

rights.

Finally, the court held that plaintiff failed to adequately allege a claim against Gov. Cuomo and Supt. Vullo in their individual capacities for tortious interference with prospective economic advantage. This claim was based on the allegations that Gov. Cuomo and Supt. Vullo interfered with the NRA's business relationship with Lockton by inducing Lockton to agree to a consent order that prohibited Lockton from participating in any NRA insurance programs in New York. This claim was deficient, the court held, because plaintiff failed to adequately allege that defendants acted solely out of malice or to inflict harm on the NRA. Lockton voluntarily agreed to the Consent Order after the DFS investigation revealed numerous violations of New York Insurance Law. The purpose of the Consent Order was to remedy the violations. The NRA's contention that the Consent Order was intended to drive the NRA out of New York was implausible, since the Consent Order allowed Lockton to offer the NRA corporate insurance. In addition, the Consent Order did not prevent other insurance companies from offering lawful affinity-type insurance programs to the NRA. Plaintiff's tortious interference claim was also deficient due to plaintiff's failure to adequately allege that defendants used wrongful means to interfere with the NRA's business relationship with Lockton. // Jordan

Reinsurance

Second Circuit Finds Factual Issues Regarding Whether Limit of Liability in Reinsurance Agreements Include Loss Adjustment Expenses

Reinsurer Not Bound by Reinsured's Settlements

Utica Mutual Insurance Co. v. Clearwater Insurance Co., 906 F.3d 12 (2d Cir. 2018)

Case at a Glance

A district court granted partial summary judgment to the reinsured with respect to five reinsurance

agreements, holding: (1) that the asbestos-related personal injury losses submitted to the reinsurer were covered by the reinsurance agreements; (2) that the limit of liability in the reinsurance agreements unambiguously included loss adjustment expenses; and (3) that the reinsurer was bound to indemnify the reinsured for payments made by the reinsured to its insured under a settlement agreement that resolved disputed claims submitted by the insured under some of the reinsured policies. The Court of Appeals disagreed, remanding for further factual analysis and consideration with respect to the first two issues and holding that the reinsurer was not bound by the settlement entered into by its reinsured under the facts presented. All three of these issues were decided based upon the Court of Appeal's interpretation of the reinsurance agreements and the underlying reinsured policies.

Summary of Decision

This case arises out of an unusual insurance program that suffered high losses from asbestos-related person injury claims. Over a period of about 40 years, Utica Mutual Insurance Company issued various primary and umbrella liability insurance policies to Goulds Pumps, Inc. The primary policies for 1978 – 1981 did not contain any aggregate limit of liability, which, in the words of the Court of Appeal, “exposed Utica to potentially limitless liability.” Clearwater Insurance Company reinsured the 1978 and 1979 Utica umbrella insurance policies under two reinsurance certificates (the “Clearwater Certificates”) and reinsured the 1979-1981 Utica umbrella policies as part of a pool of reinsurers managed by Towers, Perrin, Forster & Crosby, Inc. (the “TPF&C Memoranda”). The five reinsurance agreements provided indemnity for both losses and loss adjustment expenses paid by Utica. Each reinsurance agreement contained an aggregate limit, and the total limit of all five reinsurance agreements was \$7,712,500. Goulds faced many thousands of asbestos-related personal injury claims, for which it turned to Utica for coverage. In the face of potentially staggering liability on the primary policies that did not have limits, Goulds and Utica each filed lawsuits against each other concerning these policies, and ultimately reached a settlement that treated the policies as having agreed-upon defined aggregate

limits. Utica began to pay Goulds for its insured losses under the terms of their settlement.

When Utica's payments reached an amount that the district court described as that which "Utica regarded as an amount sufficient to trigger its coverage under its reinsurance contracts," Utica started to submit claims on its reinsurance. Clearwater initially paid Utica under their reinsurance agreements. After paying nearly \$1 million Clearwater stopped paying Utica, taking the position that the absence of limits in the Utica primary policies, which it had not reinsured, meant that the losses never exhausted those policies and reached and triggered the umbrella policies, which it had reinsured. Litigation ensued, with Utica seeking additional loss payments from Clearwater and Clearwater seeking to recoup the amounts it had paid.

Three issues were presented on appeal: (1) whether, given the absence of a loss limit in the primary policies, the losses reached the umbrella policies (and Clearwater's reinsurance of the umbrella policies); (2) whether the limits of Clearwater's reinsurance agreements included both losses and loss adjustment expenses, or whether the limits encompass only loss payments, with loss adjustment expenses being payable in addition to the limits; and (3) whether Clearwater was obligated to pay amounts Utica had voluntarily paid Goulds through their settlement.

The first issue turned on an interpretation of the Utica umbrella policies, particularly a provision stating that the umbrella policies would cover expenses "not covered by" the primary policies. Clearwater argued this meant that the umbrella policies did not cover asbestos-related claims because such claims were covered by the primary policies, but Utica contended that it meant that the umbrella policies had to cover amounts that Utica did not pay under the primary policies, because it interpreted those policies to have aggregate limits of liability that were exceeded. The district court, which had granted Clearwater summary judgment on other grounds, had not decided what "not covered" meant in this context, and the Second Circuit remanded the matter so that

the district court could consider and rule on that issue.

With respect to the second issue of whether loss adjustment expenses were included in the limit of the reinsurance agreements, the court found this issue also to present a question of contract interpretation. Although the reinsurance agreements contained "follow the form" clauses, and hence the issue would be resolved by the determination of whether loss adjustment expenses were included within the limits of the underlying umbrella policies, the court found that it could not resolve the issue because the umbrella policies were ambiguous with respect to this issue, and the district court had not considered and ruled upon that ambiguity. The Court of Appeal therefore remanded for further consideration of this issue by the district court.

Finally, with respect to the final issue of whether the reinsurers were bound by Utica's settlement with Goulds, the Court of Appeal held that Clearwater was not obligated to indemnify Utica for payments it had made to Goulds under its settlement agreement with Goulds because the Clearwater Certificates did not contain an express follow-the-settlements clause, and New York law would not imply such a provision into a contract which did not contain such a provision. While the TPF&C Memoranda contained what amounts to a follow-the-settlements clause, the requirement for payment by the reinsurers under that provision was expressly conditioned upon the approval of the claims by Towers, Perrin. The Court of Appeals held that since such authorization had never been requested or given, Clearwater was not obligated to pay Utica under the terms of the TPF&C Memoranda. Utica contended that this condition was excused because it was impossible of performance, as TPF&C had stopped managing the reinsurance pools decades ago. The Court of Appeals held that, regardless of impossibility, such prior approval was still a condition precedent to Clearwater's contractual obligation to reimburse Utica for the settlements. // Goss