

Does a Three-Year Policy Cover a 44-Year Claim?

Equitas Insurance Limited (EIL), as successor to certain reinsurance contracts issued by syndicates at Lloyd's of London (collectively, "Reinsurers"), reinsured the Insurance Company of the State of Pennsylvania (ICSOP) under two facultative reinsurance contracts purchased by ICSOP's parent company, AIG. The reinsurance contracts stated that the "[p]erils and interests reinsured hereunder" would be "[a]s original." They also contained a "follow-the settlements" provision. ICSOP's reinsured policy was an umbrella liability policy issued to a Dole Food Company predecessor ("Dole") for a three-year period from 1968–1971.

Dole was sued by various homeowners in Carson, California, over pollution from hazardous levels of petroleum hydrocarbons in the soil and groundwater at a housing tract site developed by Dole. Dole sought insurance coverage for the homeowners' claims and eventually settled with its insurers for \$30 million, \$20 million of which was paid under the ICSOP umbrella policy that did not contain a pollution exclusion. The umbrella policy provided that disputes between Dole and ICSOP would be governed by Hawaii law. Hawaii follows the all sums doctrine for allocation of progressive environmental damage, which permits allocation of the entire amount of damage to any policy period where damage occurred.

ICSOP billed EIL under the two facultative reinsurance contracts for the reinsured portion of the entire \$20 million settlement payment attributable to the ICSOP umbrella policy, which was approximately \$7.2 million. ICSOP contended that the billing was appropriate under Hawaiian all sums allocation principles and that EIL was obligated to "follow the settlements" and reimburse ICSOP under the facultative contracts for any settlement made within the terms of the umbrella policy. ICSOP also argued that the reinsurance provided co-extensive coverage to its umbrella policy, requiring EIL to reimburse it in full for the settlement under the applicable Hawaii law.

EIL disputed the billing, claiming it was being asked to pay for 44 years' worth of pollution coverage even though it only issued three years' worth of reinsurance. EIL argued that temporal terms are "fundamental under English law" interpreting insurance policies. EIL also argued that ICSOP provided late notice of the claim and that it should not have to pay ICSOP on that basis.

ICSOP sued EIL in the U.S. District Court for the Southern District of New York seeking to recover the \$7.2 million it billed to EIL. The parties agreed that English law governed the reinsurance contracts at issue. Both parties moved for summary judgment.

Case: *The Insurance Company of the State of Pennsylvania v. Equitas Insurance Limited*, No. 17-CV-6850-LTS-SLC (S.D.N.Y. July 16, 2020)

Court: U.S. District Court for the Southern District of New York

Date decided: July 16, 2020

Issue decided: Whether a follow-the-settlements provision required Equitas Insurance Limited to indemnify the Insurance Company of the State of Pennsylvania for the reinsured portion of a \$30 million settlement of an environmental claim that spanned 44-plus years, "notwithstanding the three-year stated policy period of each of the Reinsurance Policies" issued by Equitas.

Submitted by: Charles E. Leasure III

The court noted that English law contains a strong presumption of "back to back" coverage in reinsurance cases, holding that liability under proportional facultative reinsurance is co-extensive with the underlying insurance. The court agreed with ICSOP that EIL was obligated to follow the settlement of ICSOP for the full amount of the reinsured portion of the settlement paid by ICSOP to Dole under Hawaii law—that is, payment for the entire 44 years of pollution damage, not just for a pro rata portion of the three reinsured years.

The court distinguished a factually similar English case argued by EIL which held that an exception to the back to back presumption exists because of the temporal element contained in the insurance contracts under English law and because English law does not recognize the all sums allocation method. The court reasoned that since the parties were aware that Hawaii law governed the underlying ICSOP policy (under the umbrella policy's terms), the all sums allocation applied to the reinsurance contracts

because the parties were aware, and could predict, that Hawaii law would govern treatment of the umbrella policy. The court did not accept EIL's argument that the exception to the back to back presumption should apply under the theory that the parties could not have predicted what law would govern the underlying policies that were at issue in that case.

The court ruled that the "back to back" presumption under English law, together with the follow-the-settle-

ments principle, required EIL to pay ICSOP the full \$7.2 million portion of the \$20 million payment made under the ICSOP policy to Dole (plus interest from the date payment was due). The court denied EIL's late notice motion.



Charles Leasure III is a partner at Porter Wright Morris & Arthur, LLP.

Newly Certified Arbitrators



Alan W. ("Willie") Borst, Jr. worked 20-plus years with AIG, XL Re, and Allianz, serving as a complex claims examiner and vice president; in private law practice, he handled trials and appeals of ceding carriers in life and disability rescission cases, and of reinsurers disputing coverage of extra contractual and excess-of-policy-limits matters. A Chartered Property Casualty Underwriter (CPCU), Alan's alternative dispute resolution appointments have included FINRA, New York and Westchester County Commercial Divisions.



James E. Fitzgerald has been a trial lawyer and litigator in insurance and reinsurance for 40 years and has first-chaired more than 40 federal and state trials for insurers and arbitrated dozens of cases in various tribunals. Licensed in New York, where he started his practice at Mendes & Mount, Jim has practiced in California since 1983 and has been a Los Angeles partner with Stroock & Stroock & Lavan, Akin Gump Strauss Hauer & Feld, and Drinker Biddle & Reath (now Faegre Drinker Biddle & Reath). Jim has also been involved in education as a NITA trial instructor for 30 years, an in-house CLE program provider for insurers, and a speaker on insurance and trial procedure issues for APCIA, PLI, the ABA, and the L.A. Bar Association.



Ben Miclette's role as a reinsurance arbitrator and expert witness is supported by 25-plus years of experience as an actuary in the life and health reinsurance industry, working in the individual and group insurance markets. During his career, he has held positions in the Canadian, U.S. and international markets, with roles ranging from head of business lines, chief pricing actuary, risk management officer, and global product expert. His experience includes business development, product creation, risk management, reinsurance transactions (quota-share, excess-of-loss, stop-loss, coinsurance/YRT, etc.), claim management and profitability management. His current professional activities center around providing expert witness, reinsurance arbitration and actuarial consulting services. Ben is a Fellow of the Society of Actuaries and a Fellow and board member of the Canadian Institute of Actuaries.