Would Reinsurers Be Liable For Retroactive COVID-19 Coverage?

By **Andrew Foreman and Teresa Snider** (April 24, 2020)

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Many insurance policies covering business interruptions require physical loss of or damage to property, and some contain explicit virus exclusions. As such, the extent to which COVID-19-related business interruptions would trigger coverage under those policies remains unclear.

In response, legislators in New Jersey, Ohio, Massachusetts, New York, Pennsylvania, Louisiana and South Carolina have proposed laws that would impose liability on insurers for such business interruptions without regard to whether there is physical property damage or a virus exclusion in the policy.[1]

As the economic toll grows, it seems likely more states will join in — indeed, during the writing of this article, the list of states where legislation has been introduced has been updated several times. In addition, members of Congress have urged insurers to "recognize financial loss due to COVID-19 as part of policyholders' business interruption coverage," in spite of physical damage requirements.[2]

Others have proposed legislatively declaring the crisis a "qualifying event for all existing ... business interruption insurance policies,"[3] suggesting the federal government might join state efforts.[4] The insurance industry has responded with strong opposition to the proposals to expand coverage retroactively: "Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19."[5]

If these, or any similar, legislative proposals were to pass, they would expand coverage under policies that otherwise would not have covered business interruptions due to COVID-19. Undoubtedly, there will be legal challenges to such expansions of coverage, and some commentators have already addressed the constitutionality of such legislation.[6]

But these legislative measures may survive such legal challenges, as courts have previously permitted states to alter contractual relationships in limited circumstances — including in connection with states of emergency.[7] Assuming any of these proposals passes and is upheld by a court, reinsurers will face the question of whether they are liable to their ceding companies for any expanded coverage mandated by the legislation.[8]

To answer the question, first consider what would happen if insurers were to pay uncovered business interruption claims without being compelled legislatively. In most cases, COVID-19 claim payments clearly outside coverage would not be reinsured, unless the reinsurance agreement provided coverage for ex gratia payments.

A real-life example of the reinsurance consequences stemming from an insurer's payment of claims outside coverage occurred when Hurricanes Charley, Frances, Jeanne and Ivan all hit in 2004. At the time, policies covering hurricane wind damage charged homeowners one deductible per storm, leaving an estimated 36,000 Florida policyholders on the hook for multiple deductibles where more than one hurricane damaged their insured properties.[9]

Some insurers waived multiple deductibles, but reinsurers responded that they were not likely to subsidize the decision because the reinsurers' premium was "a function of the expectations that deductibles [would be] enforced."[10] Significantly, there was no legal obligation for the insurers to waive the multiple deductibles, only political pressure to do so.

If there had been a legal requirement to waive — if, for example, Florida had passed legislation to eliminate multiple deductibles from 2004 policies retroactively — the potential liability of the reinsurers may have landed in a gray area. That gray area, between the clear cases of claim payments within existing coverage and outside retroactively expanded coverage, is the focus here.

Several typical reinsurance contract clauses will likely be central to the analysis, including follow-the-form, original-conditions, follow-the-fortunes, and follow-the-settlements clauses. All are broadly designed to make reinsurance operate in parallel with the underlying coverage. But the effect of those clauses after a mandated retroactive legislative change in the underlying coverage remains an unsettled legal question.

Other clauses in the reinsurance contract may also be relevant to coverage. And to the extent reinsurers could make any constitutional challenge to the legislation, the analysis in the reinsurance context may be different than the analysis that would apply in the direct insurance context.

Follow-the-Form or Original Conditions Clauses

Follow-the-form clauses aim to achieve concurrency between the underlying policy or policies and the reinsurance contract, "'incorporat[ing] by reference all the terms and conditions of the reinsured policy [or policies], except to the extent that the reinsurance contract by its own terms specifically defines the scope of coverage differently.'"[11] A follow-the-form clause might provide:

> The liability of [the reinsurer] specified in Item 4 of this Certificate shall follow that of [the cedent], and except as otherwise specifically provided herein, shall be subject in all respects to the terms and conditions of [the cedent's] policy.[12]

Similarly, an original conditions clause might say that the reinsurance is:
subject to the same terms, conditions, interpretations, waivers, modifications, alterations, and cancellations as the respective policies of the Company to which this Contract applies.[13]

If the scope of the cedent's liability changes, as would happen if business interruption coverage expands retroactively, a follow-the-form clause or original conditions clause might change the scope of the reinsurer's liability as well. Although no cases of mandated retroactive changes to coverage have been identified, several cases examine the effect of consensual changes under a follow-the-form clause in the context of excess insurance.

In Gencorp Inc. v. American International Underwriters,[14] the court examined "whether certain excess insurance policies, which 'sit above' and 'follow form' to two underlying umbrella insurance policies, incorporate[d] from the underlying umbrella policies an absolute pollution exclusion endorsement added after the policy period had ended and made retroactive to the inception date of the underlying umbrella policies."[15]

The policyholder was party to both the umbrella policies and the excess policies. The excess policies expressly provided that they "would incorporate the terms of the underlying ... [p]olicies and that any of those policies could—at least under appropriate circumstances—be modified by endorsement."[16] For example, one of the excess policies included this follow-the-form provision:

> Except as may be inconsistent with this Certificate, the coverage provided by this Certificate shall follow the insuring agreements, conditions and exclusions of the underlying insurance (whether primary or excess) immediately preceding the layer of coverage provided by this Certificate, including any change by endorsements.[17]

Over a decade after the policies were issued, the policyholder and its umbrella insurer (which was a captive of the policyholder) settled a coverage dispute and amended both underlying umbrella policies by retroactive endorsement, limiting the scope of coverage by excluding all pollution liability.[18]

The policyholder later sued its excess insurers to recover defense costs and obtain indemnification for pollution losses, but the excess insurers responded that because their policies "followed form" to the umbrella policies, their scope of coverage narrowed in accordance with the retroactive endorsement.[19]

The Sixth Circuit agreed with the excess insurers. Among the factors the court considered were that the follow-the-form provisions in the excess policies showed that the policyholder and excess insurers "did intend for the excess policies to follow the form of the underlying ... policies, including future changes."[20]

In addition, "there is no per se rule against post-loss modifications."[21] Because the policyholder "agreed that the Endorsements would be 'effective from inception[,]' ... from the Excess Insurers' standpoint, the Endorsements were in place on the effective dates of the [underlying p]olicies, and were therefore properly incorporated into the applicable policies."[22]

Finally, although "the Excess Insurers [were] benefitting from a fortuitous change in the underlying contracts, ... that fortuity was created by" the policyholder.[23]

In R.W. Beck & Associates v. City & Borough of Sitka,[24] the U.S. Court of Appeals for the Ninth Circuit held that under a 'following form umbrella policy, an excess insurer was bound by a retroactive change to the underlying policy that expanded coverage.[25] Both the underlying primary policy and the excess policy initially lacked contract liability coverage.[26]

After a loss and jury verdict against the policyholder, the underlying insurer and policyholder "agreed to a 'voluntary reformation' of the [underlying] policy" by endorsement, made retroactive to the date of inception, that provided coverage for contractual liability claims.[27] The policyholder argued that the coverage had been omitted by mutual mistake.[28]

In holding the excess insurer liable, the court explained that "[b]y agreeing to 'follow the form' of the underlying policies and issuing excess liability insurance without reviewing those policies, [the excess insurer was] bound by a change in an underlying policy to correct a mutual mistake."[29]

In particular, the court noted that the excess insurer "did not rely on the error in the [underlying] policy when [it] issued its excess policy"; the policyholder told its excess insurer when procuring the excess policy that the underlying primary policy "would include" contract liability coverage; and the excess insurer "noticed the absence of a contract liability provision, but did not inform [its policyholder] of this apparent error, did not adjust its premium downward, and was not concerned because under its 'following form' excess policy it faced no exposure on claims not covered by an underlying primary policy."[30]

Similarly, in L. E. Myers Co. v. Harbor Insurance Co.,[31] the Illinois Supreme Court affirmed the liability of an umbrella insurer whose policy followed form to the underlying policy, which the underlying insurer had retroactively amended by endorsement after a loss.[32] The underlying insurer "had erred in failing to limit the exclusion" as the policyholder had requested and "agreed to incorporate in the policy" the omitted term.[33]

The court found it significant that the umbrella insurer "admittedly did not see a copy of the [underlying] policy before issuing its own," nor "had [it] been advised by either the [policyholder] or the [policyholder]'s broker as to what coverage was provided by the [underlying] policy."[34] In addition, the umbrella insurer did not claim that "the premium which [it] charged was not in an amount sufficient to purchase coverage under the policy as reformed."[35]

These cases suggest that the existence of a follow-the-form clause would be relevant to whether a reinsurer would be liable for a retroactive expansion of underlying coverage. But none of the decisions relies solely on the existence of a follow-the-form clause. They also acknowledge additional factors that may also be relevant to the analysis in the reinsurance context, such as:

- Whether the parties intended the follow-the-form clause to cover future changes to coverage (even where such changes apply retroactively), especially if that intent is explicit — for example, the sample original conditions clause above specifically references "modifications" and "alterations";
- Whether the reinsurer saw the underlying policy (or policy form) prior to issuing the reinsurance contract;
- Whether the reinsurer knew the underlying policy included a particular coverage requirement or exclusion;
- Whether the reinsurer expressly approved the policy form; and
- Whether the reinsurer relied on any knowledge it had about the underlying policy in issuing the reinsurance contract, such as by modifying the terms of the proposed reinsurance when the specific provisions in the underlying policy became known or by pricing the reinsurance contract on the basis of the existence of certain coverages or exclusions.

On the other hand, in all of the above-cited cases except Gencorp, the underlying insurer and policyholder had agreed on the policy terms before issuance, but the policy was incorrect as issued due to mutual mistake. And in Gencorp, the only case where the underlying insurer and policyholder decided to change the policy terms after the policy was issued, the follow-the-form clause included express forward-looking language.

As noted, the sample original conditions clause quoted above provides that the reinsurance is "subject to the same ... modifications[and] alterations ... as the respective policies of the Company," which a court might find includes a retroactive expansion of coverage. However, in contrast to the analysis in L. E. Myers, it seems likely the premium paid to the reinsurer would not have been "in an amount sufficient to purchase coverage under the policy as reformed."

Finally, some reinsurance contracts preclude the insurer from changing its policy forms without prior reinsurer approval. Although such a provision might play into the analysis, unlike in the typical scenario in which the application of the clause would have been contemplated, the insurer responding to a mandatory legislated change in coverage would not have instigated the change — it would have been forced upon the insurer.

Follow-the-Settlements or -Fortunes Clauses

Follow-the-settlements or follow-the-fortunes clauses — used interchangeably here, as some courts do — bind a reinsurer to its cedent's claims-handling decisions. According to some courts, "[t]hey preclude the reinsurer from challenging a cedent's decision to settle so long as the settlement is 'reasonably within the terms of the [cedent's] policy, even if not technically covered by it' and so long as the cedent has acted in good faith."[36] A follow-the-settlements clause might say:

All claims involving this reinsurance, when settled by [the cedent], shall be binding on [the reinsurer], which shall be bound to pay its proportion of such settlements promptly following receipt of proof of loss.[37]

To bind a reinsurer under the follow-the-settlements doctrine, the cedent's payment must be "at least arguably within the scope of the insurance coverage that was reinsured," not "fraudulent, collusive or otherwise made in bad faith, and ... not an ex gratia payment."[38] An ex gratia payment is "one made by a party that recognizes no legal obligation to pay."[39]

A party might make such a "payment to avoid greater expense, as in the case of a settlement by an insurance companyto avoid the cost of a suit,"[40] or in the context of an ongoing business relationship, as a commercial accommodation. Follow-the-settlements assumes "concurrency of coverage between the ceding company's policy and the policy of reinsurance."[41] Otherwise, a payment within the underlying policy's coverage would not necessarily be within the reinsurance coverage.

In North River Insurance Co. v. CIGNA Reinsurance Co.,[42] the U.S. Court of Appeals for the Third Circuit held that the "'follow the fortunes' doctrine does not require the reinsurer to cover risks undertaken after the certificate of reinsurance is issued."[43] In short, "a reinsurer cannot be held liable for a kind of loss that it did not agree to cover."[44]

In so ruling, the Third Circuit cited Insurance Company of North America v. United States Fire Insurance Co.,[45] a case involving facultative reinsurance in which the insurer's addition of coverage after the underlying policy was issued did not bind its reinsurer.

In INA, the insurer issued an open marine cargo policy to its policyholder and purchased facultative reinsurance for that risk. The insurer subsequently issued two binders, providing coverage retroactively for the policyholder during inland transport and bagging of the cargo and charging additional premium for that coverage. A hurricane destroyed the cargo during bagging operations.

The insurer paid the claims and sought recovery from its reinsurer, which refused payment. The insurer argued that the reinsurer was liable to pay as a result of the following provision in the reinsurance contract:

> This reinsurance is subject to such risks, valuations and conditions, usual or unusual as are or may be taken or granted by the reassured, including any alterations, amendments or extensions to which the reassured may hereafter agree without notice to the reassurers, and to pay as may be paid by the reassured, liable or not liable.[46]

The court disagreed, finding that the reinsurer had never agreed to reinsure a loss not covered by the original insurance policy.[47] The issuance of the binders and the testimony of the policyholder established that the claim was for a risk not covered by the original policy. Notably, the court made its decision in INA in the context of a consensual expansion of coverage by the underlying insurer, as in the follow-the-form cases described above.[48]

In contrast, although the retroactive expansion of business interruption coverage under the various legislative proposals mentioned above would be a risk "undertaken after the certificate of reinsurance [was] issued," quoting from North River, the insurer would not have voluntarily agreed to cover that business interruption risk. Both the insurer and reinsurer would be paying claims outside the original coverage grant as a result of legislation expanding the coverage provided by the policy.

Looking further at the exceptions to the applicability of follow-the-settlements — when payments are fraudulent, collusive or ex gratia — muddies the water even more. In the usual case, a payment outside the scope of a policy as initially written is ex gratia, as the scope of coverage does not change in the ordinary course.

Thus, an argument exists that the positive requirement that a payment be "at least arguably within the scope of the insurance coverage" is essentially the same as saying that the payment must not be ex gratia. These requirements are arguably two sides of the same coin.

If an insurer paid a COVID-19 business interruption claim that it would not otherwise have paid, and that payment was at least arguably within the retroactively expanded scope of coverage, the payment would not have been fraudulent, collusive or ex gratia under the expanded coverage. For example, New Jersey's proposed statute states:

> Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption in force in this State on the effective date of this act, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic, as provided in the Public Health Emergency and State of Emergency

> declared by the Governor in Executive Order 103 of 2020 concerning the coronavirus disease 2019 pandemic.

Thus, even though such coverage might be outside the original policy's coverage grant, the insurer would nonetheless have a legal obligation to pay. Though that wouldn't change the policy that was reinsured — the policy as it was written when the reinsurer agreed to cover it — it might complicate the reinsurance analysis.

The court in North River observed, quoting from the INA case, that "'[i]t would be an unwarranted and indeed tortured construction of [follow-the-fortunes] to hold a reinsurer bound, for example, to pay if the prime insurer paid monies to its insured on a claim completely without the scope of the policy and not in good faith.'"[49]

But here, the insurer would be paying monies within the newly expanded scope of the policy in good faith. If a claim payment is not technically ex gratia, it is conceivable a court or arbitration panel could find the payment to be "at least arguably within the scope of the insurance coverage" for purposes of follow-the-settlements.

Other Clauses

Other provisions of a reinsurance contract may also be relevant to whether a reinsurer would be liable for a legislatively mandated retroactive expansion of coverage. For example, the presence of a clause that explicitly provides coverage for ex gratia payments would be important. A sole-judge clause such as the following might also come into play:

> the Company shall be the sole judge as to what shall constitute a claim or loss covered under the Company's policies and as to the Company's liability thereunder.

Such a clause might be construed to weigh in favor of imposing liability on the reinsurer, as it gives the underlying insurer sole authority to determine coverage. Thus, the insurer's determination that an otherwise-uncovered COVID-19 business interruption claim was, in fact, covered by the underlying policy might arguably bind the reinsurer.

Some reinsurance agreements contain a clause providing coverage for extracontractual obligations. Although, in general, such clauses define extracontractual obligations to include only those liabilities that arise from the handling of any claim or business covered under the reinsurance agreement, some are broader, opening up another potential avenue for recovery.

For example, an extracontractual obligations clause might provide that a reinsurer must pay extracontractual obligations including, but not limited to, those arising out of particular types of conduct, or might include any liability the company is ordered to pay. While "ordered" is generally understood to refer to a court order, in this context it might also refer to legislative action.

In addition, a cedent might argue that the existence of an extracontractual obligations clause backstops its other arguments and moots all reinsurer defenses. On the other hand, some extracontractual obligations clauses pay a different percentage of a loss than is provided for covered losses, potentially reducing interest by cedents in recovering through an extracontractual obligations clause.

Another type of clause that may impact whether and the extent to which a reinsurer may be held liable is the arbitration clause. For example, an arbitration clause that instructs the panel to consider and enforce the original intent of the parties may result in a different outcome than a clause that directs the arbitrators to consider the practice of the reinsurance industry or one that states that the panel should consider the contract to be an honorable engagement and not merely a legal obligation.

Claims control, claims cooperation, and consent to settle clauses that exist in some reinsurance contracts might be relevant as well. These provisions reflect a higher level of reinsurer involvement — in contrast to follow-the-form, -fortunes and -settlements. A reinsurer engaged in approving claim payments under retroactively expanded insurance coverage might find it difficult to refuse reinsurance coverage for those same claims. On the other hand, a reinsurer that refuses to consent to settlement could risk a bad faith claim from both the policyholder and the cedent.

Ultimate net loss and salvage and subrograton clauses might also be implicated where there is a mechanisim for the insurer to recover from state funds. Whether a cedent would need to first attempt to collect from a fund, and then bill its reinsurer for any amounts not recovered, or be able to collect from reinsurers in the first instance and pass along recoveries to it will depend on the provisions of the reisurance contract.

There is also the duty of utmost good faith that permeates the reinsurance relationship. "The duty of utmost good faith is a mutual one; it is an obligation of the reinsurer as well as of the cedent."[50] The duty requires the cedent not to "place its own interests above those of the reinsurer."[51]

Placing the reinsurer's interests on the same level as the cedent's might mean the cedent should challenge the legislation or not pay claims until challenges by others have been resolved or — at the very least — obtain its reinsurer's input before deciding on a course of action with respect to legislatively-expanded coverage.

However, utmost good faith flows in both directions. As a result, cedents are likely to argue that the duty of utmost good faith requires the reinsurer to indemnify the cedent for claims paid under retroactively expanded coverage.

Finally, a court or arbitration panel might be persuaded by an equitable argument to follow the money. If insurers are going to be liable for losses that they did not anticipate, those insurers may argue that their reinsurers should absorb a share of those losses commensurate with the share of premium they received.

Although the U.S. Court of Appeals for the Second Circuit vacated its own opinion for other reasons in Global Reinsurance Corp. of America v. Century Indemnity Co.,[52] the court seemed persuaded that a reinsurer receiving 50% of the premium should bear 50% of the risk.[53] To be sure, equitable arguments about premium could lead to divergent results in court and in arbitration, with courts denying reinsurance claims based on strict reading of the reinsurance contracts and arbitrators making reinsurers share in their cedents' pain.

Constitutionality of Change with Respect to Reinsurance

As noted above, others have addressed the constitutionality of a retroactive expansion of coverage under the contract clause. The resolution of that question will likely turn on whether (1) there is "a substantial impairment of a contractual relationship"; (2) "a significant and legitimate public purpose" for the change exists; and (3) "the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption."[54]

To the extent any separate challenge to the constitutionality of the legislation can be made on the reinsurance level, it might seem on first blush like the analysis of these three factors would not vary between the underlying policy and the reinsurance contract. For example, the "public purpose" in both contexts would be the same: to cover COVID-19 business interruption losses that would not otherwise be covered.

But in determining the extent of the impairment, the first element of the test, a court is "to consider whether the industry the complaining party has entered has been regulated in the past."[55] Insurance is much more regulated than reinsurance. Whether that difference could flip the balance so that the constitutional question comes out one way for the underlying policy and another for the reinsurance contract is unknown.

But in Western National Mutual Insurance Co. v. Lennes (In re Workers' Compensation Refund),[56] the U.S. Court of Appeals for the Eighth Circuit held the retroactive application of a statute redistributing reinsurance premiums to be unconstitutional under the contract clause.[57] In its analysis, the court found "that Minnesota's regulation of excess reinsurance premiums [had] not been sufficiently pervasive so as to destroy all reasonable contractual expectations."[58]

Similarly, the lower level of regulation in the reinsurance industry may affect whether reinsurers would be liable for COVID-19 claims under a retroactive expansion of coverage.

Conclusion

As of this writing, no state has yet passed a retroactive expansion of business interruption coverage to cover COVID-19 losses. If one does and if that legislation is upheld as constitutional, it remains an open question whether reinsurers of the underlying policies will be liable for that expanded coverage.

Other legislative and regulatory responses to the COVID-19 pandemic may also expand insurer liability. The terms of any such statute or regulation and the language of the reinsurance contract, including any "following" clauses — whether form, fortunes or settlements — will be highly relevant to the ultimate outcome of disputes over reinsurer liability, as will the forum in which such a dispute is decided. Case law provides no definitive answer, though a variety of factors identified by the courts in the direct insurance context will likely inform any analysis.

Clarification: This headline has been updated to clarify that the insurance in question would retroactively cover COVID-19 losses.

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[1] COVID-19, Legislation, Reinsurance Ass'n of

Am., https://www.reinsurance.org/Secondary.aspx?id=8199.

[2] Letter from Nydia M. Velazquez et al., Members of Cong., to David Sampson, President & CEO, Am. Prop. Cas. Ins. Ass’n, et al. (Mar. 18, 2020), https://cunningham.house.gov/sites/cunningham.house.gov/files/wysiwyg_uploaded/Signed%20BII%20Letter_Final.pdf.

[3] Press Release, Problem Solvers Caucus, Problem Solvers Caucus Release Health Crisis & Economic Revival Package (Mar. 19, 2020), https://problemsolverscaucus-gottheimer.house.gov/media/press-releases/problem-solvers-caucus-release-health-crisis-economic-revival-package.

[4] There is also a draft proposal in Congress to create a federal pandemic-risk reinsurance program “similar to the Terrorism Risk Insurance Act,” a “federal backstop for terrorism risk created in the aftermath of 9/11.” David Hood & Lydia Beyoud, House Democrats Mull Insurance Program for Virus-Stricken Companies, Bloomberg Law (Apr. 9, 2020), https://news.bloomberglaw.com/coronavirus/house-democrats-mull-insurance-program-for-virus-stricken-companies. The proposal, which “could provide immediate relief” by filling in any gaps in existing business interruption coverage due to virus exclusions, might reduce or eliminate any need for the various state proposals to expand coverage retroactively. But until the details and nature of the program are known and the legislation is passed, any effect on the retroactive coverage expansion proposals remains unclear.

[5] Letter from Charles Chamness, President & CEO, Nat’l Ass’n of Mut. Ins. Cos., et al. to Nydia M. Velazquez, Chair, House Comm. on Small Bus. (Mar. 18, 2020), https://www.hinshawlaw.com/assets/htmldocuments/Alerts/Joint_Trades_Response_1584664268.pdf.

[6] Julie E. Nevins & Robert Lewin, The Constitutionality of Government Action Mandating COVID-19 Business Interruption Coverage, Stroock & Stroock & Lavan LLP (Mar. 23, 2020), https://www.stroock.com/publication/the-constitutionality-of-government-action-mandating-COVID-19-business-interruption-coverage/.

[7] See, e.g., Vesta Fire Ins. Corp. v. Florida, 141 F.3d 1427 (11th Cir. 1998) (finding that statute precluding insurers from withdrawing entirely from insurance industry in Florida did not violate Contract Clause or substantive due process protections); Louisiana v. All Prop. & Cas. Ins. Carriers Authorized & Licensed to Do Business in State, 2006-2030 (La. 08/25/2006), 937 So. 2d 313 (upholding constitutionality of laws extending time for filing insurance claims from Hurricanes Katrina and Rita).

[8] The proposals include mechanisms by which the insurers paying otherwise-uncovered business interruption claims would be able to seek reimbursement from the state. If that resulted in insurers bearing none of the losses, they might not turn to their reinsurers—but that’s a big “if.”

[9] Gallagher Moves Forward with Deductible Relief, Florida Underwriters (Feb. 2005).

[10] After the storms: homeowners deductibles and reinsurance raise questions in Florida.; United States top five homeowner multi-peril insurers in Florida by market share in percentages for 2003, Best’s Review (Jan. 2005).

[11] New Hampshire Ins. Co. v. Clearwater Ins. Co., 129 A.D.3d 99, 112 (N.Y. App. Div. 2015) (citation omitted).

[12] Am. Emp’rs’ Ins. Co. v. Swiss Reinsurance Am. Corp., 413 F.3d 129, 132 (1st Cir. 2005).

[13] Sometimes, a follow-the-fortunes clause will include original conditions languages, such as in the following clause: “Coverage under this Agreement will be subject in all respects to the same interpretations (whether judicial or otherwise), terms, conditions, waivers, alterations and modifications as the Policies comprising the Subject Business, the true intent being that the Reinsurer will in every respect follow the fortunes of the Company in respect of risks the Company has with respect to the Subject Business.”

[14] 178 F.3d 804 (6th Cir. 1999).

[15] Id. at 808.

[16] Id. at 812.

[17] Id. at 822.

[18] Id. at 809.

[19] Id. at 810.

[20] Id. at 812–13.

[21] Id. at 815.

[22] Id. at 831.

[23] Id.

[24] 27 F.3d 1475 (9th Cir. 1994).

[25] Id. at 1478, 1483.

[26] Id. at 1480.

[27] Id.

[28] Id.

[29] Id. at 1483.

[30] Id. at 1481.

[31] 77 Ill. 2d 4 (1979).

[32] Id. at 7–8.

[33] Id. at 8.

[34] Id. at 12.

[35] Id.

[36] Am. Emp’rs’ Ins., 413 F.3d at 132 (alteration in original).

[37] Id.

[38] Granite State Ins. Co. v. ACE Am. Reinsurance Co., 46 A.D.3d 436, 439 (N.Y. App. Div. 2007).

[39] Id.

[40] Id.

[41] Id.

[42] 52 F.3d 1194 (3d Cir. 1995).

[43] Id. at 1204.

[44] Id. at 1206–07.

[45] 322 N.Y.S.2d 520 (Sup. Ct. 1971), aff’d without opinion, 348 N.Y.S.2d 122 (1st Dept. 1973).

[46] Id. at 522 (internal quotation marks omitted). The court referred to this as a “follow-the-fortune” clause. Id.

[47] Id. at 523–24.

[48] See also Am. Ins. Co. v. N. Am. Co. for Prop. & Cas. Ins., 697 F.2d 79, 81 (2d Cir. 1982) (reinsurer not obligated to pay where settlement was primarily designed to compensate insured for punitive damage award excluded from reinsurance coverage); State Auto. Mut. Ins. Co. v. American Re-Ins. Co., 748 F. Supp. 556, 561 (S.D. Ohio 1990) (reinsurer not liable for insurer’s subsequent expansion of underlying coverage); Reliance Ins. Co. v. General Reinsurance Corp., 506 F. Supp. 1042, 1047–49 (E.D. Pa. 1980) (court rejected insurer’s characterization of settlement, finding that settlement was actually of uncovered punitive damage award); City of Renton v. Lexington Ins. Co., 2007 U.S. Dist. LEXIS 69959, at *22 (W.D. Wash. Sept. 19, 2007) (reinsurer not bound to pay where insurer paid claim completely outside scope of policy and not in good faith); Mich. Millers Mut. Ins. Co. v. N. Am. Reinsurance Corp., 452 N.W.2d 841, 843–44 (Mich. Ct. App. 1990) (reinsurer not required to pay where insurer had no liability under original policy).

[49] North River Ins., 52 F.3d at 1206 (quoting Ins. Co. of N. Am. v. U.S. Fire Ins. Co., 322 N.Y.S.2d at 523).

[50] United Fire & Cas. Co. v. Arkwright Mut. Ins. Co., 53 F. Supp. 2d 632, 642 (S.D.N.Y. 1999).

[51] Munich Reinsurance Am., Inc. v. Am. Nat’l Ins. Co., 999 F. Supp. 2d 690, 737 (D.N.J. 2014); see also Hartford Accident & Indem. Co. v. Mich. Mut. Ins. Co., 93 A.D.2d 337, 341–42 (N.Y. App. Div. 1983).

[52] 843 F.3d 120 (2d Cir. 2016).

[53] Id. at 126.

[54] Energy Reserves Grp. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983) (internal quotation marks omitted) (alterations in original).

[55] Id. at 411.

[56] 46 F.3d 813 (8th Cir. 1995).

[57] Id. at 816, 821.

[58] Id. at 820.