by this.

13 MS. VYSKOCIL: - - - USF&G.

14 JUDGE PIGOTT: But we're bound by this.  
15 How do - - - I mean, we can't cross-examine her. I  
16 mean, she said - - -

17 MS. VYSKOCIL: No. And that, Your Honor,  
18 gets back to a question Judge Lippman asked. What  
19 would - - - what are these reinsurers asking for  
20 leave of this court to do? First of all, they're  
21 asking to be relieved of the follow-the-fortunes  
22 standards that says if it's arguable, if it's  
23 ambiguous, if it's debatable - - -

24 JUDGE PIGOTT: I don't get that. I don't  
25 think that's true at all.

1 MS. VYSKOCIL: - - - we get - - -

2 JUDGE PIGOTT: I think what they're arguing  
3 is that if there's bad faith involved in this thing,  
4 we shouldn't have to pay for bad faith. Now, I agree  
5 with you, there's other claims. There's one about  
6 attorneys' fees and other things. But - - -

7 MS. VYSKOCIL: But it's unclear whether  
8 there's bad faith.

9 JUDGE PIGOTT: Well, that's why you - - -

10 MS. VYSKOCIL: There is - - - we're  
11 debating it.

12 JUDGE PIGOTT: - - - need a trial.

13 JUDGE SMITH: Well, but isn't the ultimate  
14 question whether it's reasonable to allocate zero to  
15 the bad-faith claims? I mean, people pay on mediocre  
16 and bad claims all the time.

17 MS. VYSKOCIL: Yes, Your Honor. If that's  
18 the question.

19 JUDGE SMITH: Was this so - - - were these  
20 bad-faith claims so terrible that it was reasonable,  
21 as a matter of law, that a jury could not find it  
22 unreasonable, to allocate zero to them?

23 MS. VYSKOCIL: Well, a couple of things,  
24 Your Honor. Yes, based on the fact that we came  
25 forward with affidavits of every participant. They

1 have no - - -

2 JUDGE SMITH: Yes, but can't you - - -

3 MS. VYSKOCIL: - - - rebuttal to that.

4 JUDGE SMITH: - - - always - - - any time  
5 an insurance company is settling a case, they can get  
6 - - - or any time a defendant is settling a case,  
7 they can happily get the plaintiff to allocate the  
8 settlement to where the money's coming from.

9 MS. VYSKOCIL: Well, Your Honor, they  
10 didn't do it at that time. They did in response to  
11 these reinsurers' claims. And the reinsurers had the  
12 right to depose those people, and they forwent that,  
13 because they know what the testimony was going to be.

14 CHIEF JUDGE LIPPMAN: Counselor, let me ask  
15 you. Come to the - - - 1959, how did that come  
16 about?

17 MS. VYSKOCIL: How it came about, Your  
18 Honor - - - and again, this is explained. We have  
19 put in affidavits from each participant explaining  
20 how we got where we got.

21 CHIEF JUDGE LIPPMAN: Who was to benefit  
22 from the 1959?

23 MS. VYSKOCIL: I'm sorry, Your Honor.

24 CHIEF JUDGE LIPPMAN: Who benefited from  
25 putting it at 1959?

1 MS. VYSKOCIL: Well, as Judge Smith said,  
2 clearly the asbestos plaintiffs did, because the '59  
3 year had the highest limits. But - - -

4 CHIEF JUDGE LIPPMAN: Were they pressing  
5 for that?

6 MS. VYSKOCIL: Each - - -

7 CHIEF JUDGE LIPPMAN: Were they pressing  
8 for that?

9 MS. VYSKOCIL: No. We pressed for one  
10 year. Let me explain, Your Honor.

11 MS. VYSKOCIL: And the affidavits - - -

12 CHIEF JUDGE LIPPMAN: Yes, do explain.

13 MS. VYSKOCIL: - - - lay this out.

14 JUDGE GRAFFEO: Well, it took you out of  
15 the - - - all the retentions, so that you were able  
16 to make claims against the reinsurers.

17 MS. VYSKOCIL: Well, I don't actually think  
18 that's right either, Judge Graffeo. If, as Mr.  
19 Wachtell argues, we were required somehow - - - and  
20 don't concede that we were, because it's not how the  
21 case was settled; and that's laid out by every  
22 participant, how we got from A to B - - - but even if  
23 you were to spread the settlement amount, the 987  
24 million dollars, over all of the years, the  
25 retentions would have to be pro rated similarly.

1 I mean, the law in New York says that you  
2 don't get multiple limits and only one retention.  
3 You correspondingly - - - if you're going to spread  
4 the dollar amount, you've got to - - -

5 JUDGE SMITH: But wasn't there - - -

6 MS. VYSKOCIL: - - - pro rate the  
7 retention, so - - -

8 JUDGE SMITH: - - - also - - - wasn't there  
9 also benefit to the asbestos plaintiffs, from going  
10 into the last year, because the guy who had no injury  
11 until 1958 - - -

12 MS. VYSKOCIL: Yes, Your Honor.

13 JUDGE SMITH: - - - could take nothing,  
14 except by 19 - - - yes.

15 MS. VYSKOCIL: Yes. And that's what I mean  
16 when I say we have affidavits explaining that what  
17 USF&G and each of the parties did, was do a ground-up  
18 approach. We looked at the number of claimants. We  
19 debated, we negotiated and agreed on dollar values.

20 CHIEF JUDGE LIPPMAN: Well, the settlement  
21 was a compromised, negotiated agreement?

22 MS. VYSKOCIL: It's a series of  
23 interrelated - - -

24 CHIEF JUDGE LIPPMAN: But each one has some  
25 interests that wanted to be accomplished, right?

1 MS. VYSKOCIL: Correct, Your Honor. And  
2 the giving in on the fact that only one policy had to  
3 respond, was an argument that USF&G made based on  
4 anti-stacking principles of California law at the  
5 time. The policy holders - - -

6 JUDGE SMITH: And on which you prevailed in  
7 the settlement?

8 MS. VYSKOCIL: Yes. And the policy holders  
9 argued it's - - - we don't care if it says  
10 "accident". Yes, we did agree that the poli - - -  
11 and we did get a ruling that the policy said  
12 "accident". But the insured argued to us, under  
13 California law, whether it's accident or it's  
14 occurrence-based, it's still a triple trigger. You  
15 still have to pay under every policy. And then we  
16 argued back in response to that, yes; but under  
17 California law, you can't collect under every policy.  
18 There's an - - -

19 JUDGE SMITH: In other - - -

20 MS. VYSKOCIL: - - - anti-stacking  
21 principle.

22 JUDGE SMITH: - - - you agreed on  
23 continuous trigger and no stacking?

24 MS. VYSKOCIL: Correct. So there was - - -

25 JUDGE SMITH: You could have - - -

1 MS. VYSKOCIL: - - - a series - - -

2 JUDGE SMITH: - - - and they could have  
3 caved on continuous trigger; you could have - - -

4 MS. VYSKOCIL: Correct.

5 JUDGE SMITH: - - - caved on stacking, but  
6 you didn't.

7 MS. VYSKOCIL: Correct. A series of  
8 interrelated compromises. And what these reinsurers  
9 are wrongfully doing is picking apart each thread,  
10 basically, that went into that series of interrelated  
11 compromises, because they don't like this piece of it  
12 and they don't like that piece of it. They want the  
13 benefit. They want the 987-million-dollar cap that  
14 we negotiated.

15 CHIEF JUDGE LIPPMAN: You think there's no  
16 issue, at this point, of your bad faith?

17 MS. VYSKOCIL: No, Your Honors. The 987 -  
18 - -

19 CHIEF JUDGE LIPPMAN: That's finished, and  
20 there's - - - the settlement wiped out any  
21 allocation?

22 MS. VYSKOCIL: Correct, Your Honor.

23 CHIEF JUDGE LIPPMAN: Any arguments - - -

24 MS. VYSKOCIL: The nine - - -

25 CHIEF JUDGE LIPPMAN: - - - of bad faith?

1 MS. VYSKOCIL: Correct. The 987 million  
2 dollars is less than one half - - -

3 CHIEF JUDGE LIPPMAN: Couldn't they still  
4 be challenging that, without challenging the  
5 allocation?

6 MS. VYSKOCIL: No, Your Honors.

7 CHIEF JUDGE LIPPMAN: Why not?

8 MS. VYSKOCIL: The 987 - - -

9 CHIEF JUDGE LIPPMAN: Why not? Why not?

10 MS. VYSKOCIL: Because the allocation - - -  
11 the 987-million-dollar figure, we explained - - - the  
12 affidavits of every single participant explained how  
13 you get to that number.

14 CHIEF JUDGE LIPPMAN: Yes, but they're  
15 saying you breached your treaty with them. That's  
16 their argument.

17 MS. VYSKOCIL: It is - - - there's nothing  
18 - - - first of all, by the way, Your Honors, we don't  
19 even concede that if it were bad-faith money that we  
20 had paid, that that's un-reinsured. And we explain  
21 that in our briefs to you. We don't even concede  
22 that.

23 JUDGE SMITH: What about the - - - what  
24 about the fact that the value - - - the valuations in  
25 the settlement, you valued the lung cancer and the

1 mesothelioma claims at a set - - - I guess at 200,000  
2 and 500,000 - - -

3 MS. VYSKOCIL: Yes.

4 JUDGE SMITH: - - - for settlement  
5 purposes. What about the fact that the plaintiffs'  
6 valuations - - - the plaintiffs' experts' valuations  
7 were lower than that?

8 MS. VYSKOCIL: Well - - -

9 JUDGE SMITH: Doesn't that suggest that you  
10 were loading some of the settlement onto that?

11 MS. VYSKOCIL: No. They were not lower  
12 than that, actually, Your Honor. What the reinsurers  
13 have done is ten years - - - ten years of discovery  
14 in a case where, by contract, they're - - -

15 JUDGE SMITH: But - - -

16 MS. VYSKOCIL: - - - obligated to pay  
17 within forty-eight hours.

18 JUDGE SMITH: - - - could you address  
19 specifically those expert valuations I'm - - - how  
20 did the valuations get - - - how did the valuations  
21 come to be higher than the plaintiffs' experts'  
22 numbers?

23 MS. VYSKOCIL: They aren't, Your Honor.  
24 What I was going to say is in that ten years of  
25 discovery, they found one shred of paper that

1 contained a valuation that was outdated, that was a  
2 document that we actually used to try to argue to the  
3 plaintiffs for a lower value. And they ignore the  
4 mountains of other evidence, and the settlement  
5 values in California at the time - - -

6 JUDGE SMITH: Is there - - -

7 MS. VYSKOCIL: - - - that show us - - -

8 JUDGE SMITH: - - - is there a document  
9 before the actual settlement, before, say, April of  
10 2002, is there a document that puts a higher value on  
11 lung cancer and mesothelioma?

12 MS. VYSKOCIL: There are countless  
13 documents in the record. And they make - - -

14 JUDGE SMITH: I was just - - - can you cite  
15 me to one?

16 MS. VYSKOCIL: Well, I mean, Your Honor, I  
17 recall - - - I'm not recalling specifically. But I  
18 do recall attached to the affidavit of our - - -  
19 USF&G's vice president, who negotiated and signed the  
20 settlement agreement, Mr. Yessman, there is a  
21 document. But it is a document from April of 2002.  
22 I can't recall a specific one earlier than that.

23 But that April document is the culmination  
24 of months and months and months of back and - - -

25 JUDGE SMITH: Because that has something

1           like 160 million in it for bad faith.

2                   MS. VYSKOCIL: It does, Your Honor. And if  
3 you look at it, the total dollar amount they sought  
4 there was 198 million.

5                   JUDGE SMITH: It's a small - - - it's, I  
6 mean - - - yes, I mean - - -

7                   MS. VYSKOCIL: If you subtract out the bad  
8 faith - - -

9                   JUDGE SMITH: - - - if it's 160 million,  
10 it's still money, I mean, you know - - -

11                   MS. VYSKOCIL: And the element in that  
12 demand, six weeks before we settled this case, for  
13 compensatory damages alone, was more than double what  
14 we ultimately paid to settle this case. Which is why  
15 - - -

16                   JUDGE SMITH: As a matter of fact, wasn't  
17 it - - - I mean, I'm a little confused. Was the  
18 number 975 or 987?

19                   MS. VYSKOCIL: 987, as I recall.

20                   JUDGE SMITH: How did - - - why does the  
21 settlement agreement say 975?

22                   MS. VYSKOCIL: Well, there are a bunch of  
23 different funds into which the money went, Your  
24 Honor. And I'm not recalling that it says 975.

25                   JUDGE SMITH: I mean, I guess the reason I

1 ask, actually, is that 975 struck me, because it's  
2 exactly half the April demand. And I just wondered  
3 if - - -

4 MS. VYSKOCIL: Well, that's why - - -

5 JUDGE SMITH: - - - somebody didn't just  
6 cut it in half?

7 MS. VYSKOCIL: - - - half of the  
8 compensatory part of the demand, without any regard  
9 to the bad-faith component.

10 JUDGE SMITH: I thought it was half the  
11 total.

12 MS. VYSKOCIL: No, the total, as I recall  
13 it, was 1.98 million (sic) - - - two billion.

14 JUDGE PIGOTT: Plaintiffs demand a lot.

15 MS. VYSKOCIL: Well, but the point is, what  
16 we ultimately were able to cap are potentially  
17 limitless coverage exposure without any regard for  
18 bad faith, that was less than half of the demand we  
19 got six weeks before the settlement, without any  
20 regard, without any dollar in there, for bad faith.

21 JUDGE SMITH: Let me ask, what  
22 jurisdiction's law are we applying?

23 MS. VYSKOCIL: Well, Your Honor, the  
24 contracts really don't have a choice - - - they don't  
25 have a choice of law provision. I think it's our

1 assumption - - - we've been arguing to you under New  
2 York law, given that you're the New York Court of  
3 Appeals.

4 But the law is uniform, frankly, on these  
5 concepts to follow-the-fortunes. And we've cited to  
6 you for that reason, cases from jurisdictions outside  
7 - - -

8 CHIEF JUDGE LIPPMAN: What's the policy  
9 argument that supports your side in terms of follow-  
10 the-fortunes?

11 MS. VYSKOCIL: The policy - - -

12 CHIEF JUDGE LIPPMAN: What would be  
13 damaging in terms of follow-the-fortune, if we  
14 accepted your adversary's arguments?

15 MS. VYSKOCIL: The policy argument, Your  
16 Honor, is that in every single case - - - and that's  
17 why I mentioned before, that as coverage cases get  
18 more and more complicated, more and more dollars  
19 involved, if you look at the cases that we cite to  
20 you, it has now become routine and reflexive for  
21 reinsurers to say oh, they manipulated the settlement  
22 to maximize reinsurance - - -

23 CHIEF JUDGE LIPPMAN: You don't think  
24 there's anything more unusual about this case than  
25 any of those - - -

1 MS. VYSKOCIL: No, I do not - - -

2 CHIEF JUDGE LIPPMAN: - - - other cases?

3 MS. VYSKOCIL: - - - Your Honor. No, I do  
4 not. If you look at the Gerling case in the Second  
5 Circuit, the identical kind of arguments were made.  
6 If you look at Seven Provinces, identical kind of  
7 arguments - - -

8 CHIEF JUDGE LIPPMAN: And there's no room -  
9 - -

10 MS. VYSKOCIL: - - - were made.

11 CHIEF JUDGE LIPPMAN: - - - there's no room  
12 to let them - - - to go back and look at this narrow  
13 issue - - -

14 MS. VYSKOCIL: What - - -

15 CHIEF JUDGE LIPPMAN: - - - as to, at  
16 least, good faith?

17 MS. VYSKOCIL: No, Your Honor. What are  
18 they going to do? They're going to try - - -

19 JUDGE GRAFFEO: What about the Third  
20 Circuit - - -

21 MS. VYSKOCIL: - - - the very claim we  
22 settled.

23 JUDGE GRAFFEO: What about the Third  
24 Circuit Travelers case?

25 MS. VYSKOCIL: The Third Circuit, in the

1 Travelers case, Your Honor - - - I'm glad that you  
2 brought it up, actually. Because at the end of the  
3 day, in the INA case, the Third Circuit said, first  
4 of all, every follow-the-fortunes decision agrees  
5 follow-the-fortunes applies to allocation. Second,  
6 there is no duty, none, on a ceding company, to  
7 allocate in a way that minimizes its reinsurance.

8 Third, the fact that you know you have  
9 reinsurance - - - which by the way, they haven't  
10 demonstrated that anybody, when they negotiated this  
11 settlement - - - getting back to questions you asked  
12 me, Judge Pigott - - - had reinsurance in mind. No  
13 evidence whatsoever.

14 JUDGE SMITH: Wouldn't you want to fire  
15 somebody who didn't know what the reinsurance  
16 situation was when he settled a billion-dollar case?

17 MS. VYSKOCIL: Well, Your Honor, that's the  
18 final point. I mean, yes - - - and we were required,  
19 by the way, to know the reinsurance when we  
20 ultimately pended. I'm saying the plaintiffs - - -

21 JUDGE SMITH: Um-hum.

22 MS. VYSKOCIL: - - - and MacArthur had no  
23 knowledge. Of course we had knowledge of  
24 reinsurance, because we were going to be required to  
25 make SEC disclosures immediately thereafter.

1 JUDGE SMITH: Do you say that you - - - do  
2 you say that you were free to resolve reasonable  
3 doubts in your favor, that is, to load it onto the  
4 reinsurers, as long as it was reasonable?

5 MS. VYSKOCIL: Yes, I do say that, Your  
6 Honor.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.

8 MS. VYSKOCIL: Can I just for two seconds  
9 on the retention point, Your Honor?

10 CHIEF JUDGE LIPPMAN: Two seconds,  
11 counselor. Go ahead.

12 MS. VYSKOCIL: All that I want to say is  
13 first of all, there was no dissent whatsoever on the  
14 retention point. Secondly, the clear and unambiguous  
15 treaty terms, as alleged by American Re in its own  
16 statement of undisputed material facts, told the  
17 trial court the retention was 100,000 dollars.

18 CHIEF JUDGE LIPPMAN: Okay, counselor.

19 MS. VYSKOCIL: Thank you, Your Honors.

20 CHIEF JUDGE LIPPMAN: Thanks. Thank you,  
21 counselor.

22 Counselor, rebuttal?

23 MS. SULLIVAN: Chief Judge Lippman, the  
24 public policy of New York State would be harmed if  
25 you accepted Ms. Vyskocil's pos - - -

1 CHIEF JUDGE LIPPMAN: How so? How so?

2 MS. SULLIVAN: Because follow-the-fortunes  
3 depends on the duty of good faith. The reason why  
4 reinsurance has been pacific for over a century, is  
5 that reinsurers can count on cedants to exercise  
6 their - - -

7 JUDGE SMITH: Is she right that she's in -  
8 - - that if it's a reasonable - - - that if there's a  
9 reasonable doubt, that she said that they're allowed  
10 to resolve it in their own favor?

11 MS. SULLIVAN: Absolutely not, Your Honor.  
12 Because - - -

13 JUDGE SMITH: Do they have to resolve it in  
14 your favor?

15 MS. SULLIVAN: Not at all, Your Honor.  
16 What we - - -

17 JUDGE SMITH: What's the principle?

18 MS. SULLIVAN: Reasonable and in good  
19 faith. And where there's objective evidence of bad  
20 faith - - -

21 JUDGE SMITH: Well, how do you know whether  
22 it's - - -

23 MS. SULLIVAN: - - - it goes to the jury.

24 JUDGE SMITH: - - - reasonable and in good  
25 faith? I think it's reasonable for the money to be

1 in my pocket, not yours. Why - - - if there's room  
2 for disagreement about which is the right answer - -  
3 -

4 MS. SULLIVAN: No, the - - -

5 JUDGE SMITH: - - - how do we know what  
6 good faith is?

7 MS. SULLIVAN: - - - in this case, the  
8 bankruptcy court - - - where there's objective  
9 evidence - - - now, just to go back to Gerling.  
10 Gerling and cases like that are about where the  
11 reinsurer second-guesses the pre-settlement  
12 litigation position. We're not doing that here.  
13 We're pointing you to objective evidence - - -

14 CHIEF JUDGE LIPPMAN: Counselor - - -  
15 counselor - - -

16 MS. VYSKOCIL: - - - the bankruptcy court  
17 opinion. - - -

18 CHIEF JUDGE LIPPMAN: - - - is there - - -

19 MS. SULLIVAN: - - - at 247.

20 CHIEF JUDGE LIPPMAN: - - - is there  
21 something unusual about this case beyond the normal  
22 follow-the-fortune precedent that we have? What is  
23 unusual here, if it's unusual, that even if you agree  
24 with most of what your adversary says, it still  
25 allows you to proceed and to succeed in what you're

1 seeking?

2 MS. SULLIVAN: Your Honor, what's unusual  
3 in this case is we have objective evidence that some  
4 of the claims - - - and let me read from the  
5 bankruptcy - - -

6 JUDGE GRAFFEO: But what's - - -

7 MS. SULLIVAN: - - - court: "Some portion  
8 of" - - -

9 JUDGE GRAFFEO: - - - but what's the test,  
10 counselor? I mean, at what point are you out from  
11 the follow-the-fortunes precedent and into the bad-  
12 faith realm?

13 MS. SULLIVAN: Follow-the-fortunes applies  
14 where their bill to us is within the policies - - -  
15 it was not; within the treaty - - - it was not  
16 because the treaty absolutely does not cover their  
17 tort claims against their insured. Justice Abdus-  
18 Salaam dealt with that at pages 35 to 37, and it's  
19 incontrovertible. And third, where they've departed  
20 from the settlement in a bad-faith way.

21 They settled claims that the bankruptcy  
22 court - - - and I refer you just to page A-247.  
23 Judge Pigott is absolutely correct. You could not  
24 have had the bankruptcy court's approval of the  
25 settlement, which was a condition precedent to the

1 settlement - - - page A-392 - - - unless they had  
2 approved - - - unless the bankruptcy court had agreed  
3 that there was some value to the bad-faith claims.  
4 And so that - - -

5 CHIEF JUDGE LIPPMAN: Okay, you - - - so  
6 the policy - - -

7 MS. SULLIVAN: - - - that's what's unusual,  
8 Your Honor.

9 CHIEF JUDGE LIPPMAN: - - - yes. So your  
10 policy argument is - - -

11 MS. SULLIVAN: Is, in a nutshell, Your  
12 Honor - - -

13 CHIEF JUDGE LIPPMAN: Yes, in a nutshell.

14 MS. SULLIVAN: - - - if you - - - if you go  
15 with USF&G, you will invite insulation of unilateral  
16 self-dealing by cedants. And you will do things that  
17 are very bad for the underlying insureds. What you  
18 will do is incentivize them to engage in bad-faith  
19 conduct; nine years of hiding their policies, giving  
20 them to Baltimore museums. And if they can pass that  
21 onto their reinsurers, you're going to invite bad  
22 results.

23 CHIEF JUDGE LIPPMAN: Okay, counselor.

24 JUDGE SMITH: Could I ask - - - I'm sorry -  
25 - -

1 CHIEF JUDGE LIPPMAN: Judge Smith.

2 JUDGE SMITH: - - - could I ask one  
3 untimely question?

4 CHIEF JUDGE LIPPMAN: Sure.

5 JUDGE SMITH: But you said, a while ago,  
6 something I didn't quite understand. You said they  
7 settled with the plaintiffs and MacArthur on an  
8 accident-basis and came to you on an occurrence.  
9 What in the set - - - what says that they settled  
10 with them on an accident basis?

11 MS. SULLIVAN: Your Honor, I miscited the  
12 page. And thank you for giving me the chance to  
13 correct it. It's page A-417, paragraph 10. And this  
14 is the provision of the settlement. The settlement  
15 had nothing to do with 1959.

16 If you look at page 416 to 417, that's the  
17 so ordered stipulation that records the settlement,  
18 you'll see thirteen policies released. Your Honor,  
19 I'll give you a moment to get there.

20 JUDGE SMITH: Go ahead, go ahead. I can do  
21 two things - - -

22 MS. SULLIVAN: Page 417.

23 JUDGE SMITH: - - - at once.

24 MS. SULLIVAN: You'll see thirteen policies  
25 released. Nothing singles out 1959. 1959 - - -

1 Chief Judge Lippman, you asked where did they get  
2 1959?

3 JUDGE SMITH: Well, they got - - -

4 MS. SULLIVAN: They made it up after the  
5 fact and - - -

6 JUDGE SMITH: - - - of course - - - of  
7 course they got - - -

8 MS. SULLIVAN: - - - and it was billed to  
9 us.

10 JUDGE SMITH: - - - a release on all the  
11 policies.

12 MS. SULLIVAN: Yes. But, Your Honor, there  
13 was nothing in the settlement that singled out 1959.  
14 That was after-the-fact manipulation of the bill.

15 By the way, Judge Pigott, all of the  
16 claimants are going to get their money anyway. It's  
17 the trust that's paying the claimants. And it's  
18 paying them, sometimes, at 16,000 dollars on these  
19 supposed 200,000-dollar claims.

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 MS. SULLIVAN: Your Honor, I'd just - - -

22 CHIEF JUDGE LIPPMAN: Yes.

23 MS. SULLIVAN: - - - just answer Judge  
24 Smith's question very briefly.

25 CHIEF JUDGE LIPPMAN: Answer Judge - - -

1 MS. SULLIVAN: Paragraph 10 - - -

2 CHIEF JUDGE LIPPMAN: - - - very briefly.

3 MS. SULLIVAN: - - - is the clause - - -

4 JUDGE SMITH: Paragraph 10?

5 MS. SULLIVAN: Paragraph 10, Your Honor.

6 CHIEF JUDGE LIPPMAN: Go ahead.

7 MS. SULLIVAN: The comprehen - - - if I  
8 may, Your Honor?

9 CHIEF JUDGE LIPPMAN: Sure.

10 MS. SULLIVAN: "The comprehensive general  
11 liability policies identified above are written on a  
12 caused-by-accident, as opposed to an on-occurrence  
13 basis." They settled on an accident basis, and then  
14 they try to turn around - - -

15 CHIEF JUDGE LIPPMAN: Okay.

16 MS. SULLIVAN: - - - and tell us that it's  
17 an occurrence basis.

18 CHIEF JUDGE LIPPMAN: Thanks, counselor.

19 MS. SULLIVAN: That's the policy.

20 CHIEF JUDGE LIPPMAN: That's fine.

21 Counselor, rebuttal.

22 MR. WACHTELL: Ms. Vyskocil told you, I  
23 think, several times, that every single participant  
24 in the proceeding agreed that there were zero dollars  
25 for bad faith. False. Categorically false. Myth.

1 CHIEF JUDGE LIPPMAN: What did - - -

2 MR. WACHTELL: Mr. McLean (ph.) - - -

3 CHIEF JUDGE LIPPMAN: - - - what did they  
4 agree to?

5 MR. WACHTELL: Mr. McLean, the plaintiff's  
6 attorney, got up in the bankruptcy court and said,  
7 not less than tens of millions of dollars of this  
8 settlement are attributable to the bad-faith claims.

9 Mr. Worcester sent them a demand, not for  
10 160-odd million, if you look at it - - - because you  
11 have two different categories - - - 400-plus million  
12 dollars.

13 CHIEF JUDGE LIPPMAN: But yet they signed  
14 off on the settlement?

15 MR. WACHTELL: No. No one ever signed off  
16 on zero. There is no allocation in the settlement  
17 agreement. The Appellate Division said we don't have  
18 to pay attention to any of the triable issues of fact  
19 here that the dissent is talking about, wealth of  
20 evidence, because there was no allocation for bad  
21 faith.

22 CHIEF JUDGE LIPPMAN: But wasn't it  
23 attributed to compensatory? Wasn't that the whole  
24 point?

25 MR. WACHTELL: Nothing. No one ever

1 settled - - - broke it down. There was - - - it was  
2 silent on allocation.

3 JUDGE PIGOTT: You're right about that.  
4 But it struck me that if you're trying to set up a  
5 trust, you can't stay in bankruptcy. So you got to  
6 get out. The only way you can get out is under that  
7 Manville section.

8 MR. WACHTELL: You needed value to pass,  
9 and the bankruptcy court - - -

10 JUDGE PIGOTT: So it's conceivable - - -

11 MR. WACHTELL: - - - explicit - - -

12 JUDGE PIGOTT: - - - that it could have  
13 been a legal fiction. Now, I'm not suggesting that a  
14 judge - - -

15 MR. WACHTELL: Oh, it was not a legal  
16 fiction.

17 JUDGE PIGOTT: - - - is going to do that.  
18 But there's nothing - - - we don't have the  
19 petitions. But I'm willing to gamble that there's  
20 nothing in the petitions that says there's a bad-  
21 faith claim against Western.

22 MR. WACHTELL: Yes, there is.

23 JUDGE PIGOTT: There is? Okay.

24 MR. WACHTELL: The court held that some - -  
25 - that the bad-faith claims had very substantial

1 value, and some part of the monies must be allocated

2 - - -

3 JUDGE SMITH: I think the question is what  
4 the petition says.

5 MR. WACHTELL: And this was the - - - they  
6 got an injunction based on this.

7 CHIEF JUDGE LIPPMAN: Counsel, what does  
8 the petition say?

9 MR. WACHTELL: Excuse me?

10 CHIEF JUDGE LIPPMAN: What does the  
11 petition say about bad faith?

12 MR. WACHTELL: What does the what say?

13 CHIEF JUDGE LIPPMAN: The question is, does  
14 the petition say something about bad faith.

15 JUDGE GRAFFEO: In bankruptcy.

16 CHIEF JUDGE LIPPMAN: In bankruptcy.

17 MR. WACHTELL: No, the papers before the  
18 bankruptcy court, the representations to the  
19 bankruptcy court, were that these were very real  
20 claims with very great value. You had Mr. Ostrager's  
21 e-mail on the eve of settlement, saying if this  
22 matter had settled five years ago, in other words,  
23 before all the default judgments, it would settle for  
24 five percent of the billion dollars.

25 I think a jury is entitled to, on that

1 document alone, to certainly reasonably come to a  
2 conclusion that a portion, if not the overwhelming  
3 majority of the settlement was, indeed, for bad  
4 faith. What the Appellate Division said is there's  
5 no allocation. So what?

6 JUDGE SMITH: You said a minute ago that it  
7 wasn't - - - that the offer - - - the plaintiff's  
8 demand was more than 160 million for bad faith?

9 MR. WACHTELL: That's correct.

10 JUDGE SMITH: I'm looking at 2480. Where's  
11 the rest of it?

12 MR. WACHTELL: If you look down the page,  
13 Your Honor - - - or maybe it's up the page, it's - -  
14 - there's another item there of 1.4 billion. And  
15 they're talking about judgments.

16 JUDGE SMITH: Judgment case, total WMAC  
17 liability without interest on the judgments.

18 MR. WACHTELL: That's 275 million.

19 JUDGE GRAFFEO: Are those the default  
20 judgments?

21 MR. WACHTELL: Mr. Worcester broke the - -  
22 - broke the defaults into two pieces. So one piece  
23 was 167 million; the other piece was 275 million.  
24 You add it up, you're well above - - -

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

1 JUDGE SMITH: But they knocked that down to  
2 275 million?

3 MR. WACHTELL: Yes.

4 JUDGE SMITH: I see. Okay.

5 CHIEF JUDGE LIPPMAN: Okay, thank you,  
6 counselor.

7 MR. WACHTELL: Thank you very much, Your  
8 Honor.

9 CHIEF JUDGE LIPPMAN: Thank you all.  
10 Appreciate it.

11 (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 United States Fidelity and Guaranty Company v. American Re-Insurance Company, No. 1 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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