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

LEXINGTON INSURANCE COMPANY and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

- against -

SIRIUS AMERICA INSURANCE COMPANY

DECISION AND ORDER

INDEX NO. 651208/2012

MOTION DATE 12/18/2013

SEQ. NO. 003

SALIANN SCARPULLA , J.

This is a reinsurance coverage action involving an underlying bulk settlement of asbestos bodily injury claims. Plaintiff National Union Fire Insurance Company of Pittsburgh, PA ("National") moves for summary judgment on its complaint against defendant Sirius America Insurance Company ("Sirius"), dismissing Sirius' counterclaims, and for attorney's fees pursuant to CPLR 3212.[1] Sirius cross-moves, pursuant to CPLR 3124, 3126, and 3212 (f), for an order compelling National and Lexington to respond to outstanding document requests and to appear for depositions.

National seeks to recover damages and a declaratory judgment arising out of Sirius' alleged failure to indemnify it for losses covered under four facultative reinsurance contracts. National alleges that its predecessor-in-interest Landmark Insurance Company ("Landmark") entered into four reinsurance contracts with MONY Reinsurance Corporation ("Mony Re") and Christiania Switzerland ("Christiania") to reinsure excess umbrella liability insurance policies that Landmark issued to Foster Wheeler Energy Corp. and Foster Wheeler Corp. (collectively, "Foster Wheeler") between 1979 and 1981. The defendant in this action,

Sirius, is Mony Re and Christiania's successor-in-interest.[2]

National alleges that the four reinsurance certificates at issue include: (1) Christiania Certificate C01563 which reinsures Landmark Policy FE4001115; (2) Christiania Certificate C03504 which reinsures Landmark Policy FE4001191; (3) Christiania Certificate C0171 which reinsures Landmark Policy FE4001051; and (4) Mony Re Certificate C11318 which reinsures Landmark Policy FE4001051.[3] National claims that, under each certificate, Sirius is obligated to reinsure 20% of the $5 million excess coverage layer provided for in each reinsured policy (i.e. $1 million in reinsurance coverage per certificate).

National further alleges that, after the reinsurance certificates were issued, Foster Wheeler was subjected to a massive volume of asbestos bodily injury claims. According to National, Foster Wheeler manufactured and installed industrial boilers and steam-generating equipment, some of which contained asbestos. To cover its asbestos liability, Foster Wheeler demanded coverage from its various insurers and subsequently filed an insurance coverage action in this Court. National alleges that after pursuing its various defenses and engaging in extensive negotiations, it entered into a good faith settlement agreement with Foster Wheeler on June 30, 2006, along with Lexington and several other insurers ("the settlement agreement").[4]

In its motion for summary judgment, National argues that Sirius breached the certificates by failing to indemnify National for losses arising out of the settlement agreement with Foster Wheeler. National contends that Sirius is bound to pay its share of losses under the settlement agreement based on the contractual language in the certificates and the "follow the settlements" doctrine. Specifically, National argues that Sirius failed to indemnify it for reinsurance billings submitted in November 2011, February 2012, and May 2012, in the amounts of $213,294; $2,366,666; and $780,157, respectively.[5]

National claims that it fulfilled its notice obligations under the certificates when Lexington provided notice to Sirius beginning in the late 1980s, and it provided notice to Sirius beginning in August 2008, when it began making settlement payments to Foster Wheeler. National contends that Sirius waived any and all of its coverage defenses by making payment on its November 2011 billing, without any reservation of rights. National also argues that Sirius' defenses are meritless because Sirius made payment on other reinsurance billings arising from the settlement agreement pursuant to separate reinsurance contracts held by Lexington.

Lastly, National argues that Sirius is collaterally estopped from asserting that the Mony Re certificate requires prompt notice as a condition precedent because Sirius' predecessor-in-interest, White Mountains Reinsurance Corporation, took a contrary position in *Pacific Employers Ins. Co. v White Mountains Reins. Co. of America* (Sup Ct, NY County, April 6, 2011, Lowe, J., index No. 603009/08).

In opposition, Sirius argues that National failed to provide prompt notice of its claims, and therefore it has no obligation to indemnify National under the Mony Re and Christiania certificates. Sirius claims that National should have provided notice when the settlement agreement was executed in 2006, but that National did not provide notice until at least 2008.

Specifically, Sirius contends that National's failure to provide prompt notice was a breach of a condition precedent under the Mony Re certificate, and therefore it has no obligation to indemnify National under that certificate. Sirius further argues that, although prompt notice was not a condition precedent under the Christiania certificates, Sirius has no obligation to indemnify National under these certificates if it can demonstrate that National acted in bad faith in failing to provide timely notice. In the alternative, Sirius claims that it was prejudiced from National's late notice because it could not properly establish its claim

files.

Sirius also asserts that it never waived any of its coverage defenses. Sirius argues that, prior to making payment on the November 2011 billing, it advised National that its notice was late and deficient because it did not include any details regarding the underlying asbestos claims or any reserve information. Sirius contends that it did not waive any of its contractual rights because each certificate contains a non-waiver provision that bars waiver except by a written endorsement. Sirius maintains that its payment on the November 2011 billing was *ex gratia*,[6] and that it expected that additional information would be forthcoming. Sirius further argues that it has no indemnification obligation because National failed to submit its investigative claim files for an audit, which constitutes a breach of the certificates.

Finally, Sirius argues that this motion should be denied as premature because National and Lexington failed to respond to outstanding discovery requests regarding the issues of notice, waiver, prejudice, and their settlement and allocation decisions. Sirius cross-moves to compel National and Lexington to respond to outstanding document requests and to appear for depositions.

A. The Certificates

The Mony Re certificate states, at paragraph D, that "[a]ll loss settlements made by the Company, provided they are within the terms and conditions of the original policy(ies) and within the terms and conditions of this Certificate of Reinsurance, shall be binding on the Reinsurer."

The Mony Re certificate further provides, at paragraph C, that "[a]s a condition precedent, the Company shall promptly provide the Reinsurer with a definitive statement of loss on any claim or occurrence reported to the Company and brought under this Certificate which involves a death, serious injury or lawsuit." According to the Mony Re certificate, a

"definitive statement of loss" consists "of those parts or portions of the Company's investigative claim file which in the Judgement of the Reinsurer are wholly sufficient for the Reinsurer to establish adequate loss reserves and determine the propensities of any loss reported hereunder." Paragraph F.

The Christiania certificates state, at paragraph 8, that "[a]ll claims involving this reinsurance when settled by the Company shall be binding on the Reinsurer who shall be bound to pay its proportion of such settlements." The Christiania certificates also provide, in paragraph 7, that "[p]rompt notice shall be given by the Company to the Reinsurer of any occurrence or accident which appears likely to involve this reinsurance. . . "

Further, the Christiania certificates provide, in paragraph 9, that "[p]ayment of the Reinsurer's proportion of loss and expense incurred by the Company will be made to the Company promptly upon receipt of proof of loss in a form satisfactory to the Reinsurer."

Both the Mony Re and Christiania certificates contain non-waiver provisions stating that the terms of the certificate "shall not be waived or changed except by endorsement issued to form a part hereof, executed by a duly authorized representative of the Reinsurer." Mony Re certificate, Paragraph K; Christiania certificates, Paragraph 3.

B. National's Reinsurance Billings to Sirius

In support of its motion, National submits an affidavit from Judith Harnadek, vice president of Resolute Management Inc., National's claims administrator. Harnadek states that National, through its agent Guy Carpenter, initially provided notices of loss to Sirius beginning on August 2, 2008. Harnadek further states that she prepared a reinsurance billing to Sirius under the four certificates in the amount of $853,176, which was delivered on November 17, 2011. According to Harnadek, the November 2011 billing included the settlement agreement, proof of loss forms, a periodic billing report, an allocation

spreadsheet, and a cover letter explaining that payments under the settlement agreement were being allocated using a "bathtub" method. Harnadek explains that, under a bathtub allocation, all loss payments are applied "in equal pro rata shares across all policies within a given insurance layer until the limits of the policies within that layer are exhausted. . . [and] subsequent payments are then applied in the same manner to policies in the next layer."

After Harnadek submitted the November 2011 billing, she states that she "followed up multiple times with Sirius in December 2011 and January 2012 to inquire about the status of the outstanding billing." On January 25, 2012, Patricia Molinari ("Molinari") from Sirius, advised Harnadek that payments on the November 2011 billing had "been processed and were under management review for approval." Harnadek further states that, on February 7, 2012, she received an email from Ronald Henry ("Henry"), whom she identifies as Sirius' Head of Claims. In that email, Henry stated to Harnadek, in response to the November 2011 billing: "I am approving today but looking at the files it appears we made multiple requests for coverage details and reports for about a yr before receiving your report of 11/17/11. We also received notice very late and we never received a report from the broker indicating the files were reserved. We received multiple advice forms from Chartis which are basically worthless as some have no reserve listed and no details. This puts us in a difficult position to process and pay claims with no reserves and no coverage info or docs. In the future remind the broker to get reports and other items to the market on time."

Shortly thereafter, Harnadek prepared a second reinsurance billing in the amount of $2,366,666, which was sent to Sirius on February 8, 2012. According to Harnadek, this billing was "substantially similar" to the November 2011 billing and included the settlement agreement and allocation spreadsheet. In response to the February 2012 billing, Harnadek received an email from Dawn Landolina ("Landolina") from Guy Carpenter on February 8,

2012, advising her that Sirius would like to audit the Foster Wheeler claim files. Landolina forwarded Harnadek an email that she received from Ron Henry, in which he stated: "Dawn its not 4/1 yet and I hope this is a joke. Huge billings with no backup and were these reserved previously and why not. Time for Wayne to do a claim review so pls make the arrangements and advise where the files can be reviewed. Delay code all billings."

On May 3, 2012, Harnadek prepared a third billing in the amount of $780,157. A month later on June 5, 2012, Harnadek was advised that Sirius had sent two wire transfers to Guy Carpenter on February 7, 2012, in payment of the November 2011 billing. According to Harnadek, Guy Carpenter had returned one of the two wire transfers to Sirius in the amount of $214,698 due to an application error.

Harnadek states that although she repeatedly offered to arrange for Sirius to perform an audit or a claims review, Sirius never scheduled an audit or claims review. Harnadek also states that Sirius never paid the February or May 2012 billings.

National also submits copies of Sirius' claim handler notes. On January 12, 2012, Molinari noted that she reviewed the billing, checked calculations, and that it was "okay to process payment and . . . [s]ent to manager for approval." She further noted that the settlement agreement had been reached in 2006, and that the settlement payments were allocated according to a "bathtub" method. In a note dated January 30, 2012, Wayne Shideler from Sirius stated that a settlement agreement was in place "with payments being made through 2030 with annual caps" and the allocation is a "rising bathtub approach." He further noted that "[c]overage has been verified, and allocation appears reasonable. OK to pay."

In its opposition papers, Sirius submits an affidavit from Irene McCusker, vice president of Sirius' claims department. McCusker states that Sirius first received an initial

loss advice from National in November 2010. McCusker further states that these initial advice forms "were simply unsubstantiated numbers on a page, and did not contain any information regarding the underlying claims." According to Sirius, McCusker "repeatedly requested additional information from Plaintiffs regarding the underlying claims, which Plaintiffs ignored."

McCusker states that the November 2011 billing failed to include "any details on the underlying asbestos claims, allocation analyses, [or] reserve information" which was requested by Sirius in January 2011. According to McCusker, on about February 7, 2012, "Sirius made a good faith, one-time *ex gratia* payment of $852,176 to Plaintiffs on the November 17, 2011 billing, with reservation and the expectation that additional information regarding the underlying asbestos claims and the Settlement Agreement would be forthcoming." McCusker states, however, that National never responded to its outstanding inquiries or complied with its audit request, and as a result, Sirius never made payments on National's February or May 2012 billings.

Discussion

Reinsurance certificates, like the ones at issue here, commonly contain a follow-the-fortunes clause, sometimes referred to as a follow-the-settlements clause. *United States Fid. & Guar. Co. v American Re-Ins. Co.*, 20 N.Y.3d 407, 418 (2013). Under a follow-the fortunes doctrine, a reinsurer is required to "to indemnify for payments reasonably within the terms of the original policy, even if technically not covered by it" and cannot "second guess the good faith liability determinations made by its reinsured." *Id.*; *Travelers Cas. & Sur. Co. v Certain Underwriters at Lloyd's of London*, 96 N.Y.2d 583, 596 (2001). Thus, under this doctrine, a settlement agreed to by the reinsured (or "cedent") is binding on the reinsurer, unless the reinsurer can demonstrate an impropriety in reaching the settlement.

Excess Ins. Co. Ltd. v. Factory Mut. Ins. Co., 3 N.Y.3d 577, 582, n. 3 (2004).

National argues that, based on the follow-the-fortunes doctrine, it is entitled to summary judgment for the full amount of its reinsurance billings to Sirius under the Mony Re and Christiania certificates. Because the Mony Re and Christiania certificates contain different contractual language, each certificate must be analyzed separately. I first address National's breach of contract and declaratory judgment claims under the Mony Re certificate.

1. The Mony Re Certificate

One of the main issues in dispute is whether the Mony Re certificate requires prompt notice as a condition precedent to coverage. The Mony Re certificate states that "[a]s a condition precedent, the Company shall *promptly provide* the Reinsurer with a *definitive statement of loss* on any claim or occurrence reported to the Company and brought under this Certificate which involves a death, serious injury or lawsuit." Mony Re Certificate, Paragraph C (emphasis added).

National argues that the Mony Re certificate does not require prompt notice as a condition precedent to coverage, but only requires National to submit a definitive statement of loss when it seeks payment from Sirius. The plain language of the certificate, however, makes clear that it is a "condition precedent" for National to promptly provide a definitive statement of loss for claims involving death, serious injury, or a lawsuit. A "definitive statement of loss" is defined as consisting of "those parts or portions of the Company's investigative claim file which in the Judgment of the Reinsurer are wholly sufficient for the Reinsurer to establish adequate loss reserves and determine the propensities of any loss reported." *Id.* at Paragraph F. By requiring the submission of a definitive statement of loss at a point in time that would enable the reinsurer to establish adequate reserves and

determine the propensity of the loss, the certificate clearly requires the reinsured to provide prompt notice to the reinsurer regarding any claims involving death, serious injury, or a lawsuit. *Constitution Reinsurance Corp. v. Stonewall Ins. Co.*, 980 F. Supp. 124, 127-128 (S.D.N.Y. 1997); *Pacific Empls. Ins. Co. v Global Reins. Corp. of Am.*, 693 F.3d 417, 430 (3d Cir. 2012). To hold otherwise would defeat the purpose of defining a "definitive statement of loss" as containing sufficient information for the reinsurer to establish reserves and determine the extent of any loss.

National contends that Lexington provided notice to Sirius in the 1980s, and that it provided notice in the late 2000s as it began making payments to Foster Wheeler. Based on the undisputed facts, National's obligation to provide prompt notice was triggered in 2006 at the latest, when the settlement agreement was executed. Although National submits a copy of Lexington's notices to Sirius, those notices do not fulfill National's obligation to provide notice, as notice must be given by the actual entity itself. *In Matter of Horizon Ins. Co.*, 214 A.D.2d 447, 448 (1st Dep't 1995). In addition, the 1987 notice purportedly sent by AIG to Sirius does not contain any references to particular excess policies nor did it advise that Foster Wheeler's primary insurance would be exhausted.

National also submits notices of loss that Landmark sent to its own agent Guy Carpenter on August 2, 2008, January 23, 2010, January 28, 2010, and June 9, 2010. These notices also fail to conclusively establish that notice was in fact sent to Sirius. In fact, National does not submit any evidence that it provided notice to Sirius until November 2, 2010. The earliest evidence showing that National submitted notice to Sirius consists of two loss advices, dated November 2, 2010, from Guy Carpenter to Sirius' predecessor-in-interest White Mountains Reinsurance Company of America, one in reference to Christiania certificate C03504 and the other in reference to Mony Re certificate C11318. As National

did not provide notice to Sirius until November 2010 – more than four years after the settlement agreement was executed – National failed to provide timely notice as a matter of law. *Constitution Reins. Co.*, 980 F. Supp. at 129-130 (finding a two-year delay in providing notice is unreasonable as a matter of law); *US Pack Network Corp. v. Travelers Property Cas.*, 23 A.D.3d 299, 300 (1st Dep't 2005).

Where a reinsurance contract requires prompt notice as a condition precedent – as under the Mony Re certificate – the reinsurer is not required to demonstrate prejudice to rely on the defense of late notice. *Unigard Sec. Ins. Co., Inc. v. North River Ins. Co.*, 79 N.Y.2d 576, 582-84 (1992); *Christiania General Ins. Corp. of New York v. Great America Ins. Co.*, 979 F.2d 268, 274 (2d Cir. 1992). National argues that, despite its late notice, it is still entitled to indemnification because Sirius waived all of its coverage defenses by making payment on the November 2011 billing, without any reservation of rights.

Under New York law, contractual rights may be waived "if they are knowingly, voluntarily and intentionally abandoned." *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 N.Y.3d 96, 104 (2006). Waiver is not to be presumed lightly and must be based on a "clear manifestation of intent to relinquish a contractual protection." *Fundamental Portfolio Advisors, Inc.*, 7 N.Y.3d at 104 (internal quotations omitted); *Echostar Satellite L.L.C. v. ESPN, Inc.*, 79 A.D.3d 614, 617 (1st Dep't 2010). Further, in cases where an insurer is not required to make a timely disclaimer of coverage, an insurer's "delay in giving notice of disclaimer should be considered under common-law waiver" principles. *Keyspan Gas East Corp. v. Munich Reins. America, Inc.*, -- N.Y.3d --, 2014 WL 2573382 (2014).

The documentary evidence submitted demonstrates that Sirius waived its contractual rights and coverage defenses, including its right to prompt notice, as to the November 2011

billing. Waiver occurred when Sirius recognized and stated that notice was late, yet made the decision to reimburse National for the November 2011 billing. Ronald Henry from Sirius acknowledged, in his February 7, 2012 email, that notice was "very late" and lacked details regarding reserves or the underlying claim. Notwithstanding these deficiencies, Henry stated that he was approving payment, but that in the future, the broker should "get reports and other items to the market on time." Sirius' claim handler notes further reveal that Sirius received a copy of the settlement agreement and information about how the settlement would be allocated prior to making payment on the November 2011 billing. Through the February 7, 2012 email from Ronald Henry, Sirius knowingly and voluntarily relinquished its rights to deny coverage based on notice, the proofs of loss, and National's settlement and allocation decisions in regards to the November 2011 billing.

Sirius argues that it could not have waived its rights without a written endorsement based on the nonwaiver provision in the certificates. However, the presence of a nonwaiver clause does not preclude a contract from being "effectively modified by actual performance and the parties' course of conduct" as occurred here. *Aiello v Burns Intl. Sec. Servs. Corp.*, 110 A.D.3d 234, 245 (1st Dep't 2013); *UrbanAmerica, L.P. II v. Carl Williams Group, L.L.C.*, 95 A.D.3d 642, 645 (1st Dep't 2012).

While I find that Sirius waived its rights as to the November 2011 billing, this waiver is limited in scope and does not apply to the February and May 2012 billings. After receiving the February and May 2012 billings, Sirius expressly stated to National that it required more information before making any further payment. As Sirius did not waive its rights with respect to the February and May 2012 billings, and National failed to fulfill the condition precedent of timely notice under the Mony Re certificate, Sirius has no obligation to indemnify National under the Mony Re certificate for the February and May 2012 billings,

or any future billings.

For the reasons stated above, I grant National's motion for summary judgment on its first cause of action for breach of contract with respect to the November 2011 billing under the Mony Re certificate in the amount of $213,294. National's motion for summary judgment on its breach of contract claim with respect to the February and May 2012 billings under the Mony Re certificate in the amounts of $591,666 and $195,039, respectively, is denied, and summary judgment dismissing those claims is granted in favor of Sirius.

I further deny National's motion for summary judgment on its second cause of action seeking a declaration that Sirius is obligated to indemnify National for its share of future losses under the Mony Re certificate. In cases where "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 N.Y.2d 951, 954 (1989); *Hunter v. Seneca Insurance Co., Inc.*, 114 A.D.3d 556, 556 (1st Dep't 2014). Sirius is therefore entitled to a declaration that it has no obligation to indemnify National under the Mony Re certificate for any share of future losses.

2. The Christiania Certificates

The Christiania certificates provide that "[p]rompt notice shall be given by the Company to the Reinsurer of any occurrence or accident which appears likely to involve this reinsurance." Christiania Certificates, Paragraph 7. While this provision requires National to provide prompt notice of occurrences that are likely to involve the reinsurance, prompt notice is not a condition precedent to coverage. When prompt notice is not a condition precedent, a reinsurer is required to demonstrate that late notice was prejudicial in order to avoid its obligations under the reinsurance contract. *Unigard*, 79 N.Y.2d at 584.

Sirius asserts that it suffered prejudice as a result of National's late notice because it could not adequately set up its claims file. However, an inability to properly establish a claims file does not in itself constitute prejudice. To establish prejudice, a reinsurer must show that "it suffered tangible economic injury" by the reinsured's failure to give timely notice. *Unigard Sec. Ins. Co., Ins. v. North River Ins. Co.*, 4 F.3d 1049, 1069 (2d Cir. 1993). Sirius does not claim any tangible economic injury or submit any evidence to raise an issue of fact as to whether it suffered prejudice.

Sirius argues that, even absent prejudice, National is not entitled to indemnification if its failure to provide prompt notice was due to bad faith, or gross negligence in failing to implement "routine practices and controls to ensure notification to reinsurers." *Id.* However, the New York state courts have not adopted this exception to the general rule enunciated in *Unigard*, 79 N.Y.2d 576, that a reinsurer must show prejudice resulting from late notice, and Sirius therefore cannot avoid its indemnification obligations on this grounds. *New Hampshire Ins. Co. v. Clearwater Ins. Co.*, 2013 WL 5880584 at * 4 (New York County November 1, 2013); *Granite State Ins. Co. v. Clearwater Ins. Co.*, 2012 WL 1520851 at *1, n. 1 (S.D.N.Y. April 30, 2012).

Because Sirius does not demonstrate any prejudice resulting from late notice, National argues that it is entitled to summary judgment on the Christiania certificates because it provided Sirius with adequate proofs of loss, or alternatively, Sirius waived any objections to National's proofs of loss.

As discussed above, Sirius waived all of its coverage defenses with respect to the November 2011 billing by making the February 7, 2012 payment of $853,176. *See* waiver discussion, *supra* at 11-13. As Sirius' payment on the November 2011 billing included a $639,882 payment on the three Christiania certificates, National is entitled to retain the

$639,882 that it received from Sirius. In accordance with this decision, I also grant National's motion for summary judgment dismissing Sirius's first and second counterclaims to recover the $639,882 that it paid to National.

As to the February and May 2012 billings under the Christiania certificates, National failed to demonstrate its entitlement to summary judgment with respect to those billings. Paragraph 9 of the Christiania certificates states that the reinsurer will make payment "promptly upon receipt of proof of loss in a form satisfactory to the Reinsurer." National failed to show that it provided proofs of loss that were satisfactory to Sirius. Upon receiving the February 2012 billing, Sirius advised National that it wished to conduct an audit of its claim files. National agreed to provide access to those files, but an audit was never performed. As National is obligated to provide satisfactory proofs of loss to Sirius, I direct National to produce its claim files to Sirius within 60 days of the date of this order.

I also deny National's motion for summary judgment on its first cause of action for breach of contract with respect to the February and May 2012 billings under the Christiania certificates, and its second cause of action for a declaration that Sirius is obligated to pay its share of future losses under the Christiania certificates. To the extent that National moves for attorney's fees, that portion of the motion is denied because National did not provide any basis for payment of attorney's fees.

In its cross-motion, Sirius seeks to compel National and Lexington to respond to outstanding document requests and appear for depositions. To the extent that the issues of notice, waiver, and prejudice have been resolved by this decision, Sirius' motion to compel discovery regarding those issues are moot.

Sirius argues in its cross-motion that National and Lexington failed to provide any

discovery on the issue of whether their settlement and allocation decisions were reasonable. In *United States Fid. & Guar. Co. v. American Re-Ins. Co.*, the New York Court of Appeals recently held that, while a cedent's decision on allocation is entitled to deference under a follow-the-settlements clause, the reinsurer will only be bound by the cedent's allocation if it is objectively reasonable. 20 N.Y.3d at 420-421. Further, it is well-settled that under a follow-the-settlements clause, a "reinsurer is bound by the settlement or compromise of a claim agreed to by a cedent unless it can show impropriety in arriving at the settlement." *In re Liquidation of Midland Ins. Co.*, 87 A.D.3d 487, 489 (1st Dep't 2011). Under these doctrines, Sirius is entitled to discovery regarding National and Lexington's settlement and allocation decisions, to the extent that it has not already been provided. *New Hampshire Ins. Co.*, 2013 WL 5880584 at *7; *Travelers Indem. Co. v. Excalibur Reinsurance Corp.*, 2013 WL 1409889 at * 10 (D. Conn. April 8, 2013).

In accordance with the foregoing, it is

ORDERED that the branch of plaintiff National Union Fire Insurance Company of Pittsburgh, PA's motion for summary judgment on the first cause of action with respect to the November 2011 billing under Mony Re certificate number C11318 and Christiania certificate numbers C01563, C03504, and C0171 is granted in the total amount of $213,294.00; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff National Union Fire Insurance Company of Pittsburgh, PA and against defendant Sirius America Insurance Company in the amount of $213,294.00, with interest at the statutory rate from February 7, 2012 until the date of the decision on this motion, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the branch of plaintiff National Union Fire Insurance Company of Pittsburgh, PA's motion for summary judgment on the first cause of action with respect to the February and May 2012 billings under Mony Re certificate number C11318 is denied, and summary judgment dismissing those claims is granted in favor of defendant Sirius America Insurance Company; and it is further

ORDERED that the branch of plaintiff National Union Fire Insurance Company of Pittsburgh, PA's motion for summary judgment seeking a declaration that defendant Sirius America Insurance Company is obligated to indemnify plaintiff for Sirius' share of future losses under the settlement agreement pursuant to Mony Re certificate number C11318 is denied, and Sirius is entitled to a declaration in its favor; and it is further

ADJUDGED and DECLARED that defendant Sirius America Insurance Company has no obligation to indemnify plaintiff National Union Fire Insurance Company of Pittsburgh, PA for Sirius' share of future losses under Mony Re certificate number C11318; and it is further

ORDERED that plaintiff National Union Fire Insurance Company of Pittsburgh, Pa.'s motion for summary judgment dismissing Sirius America Insurance Company's first and second counterclaims is granted, and Sirius' first and second counterclaims are dismissed; and it is further

ORDERED that the branch of plaintiff National Union Fire Insurance Company of Pittsburgh, PA's motion for summary judgment on the first cause of action with respect to the February and May 2012 billings under Christiania certificate numbers C01563, C03504, and C0171 is denied; and it is further

ORDERED that the branch of plaintiff National Union Fire Insurance Company of Pittsburgh, PA's motion for summary judgment seeking a declaration that defendant Sirius

America Insurance Company is obligated to indemnify plaintiff for Sirius' share of future losses under the settlement agreement pursuant to Christiania certificates C01563, C03504, and C0171 is denied; and it is further

ORDERED that plaintiff National Union Fire Insurance Company of Pittsburgh, Pa.'s motion for attorney's fees is denied without prejudice; and it is further

ORDERED that defendant Sirius America Insurance Company's cross-motion to compel is granted only to the extent set forth above, and otherwise denied; and it is further

ORDERED that plaintiff National Union Fire Insurance Company of Pittsburgh, Pa.'s is directed to produce its claim files to defendant Sirius America Insurance Company within 60 days of the date of this order; and it is further

ORDERED that the remaining portion of plaintiff National Union Fire Insurance Company of Pittsburgh, Pa.'s first and second causes of action with respect to Christiania certificates C01563, C03504, and C0171 are severed and shall continue; and it is further

ORDERED that plaintiff Lexington Insurance Company's first and second causes of actions with respect to the Mony Re certificates C11419, C12093, and C12639 are severed and shall continue; and it is further

ORDERED that counsel are directed to appear for a status conference at 60 Centre Street, Room 208, on October 29, 2014 at 2:15pm.

This constitutes the decision and order of the Court.

1. In their memorandum of law, plaintiffs National and Lexington Insurance Company ("Lexington") stated that they "will withdraw" their prayer for a declaratory judgment related to the three Mony Re certificates covering Lexington's excess insurance policies. Sirius opposes Lexington's withdrawal of its claims, unless the withdrawal is with prejudice or Lexington agrees that any rulings regarding the Mony Re certificate herein apply to Lexington's three Mony Re certificates as well. As Lexington has not formally moved to discontinue its claims and Sirius objects to any discontinuance without prejudice, I do not reach any determination as to Lexington's claims regarding its three Mony Re certificates at this time.

2. For ease of reference, Mony Re and Christiania will be referred to as "Sirius" and Landmark will be referred to as "National" unless it is necessary for the Court to refer to the parties' predecessors-in-interest.

3. Two reinsurance certificates – Christiania certificate C0171 and Mony Re certificate C11318 cover the same policy, Landmark Policy FE 4001051.

4. National and Lexington are both affiliates within the AIG Group of insurance companies (formerly known as the Chartis Group). The parties to the settlement agreement included Foster Wheeler and certain AIG affiliates, including National and Lexington.

5. For the November 2011 billing, National seeks only to recover $213,294, although it originally billed Sirius in the amount of $853,176. The parties do not dispute that Sirius paid $853,176 to National for the November 2011 billing, and that part of this payment was returned to Sirius (either in the amount of $213,294 or $214,698.87). The discrepancy between the amount that was returned is irrelevant to any of the issues presented here.

6. The term "ex gratia" is defined as something granted "as a favor; not legally necessary." Black's Law Dictionary (9th ed. 2009). With respect to reinsurance, the term commonly refers to a payment made by the cedent to its insured even though the loss fell "outside the scope of coverage afforded by the reinsured policy," which payment the reinsurer was not bound to reimburse. Barry R. Ostrager & Mary Kay Vyskocil, Modern Reinsurance Law and Practice § 7.01 at 7-3.

ENTERED:

Dated : 9/15/14
New York, New York

HON. SALIANN SCARPULLA
Justice Supreme Court