UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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AIU INSURANCE COMPANY, :

Plaintiff, : 07 Civ. 7052 (SHS)(HBP)

-against- : REPORT AND RECOMMENDATION

TIG INSURANCE COMPANY, :

Defendant. :

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PITMAN, United States Magistrate Judge:

TO THE HONORABLE SIDNEY H. STEIN, United States District Judge,

I. Introduction

Plaintiff AIU Insurance Company ("AIU") brings this action alleging breach of contract and seeking declaratory relief against defendant TIG Insurance Company ("TIG") based upon TIG's failure to pay amounts putatively due under nine reinsurance certificates (the "Reinsurance Certificates").

By notice of motion dated April 20, 2009, TIG moved for partial summary judgment in this action (Docket Item 67). On February 11, 2010, I issued a Report and Recommendation (the "February 2010 R&R") addressing this motion (Docket Item 80). Specifically, I recommended that TIG's motion be granted to the

extent that it sought a ruling that (1) Illinois law governs this dispute; (2) under Illinois law, a reinsurer need not demonstrate prejudice to deny coverage to a reinsured which has failed to comply with a policy provision requiring prompt notice of claims and (3) TIG did not provide reinsurance coverage to AIU for the period from October 1, 1981 - October 1, 1982. I further recommended that TIG's motion be denied to the extent that it sought a ruling that AIU breached the Reinsurance Certificates by failing to provide prompt notice of a claim involving Foster Wheeler Corporation ("Foster Wheeler") (the "Foster Wheeler Claim") without prejudice to a renewed summary judgment motion after the completion of discovery.

By Order dated March 9, 2010 (Docket Item 82), the Honorable Sidney H. Stein, United States District Judge, (1) adopted my finding that TIG did not provide reinsurance coverage to AIU for the period from October 1, 1981 - October 1, 1982 and (2) vacated the remainder of the February 2010 R&R without prejudice to a renewed motion for summary judgment by either party at the conclusion of discovery. Specifically, Judge Stein stated that consideration of the remainder of TIG's motion was premature at that time because discovery was still ongoing.

The parties thereafter completed discovery, and, by notice of motion dated April 29, 2011, TIG made a renewed motion

for summary judgment (Docket Item 100). Specifically, TIG requests that this Court make the following rulings: (1) Illinois law governs this dispute, and, thus, TIG need not prove prejudice from AIU's late notice of the Foster Wheeler Claim; (2) AIU breached the Reinsurance Certificates by providing late notice of the Foster Wheeler Claim and (3) AIU acted in bad faith by failing to have appropriate procedures in place to provide its reinsurers with prompt notice of claims, and, thus, TIG is excused from performing its obligations under the certificates (TIG Insurance Company's Memorandum of Law in Support of its Renewed Motion for Summary Judgment, dated Apr. 29, 2011 ("TIG's Mem. in Supp. of Mot. for Summ. J.") (Docket Item 101), 1-2, 26).

By notice of motion dated April 29, 2011 (Docket Item 110), AIU cross-moves for partial summary judgment. Specifically, AIU requests that this Court (1) find that New York law governs this dispute and (2) dismiss TIG's first, second, third, fourth, fifth and seventh affirmative defenses[1] (Plaintiff AIU

[1]TIG's first affirmative defense asserts that AIU breached the Reinsurance Certificates by failing to provide prompt notice of the Foster Wheeler Claim (First Amended Answer, dated Apr. 22, 2008 ("Am. Answer") (Docket Item 23), 14). TIG's second and third affirmative defenses assert the same, but additionally assert that TIG suffered prejudice as a result of AIU's breach (Am. Answer at 14). TIG's fourth affirmative defense asserts that AIU also breached the Reinsurance Certificates by failing to make its records relating to the Foster Wheeler Claim available

(continued...)

Insurance Company's Memorandum of Law in Support of its Motion for Partial Summary Judgment, dated Apr. 29, 2011 ("AIU's Mem. in Supp. of Mot. for Summ. J.") (Docket Item 111), 2-5, 35).

Finally, by notice of motion dated June 3, 2011 (Docket Item 97), TIG moves to strike paragraphs 5, 8 and 9 of the Declaration of Richard Kafaf (the "Kafaf Declaration") (Docket Item 112), which AIU has submitted in connection with its cross-motion for partial summary judgment.

For the reasons set forth below, I respectfully recommend that (1) TIG's motion to strike paragraphs 5, 8 and 9 of the Kafaf Declaration be denied, (2) TIG's renewed motion for summary judgment be granted in its entirety and (3) AIU's cross-motion for partial summary judgment be denied in its entirety. Specifically, I recommend that this Court make the following findings: (1) Illinois law governs this dispute, and, thus, TIG need not prove prejudice from AIU's late notice of the Foster Wheeler Claim in order to deny payment and (2) AIU breached the Reinsur-

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[1](...continued)
for TIG's inspection (Am. Answer at 15). TIG's fifth affirmative defense asserts that AIU is estopped from recovering pursuant to the Reinsurance Certificates because TIG justifiably and detrimentally relied on the absence of prompt notice by AIU of the Foster Wheeler Claim (Am. Answer at 15). Finally, TIG's seventh affirmative defense asserts that AIU has not met its burden of establishing that its settlement with Foster Wheeler was within the terms and conditions of the underlying policies identified in the Reinsurance Certificates (Am. Answer at 15-16).

ance Certificates by providing late notice of the Foster Wheeler Claim.

II. Facts

Both AIU and TIG have submitted statements pursuant to Local Civil Rule 56.1 in connection with their respective motions for summary judgment (Docket Items 102, 107, 114 and 121). However, because the basic facts underlying this action are the same as those set forth in the February 2010 R&R (see Docket Item 80 at 2-6), familiarity with which is assumed, I do not recite them again at length.[2] Instead, I set forth a brief overview of the dispute here and thereafter discuss the facts contained in AIU's and TIG's revised Rule 56.1 statements as they pertain to the analysis.

AIU issued three umbrella insurance polices (the "AIU Umbrella Policies") to Foster Wheeler covering the period from October 1, 1978 - October 1, 1981. These were excess insurance policies that covered certain losses to the extent that they exceeded the limits of Foster Wheeler's primary coverage with

[2]I note that, as result of Judge Stein's ruling that TIG did not provide reinsurance coverage to AIU for the period from October 1, 1981 - October 1, 1982, the facts in the February 2010 R&R concerning the fourth umbrella insurance policy are no longer relevant.

Liberty Mutual Insurance Company. AIU subsequently reinsured its exposure under these umbrella policies with International Insurance Company ("IIC"), TIG's predecessor, pursuant to the nine Reinsurance Certificates at issue in this action (Statement of Undisputed Facts in Support of TIG Insurance Company's Renewed Motion for Summary Judgment, dated Apr. 29, 2011 ("TIG's Rule 56.1 Statement") (Docket Item 102), ¶¶ 1-4, 8; AIU Insurance Company's Rule 56.1 Statement of Undisputed Material Facts, dated Apr. 29, 2011 ("AIU's Rule 56.1 Statement") (Docket Item 114), ¶¶ 2, 11-13).

In issuing the Reinsurance Certificates, L.W. Biegler Inc. negotiated on behalf of IIC and Johnson & Higgins negotiated on behalf of AIU (TIG's Rule 56.1 Statement ¶ 12; AIU's Rule 56.1 Statement ¶¶ 15-16). Six of the nine Reinsurance Certificates are signed on behalf of IIC in the name of "L.W. Biegler," and the remaining three certificates are signed in the name of "R.G. Adams." The face of each certificate also reads "CERTIFICATE OF FACULTATIVE INSURANCE ISSUED BY" International Insurance Company and displays the logo of Crum & Forster Insurance Companies ("Crum & Forster"), IIC's corporate parent. Finally, each certificate contains the following provision: "Prompt notice shall be given to the Reinsurer [i.e., IIC] by the Company [i.e., AIU] of any occurrence or accident which appears likely to

involve this reinsurance" (Exs. 13-21 to Declaration of Julie Rodriguez Aldort, dated Apr. 7, 2009 ("Aldort Decl. 2009") (Docket Item 72); Exs. 11-19 to Declaration of Julie Rodriguez Aldort Volume 1 of 5, dated Apr. 7, 2011 ("Aldort Decl.") (Docket Item 103)).

In February 2001, certain underwriters of various insurance companies brought a declaratory judgment action in New York State court against Foster Wheeler and many of its insurers seeking a declaration of the obligations of such defendants with respect to asbestos-related bodily injury claims. Foster Wheeler then filed a third-party complaint against AIU and eleven of its other excess insurers in July 2001 seeking a declaration that they were responsible for the defense and indemnity costs of asbestos-related bodily injury claims brought against Foster Wheeler. On June 30, 2006, AIU and other American International Group, Inc. member companies settled the third-party action and AIU began making payments to Foster Wheeler pursuant to the settlement agreement (TIG's Rule 56.1 Statement ¶¶ 25-28, 35; AIU's Rule 56.1 Statement ¶¶ 46, 56).

On January 25, 2007, AIU sought reimbursement for these settlement payments pursuant to the Reinsurance Certificates by submitting a reinsurance claim to Riverstone, an affiliate of TIG, and attaching the settlement agreement between Foster

Wheeler and AIU (TIG's Rule 56.1 Statement ¶¶ 51-52; AIU's Rule 56.1 Statement ¶ 57; Ex. 72 to Aldort Decl. Volume 4 of 5). On February 2, 2007, Riverstone responded to AIU's January 25 letter by citing the prompt notice provision described above, requesting a series of documents related to the Foster Wheeler Claim and reserving its rights under the Reinsurance Certificates (TIG's Rule 56.1 Statement ¶ 53; Ex. 73 to Aldort Decl. Volume 4 of 5).

AIU thereafter commenced this action against TIG, alleging that TIG had breached the Reinsurance Certificates by failing to indemnify AIU for its share of the settlement payments. TIG claims that AIU breached the prompt notice provision of the Reinsurance Certificates, and, thus, that TIG is not obligated to indemnify AIU. AIU presently seeks approximately $22.6 million dollars in reinsurance proceeds from TIG, as well as prejudgment interest on that amount (AIU's Mem. in Supp. of Mot. for Summ. J. at 1).

III. Analysis

A. Summary Judgment Standards

The standards applicable to a motion for summary judgment are well-settled and require only brief review.

> Summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). This form of relief is appropriate when, after discovery, the party -- here plaintiff -- against whom summary judgment is sought, has not shown that evidence of an essential element of her case -- one on which she has the burden of proof -- exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This form of remedy is inappropriate when the issue to be resolved is both genuine and related to a disputed material fact. An alleged factual dispute regarding immaterial or minor facts between the parties will not defeat an otherwise properly supported motion for summary judgment. See Howard v. Gleason Corp., 901 F.2d 1154, 1159 (2d Cir. 1990). Moreover, the existence of a mere scintilla of evidence in support of nonmovant's position is insufficient to defeat the motion; there must be evidence on which a jury could reasonably find for the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).
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> If the movant demonstrates an absence of a genuine issue of material fact, a limited burden of production shifts to the nonmovant, who must "demonstrate more than some metaphysical doubt as to the material facts," and come forward with "specific facts showing that there is a genuine issue for trial." Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993). If the nonmovant fails to meet this burden, summary judgment will be granted against it. Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1224 (2d Cir. 1994).

Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 84 (2d Cir. 2004); accord Jeffreys v. City of New York, 426 F.3d 549, 553-54 (2d Cir. 2005); Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1223-24 (2d Cir. 1994).

"Material facts are those which 'might affect the outcome of the suit under the governing law,' and a dispute is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Coppola v. Bear Stearns & Co., 499 F.3d 144, 148 (2d Cir. 2007), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); accord McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007). "'[I]n ruling on a motion for summary judgment, a judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [non-movant] on the evidence presented[.]'" Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 788 (2d Cir. 2007), quoting Readco, Inc. v. Marine Midland Bank, 81 F.3d 295, 298 (2d Cir. 1996).

> The party seeking summary judgment has the burden to demonstrate that no genuine issue of material fact exists . . . . In determining whether a genuine issue of material fact exists, a court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant . . . . Stated more succinctly, "[t]he evidence of the non-movant is to be believed."

Lucente v. Int'l Bus. Machs. Corp., 310 F.3d 243, 253-54 (2d Cir. 2002) (citations omitted); see also Jeffreys v. City of New York, supra, 426 F.3d at 553 ("'Assessments of credibility and choices between conflicting versions of the events are matters for the

jury, not for the court on summary judgment.'"), quoting Rule v. Brine, Inc., 85 F.3d 1002, 1011 (2d Cir. 1996); accord Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 142 (2d Cir. 2004); Dallas Aerospace, Inc. v. CIS Air Corp., 352 F.3d 775, 780 (2d Cir. 2003).

"In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant may satisfy [its] burden by pointing to an absence of evidence to support an essential element of the nonmoving party's claim." Vann v. City of New York, 72 F.3d 1040, 1048 (2d Cir. 1995). "A defendant moving for summary judgment must prevail if the plaintiff fails to come forward with enough evidence to create a genuine factual issue to be tried with respect to an element essential to its case." Allen v. Cuomo, 100 F.3d 253, 258 (2d Cir. 1996).

Finally, the Court of Appeals for the Second Circuit has explained that "in determining whether the moving party has met [its] burden of showing the absence of a genuine issue for trial, the district court may not rely solely on the statement of undisputed facts contained in the moving party's Rule 56.1 statement. It must be satisfied that the citation to evidence in the record supports the assertion." Vermont Teddy Bear Co. v.

1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004); see also Giannullo v. City of New York, 322 F.3d 139, 140 (2d Cir. 2003).

B. Choice-of-Law Analysis

TIG first moves for summary judgment on the issue of choice of law. Specifically, TIG seeks a ruling that Illinois law governs this dispute and that TIG need not, therefore, prove prejudice from late notice of a claim in order to prevail on its late notice defenses asserted in this action. AIU instead argues that because New York law governs this dispute, TIG must prove prejudice in the form of tangible economic injury.

1. Admissibility of the Kafaf Declaration

As a preliminary matter, TIG contends that paragraphs 5, 8 and 9 of the Kafaf Declaration, which purport to support AIU's argument that New York law governs this dispute, should not be considered to the extent that they contain statements not within Kafaf's personal knowledge because they do not comply with Rule 56(c)(4) of the Federal Rules of Civil Procedure (TIG Insurance Company's Memorandum of Law in Support of its Motion to Strike Paragraphs 5, 8, & 9 of the Kafaf Declaration, dated June 3, 2011 ("TIG's Mem. in Support of Mot. to Strike") (Docket Item

98), 1). TIG also contends that Kafaf's statements concerning the location of IIC's principal place of business are impermissible legal conclusions (TIG's Mem. in Support of Mot. to Strike at 1).

Paragraphs 5, 8 and 9 of the Kafaf Declaration state, in substance, that IIC, although incorporated in Illinois, was actually located out of Crum & Forster's main office in New York (Declaration of Richard Kafaf, dated Apr. 27, 2011 ("Kafaf Decl.") (Docket Item 112), ¶¶ 5, 8-9). In reaching these conclusions, Kafaf makes statements concerning the offices from which certain Crum & Forster employees associated with IIC worked and comments on material set forth on the face of the Reinsurance Certificates.

Rule 56(c)(4) provides that affidavits submitted in support of or in opposition to a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."[3] Fed.R.Civ.P.

[3]"The December 1, 2010 amendments to Federal Rule of Civil Procedure 56 moved the relevant Rule 56(e) provision to Rule 56(c)(4)." Natural Res. Def. Council, Inc. v. Wright-Patterson Air Force Base, 10 Civ. 3400 (SHS), 2011 WL 3367747 at *4 n.1 (S.D.N.Y. Aug. 3, 2011) (Stein, D.J.); see also Fed.R.Civ.P. 56 Advisory Committee Notes, 2010 Amendments.

56(c)(4); see also SCR Joint Venture L.P. v. Warshawsky, 559 F.3d 133, 138 (2d Cir. 2009). Furthermore, "[w]here a party wishes to have a court consider documents which are not yet part of the court's record, the documents must be attached to and authenticated by an appropriate affidavit and the affiant must be a competent witness through whom the documents would be received into evidence at trial." New York ex rel. Spitzer v. Saint Francis Hosp., 94 F. Supp. 2d 423, 426 (S.D.N.Y. 2000) (Conner, D.J.), citing Crown Heights Jewish Cmty. Council, Inc. v. Fischer, 63 F. Supp. 2d 231, 241 (E.D.N.Y. 1999).

Kafaf is a Senior Complex Director for Reinsurance in the Asbestos Claims Department of Chartis Claims, Inc. ("Chartis Claims"), formerly known as AIG Domestic Claims, Inc., an AIU affiliate (Kafaf Decl. ¶ 1). Prior to this, Kafaf worked within the Crum & Forster organization from approximately 1971 to 1993 in various of its New Jersey and New York offices. Specifically, Kafaf held a number of positions over the years, including: premium accounting manager; loss accounting manager; member of the corporate accounting department; treasurer of C&F Credit Corporation, a Crum & Forster affiliate that provided premium financing for commercial insurance policies; member of a task force assigned to the southwest region of Dallas, Texas to assist in claims operations; chief financial officer of Richard Whiley,

Inc., a Crum & Forster affiliate that provided reinsurance intermediary services; and vice president of the Crum & Forster environmental claims department (Kafaf Decl. ¶¶ 3-4; Supplemental Declaration of Richard Kafaf, dated June 16, 2011 ("Supplemental Kafaf Decl.") (Docket Item 124), ¶¶ 2-3; see generally Ex. 48 at 13-34 to Exhibits to Declaration of Joelle B. Larson, Volume 3 of 3 ("Larson Decl.") (Docket Item 109)).

Kafaf's statements in paragraph 5 of his declaration are based on his approximately twenty-two years of employment within the Crum & Forster organization. TIG does not dispute Kafaf's employment history (see TIG Insurance Company's Reply in Support of its Motion to Strike Paragraphs 5, 8, & 9 of the Kafaf Declaration, dated June 24, 2011 ("TIG's Reply Mem. in Supp. of Mot. to Strike") (Docket Item 99), 2-4). Instead, TIG argues that Kafaf (1) was never directly involved in IIC's corporate affairs; (2) visited L.W. Biegler Inc.'s Chicago office only once and never visited IIC's office there and (3) neither had personal knowledge of the Reinsurance Certificates at issue in this action nor of IIC's or L.W. Biegler Inc.'s organizational structure and company operations (see generally TIG's Mem. in Support of Mot. to Strike; TIG's Reply Mem. in Supp. of Mot. to Strike).

TIG's arguments are unavailing. First, at the outset of his declaration, Kafaf states that he "[has] personal knowl-

edge of the matters discussed below [i.e., in this declaration]" (Kafaf Decl. ¶ 2). Second, notwithstanding that Kafaf was neither employed directly by, nor did reinsurance work for, IIC or L.W. Biegler Inc., Kafaf nonetheless worked within the Crum & Forster organization for a substantial number of years in a wide variety of positions. In addition, his period of employment began a few years prior to, and lasted well beyond, the placement of the Reinsurance Certificates in issue. Thus, as Kafaf explains in his declaration, he became familiar with IIC during the course of his employment at Crum & Forster, because Crum & Forster "was a holding company for a number of different insurance companies, including [IIC]" (Kafaf Decl. ¶ 3). Finally, Kafaf's deposition testimony demonstrates that a number of his responsibilities within the Crum & Forster organization encompassed IIC -- even if not IIC's corporate affairs or reinsurance matters involving IIC (see generally Ex. 48 at 13-34 to Larson Decl. Volume 3 of 3). Accordingly, on the basis of the foregoing, Kafaf has sufficient personal knowledge to speak to the matters set forth in paragraph 5 of his declaration.[4]

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[4]With respect to Exhibit A to the Kafaf Declaration -- the putative first page of IIC's annual statement for the year ending December 31, 1981 -- there is sufficient evidence to support a finding that this document is what it purports to be. A document is properly authenticated by "evidence sufficient to support a

(continued...)

TIG's additional argument that Kafaf's statements in paragraph 5 are impermissible legal conclusions is also without merit. "A corporation's principal place of business for diversity of citizenship purposes is a question of fact." Navedo v. Pathmark, 86 Civ. 4218 (CSH), 1986 WL 536 at *1 (S.D.N.Y. Dec. 22, 1986) (Haight, D.J.); see also Nassau Sports v. Peters, 352 F. Supp. 867, 868 (E.D.N.Y. 1972); Leve v. Gen. Motors Corp., 246 F. Supp. 761, 762 (S.D.N.Y. 1965) (Bonsal, D.J.). Thus, although Kafaf's statements are not entitled to controlling weight in the choice-of-law analysis here, they are nonetheless properly

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[4](...continued)
finding that the matter in question is what its proponent claims." Fed.R.Evid. 901(a). This requirement may be met by circumstantial evidence, United States v. Tin Yat Cin, 371 F.3d 31, 37 (2d Cir. 2004), and by "[a]ppearance, contents, substance . . . or other distinctive characteristics, taken in conjunction with the circumstances." Fed.R.Evid. 901(b)(4). Here, as discussed above, Kafaf (1) stated that he has personal knowledge of the matters discussed in his declaration and (2) was a long-standing employee of the Crum & Forster organization. In addition, on its face, Exhibit A (1) purports to be IIC's annual statement for the year ending December 31, 1981 and (2) lists IIC's address as "233 South Wacker Drive, Chicago, Illinois 60606," which corresponds to the "Reinsurance Request Notes" that AIU submitted to L.W. Biegler Inc. and IIC in 1980 (see generally Grp. Ex. 1 to Aldort Decl. Volume 5 of 5). On the basis of these facts, a reasonable juror could conclude that this annual statement is what Kafaf claims it to be. See United States v. Tin Yat Chin, supra, 371 F.3d at 38, quoting United States v. Pluta, 176 F.3d 43, 49 (2d Cir. 1999) ("Rule 901's requirements are satisfied 'if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.'").

considered because he has sufficient personal knowledge to make such statements and they are not opinions on a matter of law.

With respect to paragraphs 8 and 9 of the Kafaf Declaration, I shall disregard only Kafaf's statement in paragraph 8 that the particular Reinsurance Certificate attached as Exhibit B to the declaration is signed by Frederick H. Jarvis and Antoinette C. Bentley.[5] Kafaf cannot authenticate these signatures as required by Rules 701 and 901(b)(2) of the Federal Rules of Evidence because he has not (1) stated that he is familiar with Jarvis's and Bentley's signatures or (2) explained how he became familiar with their signatures. See Fed.R.Evid. 701 ("[T]estimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."); Fed.R.Evid. 901(b)(2) (noting that handwriting may be authenticated by "[a] nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation"); see also United States v. Samet, 466

[5]I find it unnecessary to strike this statement from the Kafaf Declaration. However, I shall not afford it any probative value in the choice-of-law analysis.

F.3d 251, 254 (2d Cir. 2006) ("[W]e hold that lay witnesses who testify as to their opinion regarding someone's handwriting must not only meet the strictures of Rule 701, but must also satisfy Rule 901(b)(2) and have a familiarity with the handwriting which has not been acquired solely for purposes of the litigation at hand."); Samad Bros., Inc. v. Bokara Rug Co. Inc., 09 Civ. 5843 (JFK)(KNF), 2012 WL 1604849 at *5 (S.D.N.Y. May 8, 2012) (Keenan, D.J.) (same).

With respect to the remainder of Kafaf's statements in paragraphs 8 and 9 of his declaration, however, Kafaf is merely (1) quoting language that appears in the attached Reinsurance Certificate,[6] (2) speaking on the basis of knowledge that he gained throughout the course of his employment at Crum & Forster and (3) stating that a finding that IIC's principal place of business was located in New York is consistent with that knowledge. Thus, for the same reasons set forth above, the majority of Kafaf's statements are not problematic and are properly

[6]Exhibit B to the Kafaf Declaration purports to be a copy of one of the nine Reinsurance Certificates at issue in this action -- specifically, CFR 0062. There has been sufficient evidence produced in connection with the prior motion for summary judgment, as well as the present cross-motions for summary judgment, to support a finding that this Reinsurance Certificate is what Kafaf claims it to be.

considered in connection with AIU's cross-motion for partial summary judgment.

2. "Center-of-Gravity" Analysis

Since the Court's subject matter jurisdiction is predicated on diversity of citizenship, New York's choice-of-law rules control the choice-of-law issue. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941); Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1538-39 (2d Cir. 1997). In the absence of an express contractual provision designating the applicable law, New York courts apply the law of the forum which is the "center of gravity" or that has the most significant "grouping of contacts" in contract cases. Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 317, 642 N.E.2d 1065, 1068, 618 N.Y.S.2d 609, 612 (1994); accord Lazard Freres & Co. v. Protective Life Ins. Co., supra, 108 F.3d at 1539. As explained by the Court of Appeals in Tri-State Emp't Servs., Inc. v. Mountbatten Sur. Co., 295 F.3d 256, 260-61 (2d Cir. 2002):

> Courts in New York . . . apply a "center of gravity" or "grouping of the contacts" approach to choice-of-law issues in contract cases. Under this approach, courts may consider a variety of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties. See In re Allstate Ins. Co. and Stolarz,

> 81 N.Y.2d 219, 227, 597 N.Y.S.2d 904, 613 N.E.2d 936 (1993). "[T]he traditional choice of law factors" -- the places of contracting and performance -- are "given heavy weight in [this] analysis." Id. at 226, 597 N.Y.S.2d 904, 613 N.E.2d 936 (internal quotation marks omitted).

See also Alderman v. Pan Am World Airways, 169 F.3d 99, 103 (2d Cir. 1999) ("Under New York's choice-of-law rules, the interpretation and validity of a contract is governed by the law of the jurisdiction which is the 'center of gravity' of the transaction."); Beatie & Osborn LLP v. Patriot Scientific Corp., 431 F. Supp. 2d 367, 379 (S.D.N.Y. 2006) (Leisure, D.J.) (same); United States Fidelity & Guar. Co. v. Petroleo Brasileiro S.A.-Petrobras, 98 Civ. 3099 (JGK), 2001 WL 300735 at *21 (S.D.N.Y. Mar. 27, 2001) (Koeltl, D.J.) (same).

In reinsurance cases, "the state where the reinsurance certificate issued and the location where performance is expected, i.e. the place to which the ceding insurer must make its demand for payment, typically control for purposes of choice of law." Folksamerica Reinsurance Co. v. Republic Ins. Co., 03 Civ. 0402 (HB), 2003 WL 22852737 at *5 (S.D.N.Y. Dec. 2, 2003) (Baer, D.J.), vacated on other grounds, 182 Fed. App'x 63 (2d Cir. 2006), citing Christiania Gen. Ins. Corp. v. Great Am. Ins. Co., 979 F.2d 268, 274 (2d Cir. 1992); accord Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela, 991 F.2d 42, 46

n.6 (2d Cir. 1993); Arkwright-Boston Mfrs. Mut. Ins. Co. v. Calvert Fire Ins. Co., 887 F.2d 437, 439 (2d Cir. 1989); Nat'l Union Fire Ins. Co. v. Travelers Indem. Co., 210 F. Supp. 2d 479, 484 (S.D.N.Y. 2002) (Conner, D.J.); TIG Premier Ins. Co. v. Hartford Acc. & Indem. Co., 35 F. Supp. 2d 348, 350 (S.D.N.Y. 1999) (Rakoff, D.J.); Constitution Reinsurance Corp. v. Stonewall Ins. Co., 980 F. Supp. 124, 126-27 (S.D.N.Y. 1997) (Leisure, D.J.); 1A Lee R. Russ, Steven Plitt, Daniel Maldonado & Joshua D. Rogers et. al., Couch on Insurance § 9:14 (3d ed. 1995).

In the February 2010 R&R, I determined that Illinois law governed this dispute because (1) the Reinsurance Certificates had been countersigned in Chicago, and, therefore, became effective there; (2) AIU had not presented any evidence that it ever intentionally submitted claims under the certificates in New York or that the certificates themselves required that claims be submitted in New York; (3) the location of the underlying insured and insurance policy were not dispositive contacts in the choice-of-law analysis here and (4) the remaining "center of gravity" factors -- i.e., the parties' principal places of business and the place where the certificates had been negotiated -- were in equipoise (see Docket Item 80 at 13-25). However, because additional material facts have developed since the February 2010 R&R, I shall conduct the choice-of-law analysis again.

a. Issuance of the Reinsurance Certificates

The Reinsurance Certificates state that "the Company has caused this Reinsurance Certificate to be signed by its President and Secretary at New York, New York, but the same shall not be binding upon the Reinsurer unless countersigned by an authorized representative of the Reinsurer" (Exs. 13-21 to Aldort Decl. 2009; Exs. 11-19 to Aldort Decl. Volume 1 of 5). With respect to the location at which the certificates were counter-signed, the evidence available in February 2010 established the following: (1) Reid stated in his declaration that he had personally countersigned six of the nine certificates in the name of "L.W. Biegler" in Chicago, Illinois[7] (specifically, CFR 0062, CFR 0063, CFR 0064, CFR 0085, CFR 0086 and CFR 0087) and (2) the remaining three certificates stated on their face that they had been countersigned in Chicago, Illinois and bore the signature of "R.G. Adams," a casualty insurance underwriter for Crum & Forster (specifically, CFR 0071, CFR 0072 and CFR 0073) (see Docket Item

[7]Of the six certificates that Reid stated he personally countersigned, three certificates list Chicago, Illinois as the location of countersignature on their face (i.e., CFR 0062, CFR 0063 and CFR 0064) and the remaining three certificates do not identify the location of countersignature on their face (i.e., CFR 0085, CFR 0086 and CFR 0087) (see Exs. 13-15 and 19-21 to Aldort Decl. 2009; Exs. 11-13 and 17-19 to Aldort Decl. Volume 1 of 5).

80 at 16-17; see also Declaration of Norman Reid, dated Mar. 25, 2009 ("Reid Decl.") (Docket Item 70), ¶¶ 8, 16). Because AIU had not provided evidence to either rebut the Reid Declaration or to establish the state in which the Reinsurance Certificates were countersigned, I concluded in the February 2010 R&R that the certificates were issued in Illinois.

At the first installment of Reid's deposition, conducted on February 19, 2010, however, he explained that a portion of his declaration relating to the countersignature of the Reinsurance Certificates was inaccurate. Specifically, the following exchange occurred between counsel for AIU and Reid:

> Q. Now, sitting here today, do you believe this document [i.e., the Reid Declaration] to be accurate?
>
> A. With the exception of the signature on three of the policies [i.e., CFR 0085, CFR 0086 and CFR 0087].
>
> * * *
>
> A. Item No. 16, the signature on policies 85, 86 and 87, which I originally felt was my handwriting with the others [i.e., CFR 0062, CFR 0063 and CFR 0064], but after reviewing the document this week, I discovered that the signature of L.W. Biegler was not my handwriting.
>
> Q. Do you know whose handwriting it was?
>
> A. The coding department had specific rules about who to sign and whose licensed [sic] and so forth, who has the authority to sign, and they may have signed it. I don't specifically know who signed it. I don't recognize the handwriting.

(Ex. 96 at 39-41, 87-90 to Aldort Decl. Volume 5 of 5; see also Reid Ex. at 1, 6-7, 39-41, 87-90 to Deposition Transcripts Cited in Declaration of Marc L. Abrams in Support of Plaintiff AIU Insurance Company's Motion for Partial Summary Judgment, dated Apr. 29, 2011 ("Dep. Tr. Cited in Abrams Decl.") (Docket Item 113)).

As a result of the foregoing testimony by Reid, the evidence now establishes the following with respect to the location at which the certificates were countersigned: (1) Reid states in his declaration, and has testified at his deposition, that he personally countersigned CFR 0062, CFR 0063 and CFR 0064 in the name of "L.W. Biegler" in Chicago, and, moreover, each of these certificates indicates on its face that it was counter-signed in Chicago;[8] (2) CFR 0071, CFR 0072 and CFR 0073 were countersigned in the name of "R.G. Adams" (a Crum & Forster employee who worked out of the company's New Jersey office) and each of these certificates indicates on its face that it was countersigned in Chicago, although there is no documentary or testimonial evidence establishing who personally signed these

[8]See Reid Decl. ¶ 16; Ex. 96 at 39-41, 87-90 to Aldort Decl. Volume 5 of 5; Reid Ex. at 1, 6-7, 39-41, 87-90 to Dep. Tr. Cited in Abrams Decl.; Exs. 13-15 to Aldort Decl. 2009; Exs. 11-13 to Aldort Decl. Volume 1 of 5. AIU does not dispute this, other than to attack the reliability of Reid's testimony generally.

certificates;[9] and (3) CFR 0085, CFR 0086 and CFR 0087 are signed in the name of "L.W. Biegler," although they do not indicate on their face where they were countersigned and there is no documentary or testimonial evidence directly establishing who personally countersigned these certificates or where.[10]

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[9]TIG has produced witnesses who have stated in both their declarations and during their depositions that it was L.W. Biegler Inc.'s policy to countersign all of its reinsurance contracts in its Chicago office (see, e.g., Ex. 22 at ¶ 7 to Aldort Decl. Volume 1 of 5 (Decl. of Phillip J. Joschko); Ex. 23 at ¶¶ 8-9, 16 to Aldort Decl. Volume 1 of 5 (Decl. of Norman R. Reid); Ex. 24 at ¶¶ 7-9 to Aldort Decl. Volume 2 of 5 (Decl. of William J. Schwass); Ex. 89 at 49-55, 60-61, 86-89, 91-94, 163-64 to Aldort Decl. Volume 5 of 5 (Joschko Dep. Test.); Ex. 96 at 41, 75-76 to Aldort Decl. Volume 5 of 5 (Reid Dep. Test.); Ex. 97 at 71, 138-39 to Aldort Decl. Volume 5 of 5 (Schwass Dep. Test.)). Joschko has also stated that he recognizes the initials appearing on the "DATED" line of the following Reinsurance Certificates -- CFR 0062, CFR 0063, CFR 0064, CFR 0071, CFR 0072, CFR 0073 and CFR 0085 -- as belonging to two typists, "Michaline C. Sonnenberg" and "Maureen Delsenor (phonetic)," from L.W. Biegler Inc.'s Chicago office (Ex. 22 at ¶¶ 9-11 to Aldort Decl. Volume 1 of 5). Finally, Adams testified during his deposition that he had no knowledge of his name being signed to CFR 0071, CFR 0072 and CFR 0073 (Adams Ex. at 40-47 to Dep. Tr. Cited in Abrams Decl.).

[10]Again, as explained in footnote 9, TIG contends that it was L.W. Biegler Inc.'s policy to countersign all of its reinsurance contracts in its Chicago office. Moreover, TIG refers to memoranda sent by "Phillip J. Joschko, Supervisor of Special Accounts" to "Mr. R.G. Adams, Branch Manager" -- dated March 29, 1983 and December 28, 1983, respectively -- which purport to forward endorsements relating to CFR 0085 and CFR 0086 signed on Adam's behalf by Joschko's office (TIG Insurance Company's Response to AIU Insurance Company's Rule 56.1 Statement of Undisputed facts, dated June 3, 2011 ("TIG's Resp. to AIU's Rule 56.1 Statement") (Docket Item 107), ¶ 24, citing Exs. 29-30 to Aldort Decl. Volume 2 of 5; cf. Adams Ex. at 40-47 to Dep. Tr.

(continued...)

AIU first contends that the Reinsurance Certificates were issued in New York because (1) the certificates all include the following language: "the Company has caused this Reinsurance Certificate to be signed by its President and Secretary at New York, New York, but the same shall not be binding upon the Reinsurer unless countersigned by an authorized representative of the Reinsurer" and (2) the "Company" referenced in the quoted language is IIC (AIU's Rule 56.1 Statement ¶ 26; Plaintiff AIU Insurance Company's Memorandum of Law in Opposition to TIG's Motion for Partial Summary Judgment, dated June 3, 2011 ("AIU's Mem. in Opp. to TIG's Mot. for Summ. J.") (Docket Item 119), 11; AIU's Mem. in Supp. of Mot. for Summ. J. at 3, 10, 19-20; Plaintiff AIU Insurance Company's Reply Memorandum of Law in Further Support of its Motion for Partial Summary Judgment, dated June 24, 2011 ("AIU's Reply Mem. in Supp. of Mot. for Summ. J.") (Docket Item 116), 6). AIU argues that this is evidence that the Reinsurance Certificates were signed in, and, thus, issued from New York.

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[10](...continued)
Cited in Abrams Decl. (Adams stating that he had no knowledge of his name being signed to CFR 0071, CFR 0072 and CFR 0073). Although Joschko's office location is not identified in these memoranda, he worked out of L.W. Biegler Inc.'s Chicago office (see Ex. 22 at ¶ 3 to Aldort Decl. Volume 1 of 5).

TIG concedes that the "Company" in the above-referenced quote is IIC.[11] However, the Reinsurance Certificates nonetheless expressly condition their effectiveness upon the countersignature of an authorized representative of the reinsurer. Each certificate provides that the reinsurance certificate "shall not be binding upon the Reinsurer unless countersigned by an authorized representative of the Reinsurer" (Exs. 13-21 to Aldort Decl. 2009; Exs. 11-19 to Aldort Decl. Volume 1 of 5). Thus, these Reinsurance Certificates were issued where they were countersigned.[12] See, e.g., Folksamerica Reinsurance Co. v.

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[11]Specifically, in response to AIU's First Set of Requests to Admit, TIG stated: "TIG admits the phrase 'the Company has caused this Reinsurance Certificate to be signed by its President and Secretary at New York, New York" . . . does not refer to AIU, but instead refers to one of the insuring entities owned by Crum & Forster [i.e., IIC]" (Ex. A to Declaration of Marc L. Abrams, dated Apr. 29, 2011 ("Abrams Decl.") (Docket Item 113), 13 (Req. No. 31)).

[12]AIU's arguments that (1) the "event of countersignature was so trivial [] because the reinsurance risks had already been bound;" (2) TIG is confusing the events of "issuance" and "countersignature" and (3) the parties waived the countersignature requirement by first exchanging reinsurance binders, are each unavailing (see, e.g., AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 3, 11-14; AIU's Mem. in Supp. of Mot. for Summ. J. at 3-4, 21; AIU's Reply Mem. in Supp. of Mot. for Summ. J. at 11-15). Simply put, the Reinsurance Certificates state on their face that they are not binding until countersigned by an authorized representative of IIC. Thus, AIU's arguments contradict the express terms of the certificates. If AIU is correct that countersignature was unnecessary, there would have been no reason to issue the certificates with this provision or to have any of the certificates countersigned. Moreover, AIU

(continued...)

Republic Ins. Co., supra, 2003 WL 22852737 at *5 (reinsurance certificates "issued" in New York, when reinsurer's representative countersigned the certificates already signed by the ceding insurer's representative); Restatement (Second) of Conflicts § 188 cmt. e ("[T]he place of contracting is the place where occurred the last act necessary, under the forum's rules of offer and acceptance, to the give the contract binding effect[.]").

AIU next argues that "no witness has knowledge as to where six of the nine Reinsurance Agreements were countersigned [and] at least three of them were countersigned in the name of a New Jersey executive to comply with New Jersey law" (see, e.g., AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 3, 6-7, 12-13; AIU's Mem. in Supp. of Mot. for Summ. J. at 4, 10-11, 21-24; AIU's Reply Mem. in Supp. of Mot. for Summ. J. at 12-13). AIU also attacks Reid's statements and testimony generally, arguing that (1) his declaration submitted in connection with TIG's prior

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[12](...continued)
cites only one case from this jurisdiction to support its arguments -- Mills v. Everest Reinsurance Co., 410 F. Supp. 2d 243, 250 (S.D.N.Y. 2006) (McMahon, D.J.) -- and it is inapposite. First, the Mills court was not presented with a choice of law issue; instead, the court made a determination as to when the reinsurance contract at issue had formed for purposes of the statute of limitations. Second, the reinsurance contract at issue in Mills did not contain a provision like the Reinsurance Certificates here, i.e., conditioning effectiveness of the contract upon countersignature. Accordingly, I reject AIU's arguments on this issue.

motion for partial summary judgment was materially misleading and false and (2) his deposition testimony established that he lacked the personal knowledge necessary to support the statements set forth in his declaration (see, e.g., AIU's Mem. in Supp. of Mot. for Summ. J. at 4, 10-11, 21-24).

Admittedly, the evidence on the issue of countersignature has changed somewhat since the February 2010 R&R. However, AIU nonetheless fails to sufficiently rebut the evidence currently in the record and demonstrate that the Reinsurance Certificates were not countersigned in Illinois. As already discussed, it is undisputed that six of the nine certificates indicate on their face that they were countersigned in Chicago, Illinois; Reid further testified that he personally countersigned three of these certificates in Chicago. The remaining three certificates do not indicate on their face where they were countersigned and there is no direct documentary or testimonial evidence illuminating the issue. The only evidence concerning the place at which these certificates were countersigned is the evidence that L.W. Biegler Inc.'s policy was to countersign all of its reinsurance contracts in its Chicago office. AIU calls this testimony "speculative" and characterizes it as mere "damage control" for Reid's alleged misleading and false statements; however, given AIU's failure to rebut this evidence or to offer any evidence

that the certificates were countersigned in New York, I conclude that the issuance of the Reinsurance Certificates -- one of the factors to be given the most weight in the choice-of-law analysis -- did, in fact, occur in Illinois.[13]

b. Place of Performance

TIG contends that L.W. Biegler Inc. administered claims under the Reinsurance Certificates in Illinois and that no notices of claims were ever submitted, nor handled, in New York (TIG's Rule 56.1 Statement ¶ 18). Specifically, TIG contends that (1) AIU sent two personal injury claims under the Reinsurance Certificates (the "Personal Injury Claims") to Chicago and (2) that these claims were paid from Chicago (see, e.g., TIG's Rule 56.1 Statement ¶¶ 19-21, citing in part Exs. 34-45 to Aldort

[13]AIU also argues that the Reinsurance Certificates were issued in New York because (1) "New York, New York" appears on the face of the certificates in multiple places, and, thus, this demonstrates that IIC issued the certificates for Crum & Forster and (2) Adam Pascale, TIG's head of reinsurance claims with eighteen years of experience in reinsurance matters, concluded that New York or New Jersey law governed the certificates (see, e.g., AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 10-11, 13; AIU's Mem. in Supp. of Mot. for Summ. J. at 9-10, 19-20, 24; AIU's Reply Mem. in Supp. of Mot. for Summ. J. at 5-6). Neither of these arguments, however, address the issue of where the Reinsurance Certificates were countersigned. In addition, Pascale's conclusion is a pure conclusion of law and entitled to no weight.

Decl. Volume 2 of 5 and Grp. Ex. 2 to Aldort Decl. Volume 5 of 5; TIG's Mem. in Supp. of Mot. for Summ. J. at 22; TIG Insurance Company's Opposition to AIU Insurance Company's Motion for Partial Summary Judgment, dated June 3, 2011 ("TIG's Mem. in Opp. to AIU's Mot. for Summ. J.") (Docket Item 106), 13-14; TIG Insurance Company's Reply Memorandum of Law in Support of its Renewed Motion for Summary Judgment, dated June 24, 2011 ("TIG's Reply Mem. in Supp. of Mot. for Summ. J.") (Docket Item 104), 6-7).

AIU "admits that it is unaware of any evidence indicating that it submitted notices of claims under the Reinsurance Agreements to a New York or New Jersey address" (AIU Insurance Company's Response to TIG's Rule 56.1 Statement, dated June 3, 2011 ("AIU's Resp. to TIG's Rule 56.1 Statement") (Docket Item 121), ¶ 18). AIU also does not dispute that it sent the Personal Injury Claims to Chicago and that these claims were paid from Chicago (see, e.g., AIU's Resp. to TIG's Rule 56.1 Statement ¶¶ 19-21; AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 13; AIU's Reply Mem. in Supp. of Mot. for Summ. J. at 15).

However, AIU contends that Illinois was not the expected place of performance under the Reinsurance Certificates because (1) the only locations referenced in the certificates were Crum & Forster's New York and New Jersey offices; (2) AIU

sent the Personal Injury Claims to Chicago before "Biegler, International and their various successors and affiliates [] moved offices to New Hampshire;" (3) AIU sent the Foster Wheeler Claim to New Hampshire without objection and (4) regardless of where AIU submitted claims under the certificates, payment was made to AIU in New York (see, e.g., AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 13-14; AIU's Mem. in Supp. of Mot. for Summ. J. at 20-21; AIU's Reply Mem. in Supp. of Mot. for Summ. J. at 15). Finally, AIU refers to a memorandum from C. Russell Sweet at L.W. Biegler Inc. in New York to Bart Wescott at L.W. Biegler Inc. in Chicago dated February 4, 1980 (the "Sweet Memo"), stating that three of the Reinsurance Certificates had been mistakenly sent to New York and expressing concern about problems identifying the certificates if such a problem were to occur again in the future (AIU's Reply Mem. in Supp. of Mot. for Summ. J. at 15 n.16; see also Ex. 14 to Abrams Decl.).

This evidence does not support an inference that the expected place of performance under the Reinsurance Certficates was New York. First, AIU concedes that (1) there is no evidence indicating that it intentionally submitted claims under the Reinsurance Certificates in New York and (2) it sent the Personal Injury Claims to Chicago (see, e.g., Exs. 34-45 to Aldort Decl. Volume 2 of 5; Grp. Ex. 2 to Aldort Decl. Volume 5 of 5). Thus,

the mere fact that L.W. Biegler Inc. and IIC moved their offices from Illinois to New Hampshire at some point after the Reinsurance Certificates were issued is irrelevant.

Second, although the Reinsurance Certificates make reference to Crum & Forster's New York and New Jersey offices, no provision in any of the certificates provides or even suggests that notices of claims were to be submitted to a New York office (see Exs. 13-21 to Aldort Decl. 2009; Exs. 11-19 to Aldort Decl. Volume 1 of 5). Instead, there is unrebutted evidence that AIU did, in fact, submit claims under the Reinsurance Certificates in Chicago. As a result, unrelated references to Crum & Forster's New York office location on the face of the certificates simply do not shed light on the parties' expected place of performance.

Third, AIU's argument that the expected place of performance was New York because any payment made pursuant to the Reinsurance Certificates would have been sent to AIU in New York is not persuasive.[14] Under New York's choice-of-law rules, the place of performance with respect to reinsurance contracts is typically "the place to which the ceding insurer must make its

[14]Prior to the cross-motions for summary judgment now before me, I note that AIU agreed with TIG that a reinsurance contract is performed where the cedent submits claims (see Memorandum of Law in Opposition to TIG's Motion for Partial Summary Judgment, dated June 3, 2009 ("AIU's Mem. in Opp. to TIG's 2009 Mot. for Summ. J.") (Docket Item 75), 16-18).

demand for payment." See Folksamerica Reinsurance Co. v. Republic Ins. Co., supra, 2003 WL 22852737 at *5; TIG Premier Ins. Co. v. Hartford Acc. & Indem. Co., supra, 35 F. Supp. 2d at 350. The only case which AIU cites in support of its argument -- Pac. Emp'r Ins. Co. v. Global Reinsurance Corp., Civil Action No. 09–6055, 2011 WL 2003359 at *9 (E.D. Pa. May 23, 2011) -- is not applicable here because it relies on Pennsylvania's choice-of-law rules with respect to reinsurance contracts.

My own research has disclosed one New York case in the reinsurance context in which the court made note of the location where the cedent would receive payment in its choice-of-law analysis. See Nat'l Union Fire Ins. Co. v. Travelers Indem. Co., supra, 210 F. Supp. 2d at 484 ("Any payment made in accordance with the reinsurance contract would be made to National Union in New York."). However, at best, this renders the place of performance factor neutral here, because, although AIU would receive payment in New York, AIU has also conceded that it intentionally sent claims to Chicago.

Finally, the Sweet Memo actually undercuts AIU's argument. First, the parties to the memorandum were both L.W. Biegler Inc. employees (Ex. 14 to Abrams Decl.). Such a communication would not shed light on what agreement AIU and IIC reached with respect to the place of performance under the Reinsurance

Certificates. Second, the fact that a L.W. Biegler Inc. employee was concerned that claims under the Reinsurance Certificates might be improperly submitted to a New York or New Jersey address indicates that neither the author nor the recipient expected either of those states to be the place of performance.

Accordingly, on the basis of the foregoing, I find that the expected place of performance under the Reinsurance Certificates was Illinois. However, this factor is not entitled to much weight in this choice-of-law analysis. See Restatement (Second) of Conflicts § 188 cmt. e ("[T]he place of performance can bear little weight in the choice of the applicable law when . . . at the time of contracting it is either uncertain or unknown . . . . ").

c. Remaining "Center of Gravity" Factors

The remaining "center of gravity" factors equally favor application of Illinois or New York law. For example, negotiation of the Reinsurance Certificates took place in both Chicago and New York (TIG's Rule 56.1 Statement ¶¶ 11-17; AIU's Resp. to TIG's Rule 56.1 Statement ¶¶ 11-17). AIU also sent "Reinsurance Request Notes" referencing the AIU Umbrella Policies from New York to either "L.W. Biegler, Inc. (International Insurance Co.)"

or "L.W. Biegler, Inc." in Chicago (TIG's Rule 56.1 Statement ¶ 11; AIU's Resp. to TIG's Rule 56.1 Statement ¶ 11; see also Grp. Ex. 1 to Aldort Decl. Volume 5 of 5). Following the submission of these reinsurance requests, the insurance binders for the Reinsurance Certificates were printed on the letterhead of L.W. Biegler Inc.'s Chicago office and issued to Johnson & Higgins on behalf of AIU in New York (TIG's Rule 56.1 Statement ¶ 13; AIU's Resp. to TIG's Rule 56.1 Statement ¶ 13; AIU's Rule 56.1 Statement ¶ 17; see also Ex. 1 at PL 61762, PL 61163, PL 61169, TIG 577, TIG 622, PL 62698, PL 62701 and PL 62703 to Larson Decl. Volume 1 of 3).

Moreover, AIU is a New York corporation, with its principal place of business located in New York (TIG's Rule 56.1 Statement ¶ 6; AIU's Rule 56.1 Statement ¶ 1). TIG is a California corporation, with its principal place of business located in New Hampshire (TIG's Rule 56.1 Statement ¶ 9; AIU's Rule 56.1 Statement ¶ 3). Although the parties now dispute the location of IIC's principal place of business, IIC nonetheless was an Illinois corporation (TIG's Rule 56.1 Statement ¶ 7; AIU's Resp. to TIG's Rule 56.1 Statement ¶ 7).

With respect to the location of IIC's principal place of business, AIU argues:

> [IIC] was a member of the Crum & Forster Insurance Companies, which, at the time the Reinsurance Agreement were issued, maintained a principal place of business in New York and administrative offices in Morristown, New Jersey. Although [IIC] was nominally incorporated in Chicago, at all relevant times [its] management and directors operated from the New Jersey and New York area, i.e., the same location where its parent, Crum & Forster was based. IIC was not a "payroll" company, meaning that [IIC] did not have its own distinct employees, officers, directors, office space, and bank accounts. In or around 1999, [IIC] moved its principal place of business to New Hampshire.

(AIU's Resp. to TIG's Rule 56.1 Statement ¶ 7 (citations omitted); see also AIU's Rule 56.1 Statement ¶¶ 5-10). AIU also contends that IIC "ceded 100% [of] its reinsurance exposure, including its reinsurance of AIU [], to its corporate affiliates by means of a company-wide reinsurance pool administered [by] Crum & Forster affiliate, U.S. Fire Insurance Company ("U.S. Fire"), which was domiciled and maintained a principal place of business in New York and had administrative offices in New Jersey" (AIU's Rule 56.1 Statement ¶ 9). To support its arguments, AIU relies primarily on the Kafaf Declaration. AIU also refers to selected portions of the deposition testimony of Reid, Joschko, Gibbs[15] and Adams.

[15]Dennis C. Gibbs worked in a number of positions within the Crum & Forster organization from approximately 1986 to 2009 (see Gibbs Ex. at 8-16, 38-40 to Dep. Tr. Cited in Abrams Decl.).

Unsurprisingly, TIG disputes AIU's contention that IIC maintained its principal place of business in New York. Specifically, TIG argues that (1) IIC shared its home office with L.W. Biegler Inc. in Illinois; (2) IIC maintained an Illinois telephone number; (3) IIC had directors who were residents of Illinois, i.e., Lou Biegler and Lonnie Steffen, despite having no distinct employees and a number of shared officers and directors with Crum & Forster; (4) IIC held Board of Directors meetings in Illinois; (5) despite the various Crum & Forster-owned insurance companies ceding their reinsurance exposure to U.S. Fire, IIC assumed back approximately five percent of the pool's total exposure and (6) this intercompany pooling arrangement did not affect IIC's reinsurance risk with respect to the specific Reinsurance Certificates at issue in this action (TIG's Resp. to AIU's Rule 56.1 Statement ¶¶ 7-10). To support its arguments, TIG refers to the following: (1) IIC's annual statements for the years ending December 31, 1981 and December 31, 1983 (Exs. 639 and 640 to Abrams Decl.); (2) IIC's Amended and Restated Articles of Incorporation, dated September 19, 1997 and approved on October 7, 1997 (Ex. 21 to Aldort Decl. Volume 1 of 5); (3) the Reid and Joschko Declarations (Exs. 22 and 23 to Aldort Decl. Volume 1 of 5); (4) selected portions of the deposition testimony

of Gibbs, Reid and Joschko and (5) TIG's First Amended Answer in this action (Am. Answer ¶ 1).

Because it is not necessary to the choice-of-law determination in this action, I need not determine whether IIC's principal place of business was located in Illinois or New York. As already discussed at length, the contacts that typically control for purposes of choice of law in reinsurance cases are the location where the certificates were issued and the location where performance is expected. Thus, even assuming, as AIU contends, that IIC was an Illinois corporation with its principal place of business in New York, this would, at best, be another factor that equally favors the application of Illinois or New York law. In addition, AIU cites no authority for the proposition that, under New York choice-of-law rules, when a reinsurer's principal place of business differs from (1) the location where the reinsurance certificates were issued and (2) the location where performance is expected, the reinsurer's principal place of business is controlling or entitled to greater weight.

Finally, AIU argues that (1) the Court should consider the location of the underlying insured and where the underlying policy is issued and (2) these factors are especially important in the choice-of-law analysis here because L.W. Biegler Inc. (a) distributed notices directly to Foster Wheeler to renew the

Reinsurance Certificates and (b) received a "premium charge" payment directly from Foster Wheeler in connection with the certificates (AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 14-15; AIU's Mem. in Supp. of Mot. for Summ. J. at 24-25; AIU's Reply Mem. in Supp. of Mot. for Summ. J. at 10-11). I addressed a similar argument in the February 2010 R&R (see Docket Item 80 at 19-21), and the authority cited therein continues to apply here. Although the location of the underlying insured and where the underlying policy is issued are relevant to the analysis, they are not dispositive contacts. See Nat'l Union Fire Ins. Co. v. Am. Re-Insurance Co., 351 F. Supp. 2d 201, 207 (S.D.N.Y. 2005) (Chin, then D.J., now Cir. J.) (finding that these factors, along with the issuance of the reinsurance policy in Ohio and the negotiation of the policy in Ohio favored application of Ohio law); Nat'l Union Fire Ins. Co. v. Travelers Indem. Co., supra, 210 F. Supp. 2d at 484 (applying New York law because "[w]hile New Jersey is the corporate home of Integrated Packaging and the location of the insured property, Integrated Packaging is not a party in the instant dispute and has already received payment pursuant to the terms of the National Union policy"); see also Jefferson Ins. Co. v. Fortress Re, Inc., 616 F. Supp. 874, 877 (S.D.N.Y. 1984) (Haight, D.J.) (location of the risk carries less weight in reinsurance cases than in direct insurance cases).

In any event, even considering Foster Wheeler's location and where the AIU Umbrella Policies were issued, the choice-of-law analysis remains unchanged. First, the subject matter of the contract -- indemnity for claims submitted under the AIU Umbrella Policies -- was not confined to New York. Second, the renewal notices that AIU refers to are either (1) "Advance Notice of Intention to Renew" notices addressed to AIU's agent, Johnson & Higgins or (2) renewal notices addressed to Foster Wheeler, although each notice (a) contains the following sentence: "Please contact your Broker/Agent regarding this notice" and (b) indicates that a copy of the respective notice was also sent to Johnson & Higgins (see Ex. 30 to Abrams Decl.). Finally, it is not clear from the record whether IIC or L.W. Biegler Inc. ever, in fact, sent these notices to Foster Wheeler.

After a thorough review of AIU's papers submitted in connection with the cross-motions for summary judgment, I find that AIU has cited no other countervailing factors or made any other persuasive argument which suggest that New York law, rather than Illinois law, should govern this dispute.[16] Accordingly,

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[16]For example, AIU asserts that (1) New York has a "paramount interest" in this action because it has adopted a policy which disapproves of contractual forfeiture based on a "technical" breach in the reinsurance context (see, e.g., AIU's Mem. in Supp. of Mot. for Summ. J. at 25) and (2) in any event,

(continued...)

for all the foregoing reasons, I continue to find that Illinois law governs.

3. Prejudice

Because Illinois law applies to this dispute, prompt notice is a prerequisite to coverage under the Reinsurance Certificates. Keehn v. Excess Ins. Co., 129 F.2d 503, 505 (7th Cir. 1942); Allstate Ins. Co. v. Emp'r Reinsurance Corp., 441 F. Supp. 2d 865, 875 (N.D. Ill. 2005) ("The law in Illinois . . . is clear that a notice requirement, such as the one contained in the [reinsurance] [t]reaty, is a condition precedent to coverage."); 22A Paul Coltoff, Stephen Lease, Thomas Muskus & David Yanes, Illinois Law & Practice: Insurance § 580 (1999) ("The failure of the reinsured to give the reinsurer notice of a loss in accordance with the terms of the reinsurance contract constitutes a bar to recovery by the reinsured against the reinsurer . . . . "). Thus, "when the insured fails to comply with a prompt notice requirement, the insurer may deny liability,

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[16](...continued)
even if Illinois once had an interest in this action, it no longer does as a result of IIC's subsequent merger with TIG (see, e.g., AIU's Reply Mem. in Supp. of Mot. for Summ. J. at 6-8). These arguments, however, simply seek to avoid application of well-established New York choice-of-law principles, and, thus, must, therefore, be rejected.

regardless of whether it has been prejudiced by the delay." Allstate Ins. Co. v. Emp'r Reinsurance Corp., supra, 441 F. Supp. 2d at 875, citing INA Ins. Co. v. City of Chicago, 62 Ill. App. 3d 80, 83, 379 N.E.2d 34, 37, 19 Ill. Dec. 519, 522 (Ill. App. Ct. 1st Dist. 1978); accord Keehn v. Excess Ins. Co., supra, 129 F.2d at 505; see also West Am. Ins. Co. v. Yorkville Nat'l Bank, 238 Ill.2d 177, 185, 939 N.E.2d 288, 293, 345 Ill. Dec. 445, 450 (2010); Country Mut. Ins. Co. v. Livorsi Marine, Inc., 222 Ill.2d 303, 316-17, 856 N.E.2d 338, 346, 305 Ill. Dec. 533, 541 (2006); Farmers Auto. Ins. Ass'n v. Burton, 2012 Ill. App. 4th 110289, 967 N.E.2d 329, 333-34, 359 Ill. Dec. 599, 603-04 (Ill. App. Ct. 4th Dist. 2012); Emp'r Reinsurance Corp. v. E. Miller Ins. Agency, Inc., 332 Ill. App. 3d 326, 336-37, 773 N.E.2d 707, 715, 265 Ill. Dec. 943, 951 (Ill. App. Ct. 1st Dist. 2002); Northbrook Prop. & Cas. Ins. Co. v. Applied Sys., Inc., 313 Ill. App. 3d 457, 464, 729 N.E.2d 915, 920-21, 246 Ill. Dec. 264, 269-70 (Ill. App. Ct. 1st Dist. 2000).

AIU contends again, as it did at the time of the February 2010 R&R, that because the Illinois Supreme Court has not yet addressed whether a reinsurer that refuses coverage on the ground of late notice needs to show prejudice, this issue remains "an open question" (see, e.g., AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 15-19; AIU's Mem. in Supp. of Mot. for

Summ. J. at 17-19; AIU's Reply Mem. in Supp. of Mot. for Summ. J. at 3 n.3). However, for the same reasons set forth in the February 2010 R&R (see Docket Item 80 at 25-28), this is not an obstacle to a grant of summary judgment. See 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice & Procedure § 2725 (3d ed. 1998) ("The fact that difficult questions of law exist . . . is not in and of itself a ground for denying summary judgment inasmuch as refusing to grant the motion does not obviate the court's obligation to make a difficult decision . . . . "); see also Schwartzberg v. Califano, 480 F. Supp. 569, 578 (2d Cir. 1979); SEC v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir. 1978).

Moreover, AIU's argument on the merits remains unconvincing. Although it may be the case that some jurisdictions require a showing of prejudice in order to relieve a reinsurer from liability in late notice cases, AIU has still cited no Illinois authorities endorsing this result.[17] To the contrary,

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[17]At best, AIU refers to TIG's citation of Casualty Ins. Co. v. Constitution Reins. Co., No. 91 L 14732, slip. op. (Ill. Cir. Ct. Cook Cnty. Jan. 22, 1996) and contends that the court therein discussed favorably the Court of Appeals for the Second Circuit's decision in Unigard Sec. Ins. Co. v. North River Ins. Co., 4 F.3d 1049 (2d Cir. 1992) (AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 16). However, the court in Casualty Ins. Co. also stated:

> Neither can Casualty successfully argue that Illinois,

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Keehn v. Excess Ins. Co., supra, 129 F.2d at 505 and Allstate Ins. Co. v. Emp'r Reinsurance Corp., supra, 441 F. Supp. 2d at 875, both of which were decided by federal courts sitting in Illinois, have addressed this specific issue and have rejected a prejudice requirement. Keehn was decided 70 years ago, and neither AIU's research, nor my own, has disclosed any Illinois authorities rejecting or even criticizing the decision. On the basis of the foregoing, I continue to conclude that Keehn and Allstate accurately state Illinois law.

Accordingly, because TIG has demonstrated the absence of a genuine issue of material fact with respect to the choice-of-law issue and AIU has not produced any facts showing a genuine issue of material fact for trial, I respectfully recommend that summary judgment be granted in TIG's favor on the issue of choice

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[17](...continued)
like New York in Unigard, is a state that requires a showing of prejudice before a want of timely notice defense can be asserted. In the first place, were it necessary to this court's determination of the case at bar [although it is not], the legal determination would be made that in Illinois no prejudice need be shown.

Casualty Ins. Co. v. Constitution Reins. Co., supra, No. 91 L 14732 at ¶ 25; see also Ex. 5 to Supplemental Declaration of Joelle B. Larson, dated June 23, 2011 ("Supp. Larson Decl.") (Docket Item 105). Although AIU argues that this comment is a "single sentence of dicta (without any analysis)," see AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 16, AIU's opinion of whether a court's decision is particularly well-supported is ultimately irrelevant to the analysis here.

of law. Because Illinois law on the subject is clear, I further recommend that summary judgment be granted in TIG's favor on the issue of whether a reinsurer needs to demonstrate prejudice to deny coverage to a reinsured which has failed to comply with a policy provision requiring prompt notice of claims.

C. Timeliness of Notice

TIG next seeks a ruling that AIU breached the Reinsurance Certificates by providing late notice of the Foster Wheeler Claim. According to TIG, AIU's obligation to provide notice arose in July 2001 when Foster Wheeler filed its third-party complaint against AIU (TIG's Mem. in Supp. of Mot. for Summ. J. at 2, 11, 14-16). TIG further contends that (1) this obligation arose from a prompt notice provision contained in the Reinsurance Certificates, stating that "[p]rompt notice shall be given to the Reinsurer by the Company of any occurrence or accident which appears likely to involve this reinsurance" and (2) AIU failed to give notice of the Foster Wheeler Claim until January 2007 and that this almost six-year delay constitutes late notice as a matter of law (TIG's Mem. in Supp. of Mot. for Summ. J. at 2, 6, 11-13, 16-18).

AIU "acknowledges that notice [of the Foster Wheeler Claim] should have been issued [to TIG] before 2007"[18] (AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 4). However, AIU argues that summary judgment should not be granted in TIG's favor because there is an issue of fact as to whether TIG had actual knowledge of the Foster Wheeler Claim such that it cannot prevail

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[18]AIU further states: "AIU, in fact, drafted a notice to its reinsurers in 2004 [concerning the Foster Wheeler Claim,] but due to a confluence of events[,] it was never sent" (AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 4 n.3). AIU maintains that it was not required to give TIG notice of the Foster Wheeler Claim until early 2004 because of a $100,000.00 per claim deductible for asbestos-related claims contained in the AIU Umbrella Policies that had to be exhausted prior to the coverage in the Reinsurance Certificates attaching (see, e.g., AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 25-28). However, because AIU concedes that it did not provide TIG with notice of the Foster Wheeler Claim until January 2007, whether the delay in notice was three years or five and one-half years would not alter the analysis here because both passages of time are significant delays in light of the facts underlying this action. See Keehn v. Excess Ins. Co., supra, 129 F.2d at 504-05 (affirming a finding of late notice in reinsurance context based on approximately twenty-month delay); see also Safety Nat'l Cas. Corp. v. Vill. of Cahokia, No. 3:09–cv–482–JPG–DGW, 2010 WL 3724296 *5 (S.D. Ill. Sept. 15, 2010) (finding that a delay of approximately five to eight months in excess insurance case was unreasonable). In addition, I note that AIU ultimately characterizes this issue as "irrelevant" (see AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 4-5) ("While the issue of when notice was due is a complex factual question that cannot be determined on this motion for summary judgment, it is ultimately irrelevant in this case because TIG independently had actual knowledge of the event of which it claims it did not receive notice.") (emphasis in original)). Accordingly, I address AIU's argument concerning TIG's putative actual knowledge of the Foster Wheeler Claim in the text.

on its late notice defenses. Specifically, AIU contends that TIG had actual knowledge of the Foster Wheeler Claim through (1) IIC's participation as a named defendant in the Coverage Litigation with respect to excess insurance policies that it had issued to Foster Wheeler and (2) TIG's internal review of its Foster Wheeler exposure approximately one year prior to the commencement of the Coverage Litigation, which disclosed to it that IIC had reinsured the AIU Umbrella Policies (AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 4-5, 20-23). This actual knowledge, AIU contends, is sufficient under Illinois law to demonstrate that TIG had "reasonable notice" of the Foster Wheeler Claim (see, e.g., AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 19-24).

Illinois courts have held that, "if [an] insurer receives timely notice of an occurrence from a third party, this actual notice may satisfy the policy requirement."[19] Casualty

[19]In addition, the Illinois Supreme Court has explained:

> The timeliness of an insured's notice to its insurer generally is a question of fact for the trier of fact. Northbrook Property & Casualty Insurance Co. v. Applied Systems, Inc., 313 Ill. App. 3d 457, 465, 246 Ill. Dec. 264, 729 N.E.2d 915 (2000); University of Illinois v. Continental Casualty Co., 234 Ill. App. 3d 340, 363, 175 Ill. Dec. 324, 599 N.E.2d 1338 (1992) . . . . The following factors may be considered in determining whether notice to an insurer has been given within a reasonable time: (1) the specific language of the policy's notice provision; (2) the insured's

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Indem. Exch. v. Vill. of Crete, 731 F.2d 457, 458 (7th Cir. 1984), citing Ill. Valley Minerals Corp. v. Royal-Globe Ins. Co., 70 Ill. App. 3d 296, 300-01, 388 N.E.2d 253, 256-57, 26 Ill. Dec. 629, 632-33 (Ill. App. Ct. 3d Dist. 1979). Although these cases were decided in the context of direct insurance, courts frequently apply direct insurance principles to the reinsurance context. See, e.g., Keehn v. Excess Ins. Co., supra, 129 F.2d at 505; Allstate Ins. Co. v. Emp'r Reins. Corp., supra, 441 F. Supp. 2d at 871-72; Centaur Ins. Co. v. Safety Nat'l Casualty Corp., 92 Civ. 5996, 1993 WL 434056 at *5 (N.D. Ill. Oct. 22, 1993); In re Liquidation of Inter-Am. Ins. Co., 329 Ill. App. 3d 606, 615-16, 768 N.E.2d 182, 191, 263 Ill. Dec. 422, 431 (Ill. App. Ct. 1st Dist. 2002).

However, as already discussed in the February 2010 R&R (see Docket Item 80 at 38-41), IIC's involvement in the Coverage Litigation is insufficient by itself to create an issue of fact

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[19](...continued)
sophistication in commerce and insurance matters; (3) the insured's awareness of an event that may trigger insurance coverage; (4) the insured's diligence in ascertaining whether policy coverage is available; and (5) prejudice to the insurer. Country Mutual, 222 Ill.2d at 313, 305 Ill. Dec. 533, 856 N.E.2d 338.

West Am. Ins. Co. v. Yorkville Nat'l Bank, supra, 238 Ill.2d at 185, 939 N.E.2d at 293-94, 345 Ill. Dec. at 450-51; see also Country Mut. Ins. Co. v. Livorsi Marine, Inc., supra, 222 Ill.2d at 311-12, 856 N.E.2d at 343, 305 Ill. Dec. at 538.

as to the prompt notice provision. Specifically, although notice from third parties can satisfy policy requirements under Illinois law, reinsurers are not charged with notice based merely on receipt of non-specific information that might lead to discovery of a potential claim. See Centaur Ins. Co. v. Safety Nat. Cas. Corp., supra, 1993 WL 434056 at *4 (coincidental receipt of summons in suit against underlying insured by reinsurer's agent did not constitute adequate notice that the claim may have involved reinsurer); accord Unigard Sec. Ins. Co., Inc. v. N. River Ins. Co., supra, 4 F.3d at 1067 (letters from cedent to reinsurer concerning reinsurance agreement covering class of policies did not constitute notice that agreement covering specific policies would be implicated because "[t]o hold that such letters created a duty on the part of [the reinsurer] to investigate . . . [whether the policy] would be affected, would ignore the imperatives of the reinsurance market that reinsurers receive such information from ceding insurers"). Here, IIC was among 39 defendants named in the Coverage Litigation, was named in connection with excess insurance, rather than reinsurance, policies and was not named in the third-party complaint. Furthermore, AIU was one of 13 third-party defendants named in the third-party complaint, which does not allocate liability among the 13 defendants.

In addition, in the context of direct insurance, Illinois courts have declined to impose a burden of investigation on insurers based on information that they receive from third parties. See Bd. of Educ. of Twp. High Sch. No. 211 v. TIG Ins. Co., 378 Ill. App. 3d 191, 195, 881 N.E.2d 957, 960, 317 Ill. Dec. 471, 474 (Ill. App. Ct. 1st Dist. 2007) ("We will not hold an insurer liable to investigate and determine whether there are possible collateral claims forthcoming from other insureds when some of the insurer's insureds are sued for damages. Such a holding would vitiate the policy language requiring the [cedent] to immediately notify [the reinsurer] when it learned of such an occurrence."); Am. Family Mut. Ins. Co. v. Blackburn, 208 Ill. App. 3d 281, 288, 566 N.E.2d 889, 893, 153 Ill. Dec. 39, 43 (Ill. App. Ct. 4th Dist. 1991) (coverage in the press of criminal case against insured did not constitute adequate notice of occurrence because policy did not cover intentional acts and "to place a burden on all insurance agents to infer possible policy coverage whenever they read of an act of violence is unreasonable"). Accordingly, it was AIU's responsibility, and not TIG's, to examine the third-party complaint to determine whether it might implicate their reinsurance policies.

AIU also argues that, in addition to TIG's participation in the Coverage Litigation, TIG had knowledge of its spe-

cific exposure under the Reinsurance Certificates. If AIU is correct that TIG's reinsurance claims handlers did, in fact, have notice of the information contained in the third-party complaint, this would, at the very least, create an issue of fact as to whether the notice provisions of the Reinsurance Certificates were satisfied.[20] In support of its argument, AIU refers to the following documents: (1) a January 17, 2000 memorandum (the "January 2000 Memo") written by Bruce Klinker, a claims handler for Riverstone, an affiliate of TIG, which states that he had reviewed the AIU Umbrella Policies and initially believed that both AIU and IIC may have issued them and (2) an April 25, 2000 memorandum (the "April 2000 Memo") written by Klinker, which states that after speaking with Pascale and Reid, the "CFR slip policies" that he had come across were indeed reinsurance arrangements that had never been used for direct insurance coverage (AIU's Mem. in Opp. to TIG's Mot. for Summ. J. at 22-23; AIU's Mem. in Supp. of Mot. for Summ. J. at 13-14; see also Exs. 223 and 268 to Abrams Decl.).

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[20]Specifically, Foster Wheeler's third-party complaint states that as of December 31, 2000, Foster Wheeler had paid more than $265 million to defend or dispose of asbestos related claims and that its primary insurance policies had been exhausted (Ex. 6 at ¶¶ 1, 27 to Aldort Decl. 2009). This complaint gives notice, therefore, that Foster Wheeler's excess insurance policies were exposed to large claims, which, in turn, implicated the Reinsurance Certificates.

On the basis of the foregoing, AIU contends that "just prior to the commencement of the Coverage Litigation, TIG actively reviewed its own exposure to Foster Wheeler, and in the course of that investigation, determined that TIG reinsured AIU's Umbrella Policies issued to Foster Wheeler, and shared that information with the head of TIG's reinsurance claims department" (AIU's Reply Mem. in Supp. of Mot. for Summ. J. at 2). However, AIU states that TIG did nothing more with this information.

TIG contends that the January and April 2000 Memos are insufficient to establish that it had actual knowledge of the Foster Wheeler Claim. Specifically, TIG argues that these memoranda (1) indicate only that Klinker made an "internal inquiry [into] whether a certificate was direct or reinsurance coverage, with no reference to any claims, much less any reference to the asbestos claims for which AIU was required to give notice to TIG under the Reinsurance Certificates" and (2) predate the Coverage Litigation in any event (TIG's Mem. in Supp. of Mot. for Summ. J. at 17 n.14).

TIG is correct that this evidence is also insufficient to give rise to a question of fact as to whether it had actual knowledge of the Foster Wheeler Claim. The mere fact that TIG was aware that it had issued particular reinsurance certificates does not indicate that TIG had notice of the specific information

contained in the third-party complaint. Moreover, the third-party complaint was filed in July 2001 -- approximately one year after the above-referenced communications among Klinker, Pascale and Reid took place. Finally, during Pascale's deposition, conducted on June 23, 2010, he testified as follows:

> [In 2000,] Bruce [Klinker] came over to my cubical. He showed me -- I don't know whether it was one contract or a couple of contracts. He asked me if I knew what they were, and I had asked him where he got those contracts. He said he was gathering information on insurance policies issued to Foster Wheeler by companies whose run-off they were managing, and these contracts came up during that search.
>
> I told him [i.e., Klinker] that they were facultative reinsurance certificates, not direct insurance. I asked if any claims were being made against those certificates. He said no. I told him that there was really at that point nothing for me to do but wait for a claim to be made against them, at which point my department would handle those claims. The assumed reinsurance department would handle those claims. That was basically the entire conversation.

(Pascale Ex. at 36-37 to Dep. Tr. Cited in Abrams Decl.). Thus, AIU has still not demonstrated that TIG had actual knowledge of the Foster Wheeler Claim as it related to TIG's reinsurance exposure.

Accordingly, because TIG has also demonstrated the absence of a genuine issue of material fact with respect to the timeliness of notice issue and AIU has not produced any facts showing a genuine issue of material fact for trial, I respect-

fully recommend that summary judgment be granted in TIG's favor.[21]

IV. Conclusion

Accordingly, for all the foregoing reasons, I respectfully recommend that (1) TIG's motion to strike paragraphs 5, 8 and 9 of the Kafaf Declaration be denied, (2) TIG's renewed motion for summary judgment be granted in its entirety and (3) AIU's cross-motion for partial summary judgment be denied in its entirety. Specifically, I recommend that this Court make the following findings: (1) Illinois law governs this dispute, and, thus, TIG need not prove prejudice from AIU's late notice of the claim and (2) AIU breached the Reinsurance Certificates by providing late notice of the Foster Wheeler Claim. If adopted, this Report and Recommendation will close Docket Items 97, 100 and 110 in this matter.

[21]Because I find that AIU breached the Reinsurance Certificates and that TIG should prevail on its late notice defenses, I need not reach the following issues raised by the parties: (1) AIU's putative lack of procedures for providing its reinsurers with prompt notice of claims; (2) TIG's putative failure to demonstrate tangible economic injury as a result of receiving late notice of the Foster Wheeler Claim and (3) AIU's cross-motion for partial summary judgment dismissing the majority of TIG's affirmative defenses.

V. OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from receipt of this Report to file written objections. See also Fed.R.Civ.P. 6(a). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the Chambers of the Honorable Sidney H. Stein, United States District Judge, 500 Pearl Street, Room 1010, and to the Chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Stein. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS **WILL** RESULT IN A WAIVER OF OBJECTIONS AND **WILL** PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140, 155 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair

Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
August 16, 2012

Respectfully submitted,

HENRY PITMAN
United States Magistrate Judge

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