

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 SUMMARY ORDER

4 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER
5 AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER
6 COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER
7 COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN
8 ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.
9

10 At a stated term of the United States Court of Appeals for the
11 Second Circuit, held at the Thurgood Marshall United States
12 Courthouse, Foley Square, in the City of New York, on the 26th
13 day of May, two thousand and six.

14 PRESENT:

15
16 Hon. John M. Walker, Jr.,
17 Chief Judge,
18 Hon. James L. Oakes,
19 Hon. Dennis Jacobs,
20 Circuit Judges.
21

22
23 -----X
24 FOLKSAMERICA REINSURANCE COMPANY, successor-
25 in-interest of MONY REINSURANCE CORPORATION,
26
27 Plaintiff-Counter-Defendant-Appellant,

28
29 -- v.--

No. 04-2716-cv

30
31 REPUBLIC INSURANCE COMPANY,
32
33 Defendant-Counter-Claimant-Third-Party-
34 Plaintiff-Appellee,

35
36 AON RE WORLDWIDE, INC., and AON SPECIALITY
37 RE, INC.,

38
39 Third-Party-Defendants-Appellees.
40

41 -----X

42 APPEARING FOR APPELLANT: DOUGLAS CAPUDER, Capuder Fazio
Giacoa LLP, New York, New York.

1 **APPEARING FOR APPELLEE**
2 **REPUBLIC INSURANCE CO.:**

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3 **APPEARING FOR APPELLEES AON**
4 **RE WORLDWIDE, INC., and AON**
5 **SPECIALITY RE, INC.:**

RODNEY M. ZERBE (James E. Tolan,
on the brief), Dechert LLP, New
York, New York.

6
7 Appeal from judgments and orders of the United States District
8 Court for the Southern District of New York.
9

10 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
11 **DECREED** that the district court's interim and amended final
12 judgments are **VACATED**, that its orders are **VACATED** to the extent
13 that they interpret the "prompt-DSOL provision" as a matter of law,
14 that its order striking the Jessup affidavit is **VACATED**, and that
15 the case is **REMANDED** for further proceedings.
16

17 Appellant Folksamerica Reinsurance Co. appeals from, inter
18 alia, the December 2, 2003 amended opinion and order of the United
19 States District Court for the Southern District of New York (Harold
20 Baer, Jr., Judge) interpreting certain reinsurance certificates as
21 a matter of law and granting partial summary judgment to appellee
22 Republic Insurance Co. regarding one of three reinsurance
23 certificates in dispute. The district court later granted summary
24 judgment to Republic on the remaining two certificates.
25 Folksamerica argues on appeal that the grants of summary judgment
26 were in error. We assume the parties' familiarity with the
27 underlying facts of this case and the procedural history.
28

29 We assign error to the district court's ruling that the
30 prompt-DSOL provision (the first sentence of paragraph C of the
31 certificates) is unambiguous and capable of interpretation as a
32 matter of law. The terms of the reinsurance certificates create
33 ambiguity as to what event triggers the duty to promptly provide a
34 DSOL. On one hand, paragraph D ties the reinsurer's receipt of the
35 DSOL to its payment obligation, indicating that a DSOL is due only
36 after billing by the cedant. On the other hand, the definition of
37 the term "definitive statement of loss" in paragraph F indicates
38 the DSOL is due sometime before billing because the definition
39 requires the DSOL to be sufficient to set reserves to indemnify the
40 cedant for its losses.
41

42 No other term of the certificate renders the prompt-DSOL
43 provision susceptible of only one interpretation. The second
44 sentence of paragraph C could be read as requiring the first notice
45 of a claim, but it could also be read as serving a filtering
46 function by requiring a second notice (after the DSOL) to the

1 reinsurer of claims that aggregate to a large sum. The "brought
2 under" clause of the prompt-DSOL provision provides little help
3 because the clause is itself ambiguous—the subject of the verb
4 "brought" is not specified and could be either the cedant, bringing
5 forward the claim for reinsurance payment, or the certificate
6 terms, bringing a claim within the ambit of reinsurance coverage.
7

8 Because the "language in the insurance contract is ambiguous
9 and susceptible of two reasonable interpretations, the parties may
10 submit extrinsic evidence as an aid in construction, and the
11 resolution of ambiguity is for the trier of fact." State of New
12 York v. Home Indem. Ins. Co., 66 N.Y.2d 669, 670 (1985). Enough
13 factual issues remain regarding the extrinsic evidence that summary
14 judgment on the issue of the parties' intentions is inappropriate.
15 Thus, we **VACATE** the district court's orders to the extent that they
16 interpret the prompt-DSOL provision as a matter of law. Because
17 the district court's grants of summary judgment to Republic depend
18 on when Republic's duty to provide a DSOL arose, we **VACATE** those
19 grants of summary judgment. We reject the treaty-certificate
20 notice as a basis for upholding the facultative-certificate
21 judgments. See Unigard Sec. Ins. Co. v. N. River Ins. Co., 4 F.3d
22 1049, 1067 (2d Cir. 1993).
23

24 Because Republic was not entitled to judgment as matter of
25 law, we **VACATE** the district court's interim and final money
26 judgments against Folksamerica. And because extrinsic evidence
27 will be relevant on remand, we **VACATE** the district court's order
28 striking the Jessup affidavit. For the foregoing reasons, we
29 **REMAND** this case to the district court for further proceedings.
30
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32 FOR THE COURT:
33 Roseann B. MacKechnie, Clerk
34

35
36 By: _____
37 Richard Alcantara, Deputy Clerk