IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ACE PROPERTY & CASUALTY INSURANCE COMPANY, et al,	:	
	:	**NOVEMBER TERM, 2010**
Plaintiff,	:	**No. 02290**
v.	:	
R & Q REINSURANCE COMPANY,	:	
	:	**Control Number: 11081920**
Defendant.	:	

ORDER

AND NOW, this 15th day of May, 2012, upon consideration of Plaintiff's Motion for Summary Judgment, and all responses thereto, and having heard oral argument on April 17, 2012, it is HEREBY ORDERED that said Motion for Summary Judgment is GRANTED.

OPINION

Facts:

This case is centered upon the interpretation of "loss" and "expense" in multiple reinsurance certificates issued by R&Q Reinsurance Company ("R&Q"), successor in interest to INA Reinsurance Company, to Ace Property & Casualty Insurance Company ("Ace Property"), successor in interest to Central National Insurance Company (CNIC).

This case involves a specific type of reinsurance, called facultative reinsurance, which is the reinsurance of part or all of a single policy. The facultative certificates at issue in this case are the 1977 Pep Boys Certificate, the 1978 Pep Boys Certificate, the 1978 Wylain Policy, and the 1979 Wylain Policy. Ace Property, as cedant (an insurer which has obtained reinsurance), reinsured these insurance policies with R&Q as an individual reinsurer, under an "excess of loss" facultative certificate status, as well as a participant in a reinsurance pool under a "contributing excess" (a.k.a. "pro rata") facultative certificate status. It is the "excess of loss" facultative certificates that are at issue in this case, and are subject to the following discussion.

Under all four underlying insurance policies, for which Ace Property purchased reinsurance from R&Q, the insured was sued by claimants alleging asbestos bodily injury. As a result, the insured under each insurance policy entered into a funding agreement with Ace Property respecting the payment of such claims. Under the terms of the facultative certificates, Ace Property submitted proofs of loss to R&Q, and pursuant to this action, seeks payment for said proofs of loss, in addition to a declaration ensuring future payments.

Defendant, R&Q, has not paid the proofs of loss, claiming that Ace Property miscalculated its attachment point (the amount Ace Property must pay before any reinsurance applies) by combining expenses and indemnity. R&Q relies upon, among other things, the

absence of definitions of the terms “loss” and “expense” in the four facultative certificates at issue. R&Q argues that, under an “excess of loss” facultative certificate, “loss” means indemnity only, and Ace Property failed to meet its attachment point prior to submitting proofs of loss to R&Q.

Plaintiff, Ace Property, claims the meanings of the words are set forth in the underlying insurance policies for which R&Q provided reinsurance, and that Defendant’s liability follows that of the underlying insurance policy. Ace Property argues that the meaning of “loss” is limited to indemnity only under circumstances in which the facultative certificate is “non-concurrent”. However, “loss” can mean indemnity and expense in other circumstances, such as under an “excess of loss” facultative certificate.

Legal Standard:

This Court finds that Ace Property is entitled to summary judgment as a matter of law because there is no genuine issue of material fact, and the remaining issue is one of contract interpretation for the Court to decide.

The standard for summary judgment in Pennsylvania is set forth in Pa.R.C.P. 1035.2 as follows:

> “After the relevant pleadings are closed, but within such a time as to not unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law,
>
> (1) Whenever there is no genuine issue of material fact as to a necessary element of the cause of action or defense which would be established by additional discovery or expert report, or,

(2) If, after in completion of discovery relevant to the motion, including production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to the jury."

Discussion:

Based upon the language of the facultative certificates at issue, this Court has determined that the liability of the reinsurer, R&Q, follows that of the cedant company, Ace Property. This Court rejects R&Q's assertion that the meaning of the terms "loss" and "expense" is determined by the facultative certificate, and not the underlying insurance policy.

Under Clause 1, Application of Certificate, of the General Conditions section of the facultative certificates at issue, it reads:

"The Reinsurer agrees to indemnify the Company against loss or damage which the Company is legally obligated to pay under the Company's policy reinsured, resulting from occurrences taking place during the period this Certificate is in effect, subject to the Reinsurance Accepted limits shown in the Declarations. The liability of the Reinsurer shall follow that of the Company and, except as otherwise specifically provided herein or designated as non-concurrent reinsurance in the Declarations, shall be subject in all respects to all of the terms and conditions of the Company's policy except such as may purport to create a direct obligation of the Reinsurer to the original insured. The Company shall furnish the Reinsurer with a full copy of its policy and all endorsements thereto which in any manner affect this Certificate, and shall make available for

inspection and place at the disposal of the Reinsurer at reasonable times any of its records relating to this Reinsurance or claims in connection therewith."

This Court finds that because R&Q had copies of the underlying insurance policies, or at the very least had access to the underlying insurance policies, that R&Q had knowledge of the terms of those policies. Pursuant to Clause 1 of the facultative certificates at issue, R&Q's liability follows that of the cedant Ace Property's liability in the underlying insurance policies.

Under Clause 5, Definitions, of the General Conditions section of the facultative certificates at issue, it reads in pertinent part:

"Non-Concurrent – The reinsurance provided does not apply to any hazards or risks of loss or damage covered under the Company's policy other than those specifically set forth in the Declarations the retention of the Company and liability of the Reinsurer shall be determined as though the Company's policy applied only to the hazards or risks of loss or damage specifically described in the Declarations."

The Court finds that R&Q's assertion that the meaning of the terms "loss", and "expense", and "damage" is determined by the facultative certificate, and not the underlying insurance policy, only applies when the facultative certificate is "non-concurrent." This argument fails in the current case because the facultative certificates at issue are "excess of loss" therefore the reinsurer's liability follows that of the cedant company in the underlying insurance policies for which reinsurance was purchased.

Under Item 5 of the Certificates of Facultative Reinsurance at issue in this case, the parties selected "Excess of Loss" as the Basis of Acceptance, as opposed to "Contributing Excess" (a.k.a "Pro Rata"), or "Non-Concurrent". The facultative certificates at issue are not declared to be "non-concurrent", therefore the Ultimate Net Loss is determined by the terms of

the underlying insurance policies issued by Ace Property. The only way that R&Q can avoid liability is if the facultative certificates had been “non-concurrent”, as opposed to what they are, which is “excess of loss” – pursuant to Line Item 5.

The Court finds that the facultative certificates at issue are “excess of loss”, as agreed upon by the contracting parties, and therefore “loss” includes more than indemnity; specifically defense and expense.

Under Clause 6, Ultimate Net Loss, of the Coverage Agreements section of the underlying insurance policies issued by Ace Property which are resinsured by the facultative certificates at issue, it reads:

> “The term “ultimate net loss” means the total sum which the insured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, property damage or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which, are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Insured’s or of any underlying insurer’s permanent employees.”

This Court finds that Ultimate Net Loss covers indemnity and expense therefore, while “loss” is not specifically defined in the four facultative certificates at issue, the meaning carries over from the underlying insurance policies. Thus, the attachment point may include indemnity and defense, and R&Q’s liability must follow that of cedant’s liability in the underlying insurance policies.

Accordingly, it is HEREBY ORDERED:

1. Plaintiff's Motion for Summary Judgment is GRANTED;
2. A declaration that R&Q Reinsurance Company must reimburse ACE Property & Casualty Insurance Company for any unpaid proofs of loss in connection with the four facultative certificates at issue in this case which are the 1977 Pep Boys Certificate, the 1978 Pep Boys Certificate, the 1978 Wylain Policy, and the 1979 Wylain Policy; and
3. A declaration that R&Q Reinsurance Company must make future payments to ACE Property & Casualty Insurance Company pursuant to proofs of loss related to the four facultative certificates at issue in this case which are the 1977 Pep Boys Certificate, the 1978 Pep Boys Certificate, the 1978 Wylain Policy, and the 1979 Wylain Policy.

BY THE COURT:

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ALBERT JOHN SNITE, JR., J.