

Declaring That *Bellefonte* Is No Longer The Law Of The Circuit, Second Circuit Rules That Defense Costs Are Not Subject To Reinsurance Policy Limits (Insurance Law Alert)

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The Second Circuit ruled that defense costs were not subject to limits set forth in facultative reinsurance certificates. *Global Reinsurance Corp. of Am. v. Century Indem. Co.*, 2021 WL 6122136 (2d Cir. Dec. 28, 2021).

Global issued facultative reinsurance certificates to Century that indemnified expenses Century incurred in connection with commercial liability policies issued to Caterpillar Tractor Company. When Century sought reinsurance payments from Global for amounts paid to Caterpillar, Global sought a declaration that the limits of the reinsurance certificates capped its obligations with respect to both losses and defense costs. In contrast, Century argued that the limits applied only to indemnity losses and that Century's defense costs were payable in addition to policy limits.

A New York district court, applying *Bellefonte Reins. Co. v. Aetna Cas. & Sur. Co.*, 903 F.2d 910 (2d Cir. 1990), ruled in Global's favor, finding that certificates' limits imposed a cap on both losses and defense costs. (See [March 2020 Alert](#)). On appeal, Century argued that defense costs were not subject to the limits because the reinsurance certificates followed form to Century's underlying policies to Caterpillar, under which defense costs were in addition to policy limits. In a certified question, the Second Circuit asked the New York Court of Appeals whether New York law imposes a presumption that reinsurance liability limits cap both loss and defense costs regardless of the terms of the underlying policy. The Court of Appeals answered the question in the negative, stating that ordinary rules of policy interpretation apply in such cases. Following remand by the Second Circuit, the district court reversed its prior decision. Last month, the Second Circuit affirmed that ruling.

The Second Circuit ruled that Global's reinsurance obligations were subject to the same terms as Century's underlying policies, including the payment of defense costs in addition to policy limits. The court explained that this result was supported by the unambiguous follow-form clause and expert testimony relating to industry custom and practice. In particular, the court emphasized that the follow-form clause specified that the reinsurance conformed "in all respects" to "all" terms and conditions of the underlying policies unless expressly stated otherwise. The court rejected Global's contention that a "Reinsurance Accepted" provision established an intent that the reinsurance contract would not be concurrent with the underlying Century policies as to whether defense costs would be subject to the certificates' limits.

The court noted that this conclusion was also supported by expert testimony regarding reinsurance industry custom and practice, which established that during the relevant time frame, “unless otherwise specifically stated, facultative reinsurance certificates covered investigation and defense expense in addition to limits of liability when the reinsured policy covered expense in addition to its limits of liability.” The Second Circuit stated: “To the extent that *Bellefonte* and *Unigard* suggest a different result, we conclude that those decisions . . . are no longer valid law in our circuit.”

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