

**Travelers Cas. & Sur. Co. v Certain Underwriters at
Lloyd's**

2004 NY Slip Op 30324(U)

July 12, 2004

Supreme Court, New York County

Docket Number: 601033/95

Judge: Herman Cahn

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HERMAN CANN
Justice

PART 49

The AETNA CASUALTY AND
SURETY COMPANY

INDEX NO. 601033/95

MOTION DATE 3/24/04

MOTION SEQ. NO. 006

CERTAIN UNDERWRITERS
AT CLOYD'S

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 19 2004

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

Dated: 7/12/04

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X

TRAVELERS CASUALTY AND SURETY COMPANY
f/k/a THE AETNA CASUALTY AND SURETY
COMPANY,

Plaintiff,

-against-

Index No.
118676/95

CERTAIN UNDERWRITERS AT LLOYD'S,
LONDON, L'ABEILLE CIE D'ASSURANCES,
ANGLO FRENCH INSURANCE COMPANY, LTD.,
BRITISH & EUROPEAN INSURANCE COMPANY,
LTD., THE DOWA FIRE & MARINE INSURANCE
COMPANY, LTD., EXCESS INSURANCE COMPANY,
LTD., LA PRESERVATRICE CIE D'ASSURANCES,
MOTOR UNION INSURANCE COMPANY LTD.,
ST. HELENS'S INSURANCE COMPANY, LTD.
and TUREGUM INSURANCE COMPANY.

DECISION

Defendants.

-----X

TRAVELERS CASUALTY AND SURETY COMPANY
f/k/a THE AETNA CASUALTY AND SURETY
COMPANY,

Plaintiff,

-against-

Index No.
601033/95

CERTAIN UNDERWRITERS AT LLOYD'S,
LONDON, SUBSCRIBING TO LLOYD'S TREATY
NOS. C.N. 12974, 12975, AND 12976,
TUREGUM INSURANCE COMPANY, THE DOWA
FIRE & MARINE INSURANCE COMPANY, LTD.,
EXCESS INSURANCE COMPANY, LTD., and
SCOTTISH LION INSURANCE COMPANY
LIMITED.

and

LONDON OVERSEAS INSURANCE CO.
LTD., et al.,

Defendants.

-----X

CAHN, J.:

Motion sequence number 023 in Travelers Casualty and Surety
Company f/k/a The Aetna Casualty and Surety Company v Certain

Underwriters at Lloyd's London, et al., Index No. 118676/95 (the Koppers action), and motion sequence number 006 in Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company v Certain Underwriters at Lloyd's London, et al., Index No. 601033/95 (the DuPont action), are consolidated for disposition.

The defendant reinsurers in both actions' move for an order directing reimbursement of their costs and disbursements in this matter, including reimbursement for the premiums that they paid for the pre-answer security bonds that were demanded by Travelers; and (c) unsealing prior decisions issued by Justice Barry Cozier on May 20, 1998 and May 20, 1999, respectively.

BACKGROUND

The facts underlying these two actions were summarized more fully by the New York Court of Appeals in Travelers Cas. and Sur. Co. v Certain Underwriters at Lloyd's of London (96 NY2d 583 [2001]), familiarity with which is presumed.

The Koppers Action

Briefly, between 1960 and 1981, Travelers provided primary, excess and umbrella general liability coverage to the Koppers Company, Inc. (Koppers), a large chemical manufacturing company.

The Koppers Reinsurers, the sole remaining defendants in the Koppers action, include: Certain Underwriters at Lloyd's London; Anglo French Insurance Company, Ltd.; British & European Insurance Company, Ltd.; Dowa Fire & Marine Insurance Company, Ltd.; and Turegum Insurance Company.

In order to avoid excessive risk of loss on these policies, Travelers purchased various types of reinsurance, including excess of loss treaty reinsurance from the Koppers Reinsurers.

During the early 1980s, Koppers was named in a number of environmental lawsuits brought by federal, state and local authorities, as well as by private parties. These suits alleged environmental injuries resulting from decades of commercial activities at numerous industrial and hazardous waste disposal sites owned by Koppers.

In 1985, following the commencement of these environmental suits, Koppers commenced an action against Travelers, seeking a declaration of coverage for all of Koppers' pollution-related liabilities. Travelers eventually settled that coverage suit for approximately \$140 million. Travelers subsequently ceded approximately \$61.5 million of the Koppers settlement to its various reinsurers. However, although Travelers had treated each site as a separate occurrence when apportioning the settlement among its direct insurers, in apportioning the settlement among its reinsurers, Travelers treated the entire settlement as a single disaster and/or casualty.

In 1995, after demanding reimbursement from the reinsurers for their portion of the settlement, Travelers commenced the instant action seeking monetary damages and declaratory relief. In response, the Koppers Reinsurers interposed a counterclaim

seeking declaratory relief in their favor. Travelers then moved, almost immediately, to strike this responsive pleading on the ground that the Koppers Reinsurers had failed to post security, as required by Insurance Law § 1213 (c)(1).

By decision dated May 15, 1996, this court (Louis Friedman, J.) granted Travelers' motion, but only to the extent of directing the Koppers Reinsurers to post the requisite security. Following further motion practice on this issue, the Koppers Reinsurers ultimately executed Pre-Answer Security Bonds totaling \$7,737,718.17. Thereafter, by Order dated September 10, 1997, Justice Friedman ordered the entire file in the Koppers action sealed, due to numerous references, throughout the file, to confidential documents belonging to third parties,

In 1998, Travelers moved for summary judgment, declaring that the Koppers settlement constituted a single loss under the reinsurance contracts. Travelers' motion was denied by decision dated May 20, 1998 (Barry Cozier, J.). That decision was sealed pursuant to Justice Friedman's September 10, 1997 order. Shortly thereafter, the Koppers Reinsurers moved for summary judgment dismissing Travelers' claims, and for a declaratory judgment. that. they had no further obligation to Travelers with respect to the Koppers settlement. In a decision and order dated May 20, 1999, also sealed, Justice Cozier granted the Koppers Reinsurers' motion to dismiss the complaint., and directed the Clerk to enter

a judgment in favor of the Reinsurers. The Koppers Reinsurers' request for a declaratory judgment in their favor was not addressed in that decision.

The DuPont Action

Between 1967 and 1985, Travelers provided excess and umbrella liability coverage to E.I. DuPont de Nemours & Co. (DuPont), one of the world's largest chemical companies. In 1989, DuPont was named as a defendant in various environmental injury lawsuits brought by government and private entities, involving multiple hazardous waste sites. Thereafter, DuPont commenced suit against Travelers, seeking a declaration of coverage on all pollution-related liabilities arising out of these suits. Travelers eventually settled the coverage action brought by DuPont for approximately \$72 million.

As it had in the Koppers action, Travelers treated each site as a separate occurrence when apportioning the DuPont settlement among its own insurance policies; however, Travelers treated the DuPont settlement as a single disaster and/or casualty when allocating it under the applicable reinsurance treaties that it had purchased in connection with its policies.

Following its demand for reimbursement from the DuPont Reinsurers, Travelers commenced the instant suit seeking monetary damages and declaratory relief. After the DuPont Reinsurers asserted a counterclaim seeking declaratory relief in their

favor, Travelers filed an amended complaint, demanding that the DuPont Reinsurers post pre-answer security, as required by Insurance Law § 1213 (c) (1). Following the issuance of the court's May 15, 1996 decision in Koppers, in which Justice Friedman had ordered the posting of pre-answer security, the parties in Dupont stipulated to the posting of Pre-Answer Security, in the form of \$7,358,373.00 in 'commercial surety bonds.

In January 1999, after Justice Cozier had issued the May 20, 1998 decision in Koppers, denying Travelers' motion for summary judgment, the DuPont Reinsurers moved for summary judgment dismissing all of Travelers' claims and granting them declaratory relief. In a decision and order dated August 26, 1999, Justice Cozier granted the Dupont Reinsurers' motion for summary judgment, dismissed Travelers' claims for the reasons set forth in his May 20, 1999 decision in Koppers, and adjudged and declared "that [the Dupont Reinsurers] had no further obligation to [Travelers] with respect to its settlement of insurance coverage claims by E.I. DuPont de Nemours & Co. concerning pollution liabilities at the pollution sites at issue in the instant action." This August 26, 1999 decision and order was filed under seal, as well., pursuant to Justice Friedman's September 10, 1997 Order in the Koppers action.

The Appeals

On November 16, 2000, in two separate decisions, the Appellate Division, First Department, unanimously affirmed Justice Cozier's May 20, 1999 decision in Koppers, and his August 26, 1999 decision in DuPont (for both decisions, see Travelers Cas. and Sur. Co. v Certain Underwriters At Lloyd's of London, 277 AD2d 100 [1st Dept 2000]). The Court of Appeals subsequently granted Travelers leave to appeal in both actions, and thereafter affirmed both decisions in a single decision and order dated October 16, 2001 (see Travelers Cas. and Sur. Co. v Certain Underwriters At Lloyd's of London, 96 NY2d 583 [2001]).

The Current Motions

in the instant motions, the Koppers and DuPont Reinsurers each move for an order directing reimbursement for the premiums that they were required to pay to obtain their pre-answer security bonds, on the ground that they were a reasonable and necessary expenses in this matter (CPLR 8301 [a] [12]).² In addition, the Koppers Reinsurers seek an order unsealing Justice Cozier's May 20, 1998 and May 20 1999 decisions in Koppers; the DuPont Reinsurers seek an order unsealing Justice Cozier's August 26, 1999 decision in DuPont. The Koppers Reinsurers also seek declaratory relief on their counterclaim.

²Each of these Reinsurers also moved for release of their pre-answer security; however, pursuant to a prior stipulation and order, such security has since been released.

DISCUSSION

CPLR 8301 (a) (12) provides that a party to whom costs are awarded is entitled to tax necessary disbursements for such "reasonable and necessary expenses as are taxable according to the course and practice of the court, by express provision of law or by order of the court." The Koppers and DuPont Reinsurers argue that the bond premiums they paid, pursuant to Insurance Law § 1213 (c) (1), were a "reasonable and necessary expense" of these actions, and, therefore, that they are entitled to reimbursement for these costs.

While bond premiums generally are not taxable as a reasonable and necessary expense of an action, in certain circumstances, courts have permitted a prevailing party to recover such premiums. For example, in John Deere Co. of Baltimore v Cerone Equipment Co. (33 AD2d 257 [3rd Dept], affd 27 NY2d 926 [1970]), the Appellate Division awarded the appellant its costs in posting a security bond that was required, by CPLR 7102, in order to regain possession of equipment supplied to the respondent. The Appellate Division determined that the award was justified because the appellant had been required to provide the undertaking in order to regain possession; the appellant's right to possession of the equipment was "unquestionable;" the respondent had "interposed no defense that could be denominated in the slightest as meritorious;" and the respondent had

prevented peaceful repossession of the equipment and had rejected an opportunity to satisfy his obligation by paying over the amount due (id. At 258). Similarly, in Pross v Jadam Equities, Ltd. (171 AD2d 579 [1st Dept 1991]) and Two Guys from Harrison-NY v S.F.R. Realty Assocs. (186 AD2d 186 [2nd Dept 1992]), the Appellate Division, relying on the decision in Deere, found that the premiums for, respectively, an undertaking to discharge a notice of pendency and a bond to obtain a second Yellowstone injunction, could be taxed as "reasonable and necessary expenses" in the circumstances involved therein. As the Appellate Division, Second Department noted in Allied Excavating Corp. v Graves Equipment Co., Inc. (99 AD2d 499, 500 [2nd Dept 1984], which also cited to John Deere Co. of Baltimore, supra),

where the losing party pursues a baseless claim or unnecessarily delays resolution of the action, certain disbursements may be taxed which are not statutorily authorized.

As the prevailing party in these actions, the defendant Reinsurers are entitled to recover their costs and disbursements in defending these actions. The Reinsurers argue that, based on Deere and its progeny, these expenses should include the Gond premiums. Specifically, the Reinsurers argue that such reimbursement is appropriate, as they had no alternative but to post pre-answer security, since it was required both by Insurance Law § 1213 (c) (1) and by court order; Travelers' claims were completely unfounded, as demonstrated by the decisions issued by

this court, the Appellate Division, and, ultimately, the Court of Appeals; and, Travelers' demand for pre-answer security was unnecessary, as both defendant Reinsurers had always paid all valid claims during their decades of insurance dealings in the state.

Because this court finds the factual circumstances in these actions is distinguishable from those detailed in Deere, defendant Reinsurers' motions, to the extent they seek reimbursement., under CPLR 8301 (a) (12), for the bond premiums required by Insurance Law § 1213 (c) (1), are denied.

Insurance Law 1213 (c) (1) provides, in relevant part, that

[b]efore any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:

(A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount: to be fixed by the court sufficient to secure payment of any final judgment which may be rendered in the proceeding, but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding, or

(B) procure a license to do an insurance business in this state.

The purpose of this statute is to make sure that alien insurers maintain sufficient funds in the State to satisfy any

potential judgment arising from the policies of insurance that they issue here (Curiale v Ardra Ins. Co., Ltd., 88 NY2d 268 [1996]). The obligation to post pre-answer security is a regulatory requirement, imposed only on unlicensed foreign and alien insurers. Unlike the undertaking required in Deere, a foreign or alien insurer may avoid the statutory requirement to post pre-answer security either by procuring a license to do business within the state, or by obtaining certification that it has sufficient funds or securities available within the state to satisfy a potential judgment. Thus, the necessity of posting such security is the direct result of the insurer's choice to conduct business in this state without a license or sufficient reserves.

Further, although the defendant Reinsurers have prevailed at every stage of this action, it cannot be said that the claims asserted by Travelers were the type of completely baseless, meritless defenses described in Deere. As noted by the Reinsurers in their own moving papers, this action presented an issue of first impression on a complex insurance matter. The novelty of the issue was underscored by the Court of Appeals, when it granted leave to appeal, despite the fact that the underlying Appellate Division decisions were unanimous. While, ultimately, the Court of Appeals rejected Travelers' arguments and affirmed both decisions, it did so only after extensive

analysis, which differed to some degree from those of the lower courts, and only after expressly noting that Travelers' arguments had deserved discussion. Accordingly, since this court finds the reasoning in Deere to be inapplicable, given the circumstances presented here, defendants' motions, insofar as they seek reimbursement for their bond premiums, are denied.

The Reinsurers' motions to unseal the prior summary judgment decisions of the trial court are also denied. While it appears that the Court of Appeals' decision, which is not under seal, openly discusses the amount, as well as various other details, of the underlying settlements, the confidentiality of which led to the original decision to seal this file, it does not appear that all such confidential matters have been disclosed. Although the defendant Reinsurers argue that unsealing these decisions will provide important judicial guidance, which they contend is especially important since this issue is one of first impression and there is an absence of controlling reinsurance case law on these matters, such guidance is more than amply provided by the detailed and extensive discussion of the issues provided in the decision of the Court of Appeals. Accordingly, that branch of the motions is denied.

This decision will not be sealed.

However, that part of the Koppers Reinsurers' motion, seeking a final declaratory judgment in their favor, is granted.

"[W]hen a court resolves the merits of a declaratory judgment action against the plaintiff, the proper course is not to dismiss the complaint, but rather to issue a declaration in favor of the defendants" (Maurizzio v Lumbermens Mut. Cas. Co., 73 NY2d 951 [1989]). Since the court did not issue a declaratory judgment in favor of the Koppers Reinsurers in its decision and order dismissing Travelers' complaint, the motion is granted to the extent of adjudging and declaring that the Koppers Reinsurers have no further obligation to Travelers with respect to its settlement of insurance coverage claims made by the Koppers Company, Inc., concerning pollution liabilities at the pollution sites at issue in the instant action.

Accordingly, it is

ORDERED that motion sequence number 023 in Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company v Certain Underwriters at Lloyd's London, et al., Index No. 118676/95 (the Koppers action), is granted solely to the extent of ADJUDGING AND DECLARING that the Koppers Reinsurers have no further obligation to Travelers with respect to its settlement of insurance coverage claims made by the Koppers Company, Inc., concerning pollution liabilities at the pollution sites at issue in the instant action, and the motion is otherwise denied; and it is further

ORDERED that motion sequence number 006 in Travelers

Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company v Certain Underwriters at Lloyd's London, et al., Index No. 601033/95 (the DuPont action) is denied.

This constitutes the decision and order of the Court.

DATED: July 12, 2004

ENTER: *Alan Cal* _____
J.S.C.

FILED
JUL 19 2004
COUNTY OF BERK'S OFFICE