

New York County Clerk's Index No. 604517/200

Court of Appeals

STATE OF NEW YORK



ED STATES FIDELITY & GUARANTY COMPANY
T. PAUL FIRE & MARINE INSURANCE COMPANY

—against—

E-INSURANCE COMPANY; EXCESS CASUALTY R
CE PROPERTY & CASUALTY COMPANY; CENTU

E COMPANY; GENERAL FIRE & CASUALTY
COMPANY (f/k/a AGRICULTURAL INSURANCE
COMPANY; HANOVER INSURANCE COMPANY; LIFE
INSURANCE COMPANY OF NORTH AMERICA; LIFE
INSURANCE CORPORATION OF NEW YORK); PRUDENTIAL
SECURITY INSURANCE COMPANY OF HARTFORD

,

PRELIMINARY STATEMENT

olders respectfully submits this brief in s

nts made by Respondents United States I

l Fire and Marine Insurance Company (

seeks to fulfill the classic role of *amicu*

l public interest, supplementing the ef

an appropriate role for *amicus curiae*. A

Policyholders contribute on an ongoing basis

public policy at both the national and state

holders exist because businesses and in

to protect themselves, their property, a

ss, and insurance companies are in busin

insurance is a regulated industry because

es provide is an integral part of the fabr

SUMMARY OF THE ARGUMENT

should uphold the decision below with respect

of the “follow the fortunes” doctrine

– even when the insured is another

party, whether they are aware of it or not

the insurance market would struggle to exist

if the doctrine did not provide adequate protection

mass tort, environmental, and any
could be insurmountable.

contrary to Reinsurers assertions.

es a cedent from any and all claims,

settlement does not necessarily support

ent must have included bad faith. Indeed

require a release of *all* claims as a cor

g insurance company; the company s

ning insurance company, or, more sim

d as the “insurance for insurance com

ent to the ceding insurance company for

nt. *Id.*; *In re Liquidation of Union Ind*

105-06 (1996) (“Reinsurance is the insu

another insurer (the “reinsurer”) by

mechanism in which primary insurance
incommensurate with net assets, reinsurance
to offer insurance coverage limits considered
provide. *Am. Re-Ins. Co. v. Ins. Comm'n*
(1981). This function of reinsurance is crucial
for insurance companies, large and small, to offer coverage
needed. In this manner, reinsurance provided

1995) (“*CIGNA*”) (applying New York law to the reinsurer’s application to reinsurance dispute).

On several occasions, New York courts have evinced a strong preference for the reinsured’s settlement in the absence of an express ‘

22 F. Supp. at 1348; *Mentor Ins. Co. (U.K.)*

(2d Cir. 1993). The *Aetna* court explained

that reinsurers are to follow their reinsured’s settlements

ing company to make the settlement
ment is then binding on the reinsurers.”

New York courts state that there is an ex
allow the fortune doctrine in cases of ba
suspicious” about potential collusion or ba
t do not allow the reinsurer to avoid li
appeals for the Second Circuit has repe

reflects the reality that a cedent has far greater resources than do its reinsurers. Thus, the underlying principle of coverage determination and settlement of claims is "that of the primary insurer". *Unigard Sec. Ins. Co. v. N. Am. Co. for Pr* (1992). Simultaneously, the reinsurer is not liable to the policyholders, including the duty to defend. *Am. Ins. Co. v. N. Am. Co. for Pr*

LEGAL ARGUMENT

OF INSURANCE IS TO INSURE

to the rule of liberal construction, the court

purpose of insurance is to insure, or to provide

insurance contracts as not to defeat the c

interpretation.” 13 J. Appleman, Insurance

976) (footnote omitted; emphasis added)

depend upon reinsurance to provide func
insurance to work as it is structured in the
es must stand ready and willing and b
ay caused by resolving a coverage dispu
liability of reinsurance proceeds permi
icyholders.

ce market would not exist as we know

a de novo review of [cendent's] decision

ent-reinsurer relationship would be forev

y the ability of reinsurers to second gue

ent decisions, the follow the fortunes doc

and spread the risk of exposure amon

coverage for the policyholder. To na

nsurers urge would defeat all of the

against a reinsurance company. As merely
es – the amount they should have paid o
no consequence to a reinsurer, there is no
panies that wrongfully deny claims.

ers have perfectly sufficient mechanism

the course of their business in light of th

o reason to allow them to effectively bec

S' INTERPRETATION OF FOLLOW COURAGE SETTLEMENTS AND CI

position is that follow the fortunes was fo

ces) apply to post-settlement allocation d

ng effect on settlements in complex env

e court concluded in *North River In*

nance Co., "to allow reinsurers to

2007) (“*Allstate*”) (recognizing that
settlement allocation . . . as long as t
-the-settlements requirements, i.e.,
within the applicable policies”); *Travelers*
143, 158 (“*Travelers*”) (recognizing
the [follow the fortunes] doctrine d
ns”); *Ace*, 361 F.3d at 141 (holding “

urers propose, a reinsurer could circumvent the process of questioning the underlying coverage decision through a process that led to settlement. Such a process would be a loophole for reinsurers to, in fact, avoid the process of settling.

urers' construction of the follow the form clause in every case would argue lack of good faith.

cedents frequently bring bad faith claims against

This is a known reality in modern ceding

the insurance and reinsurance industries

as a cedent from any and all claims,

settlement does not support an automatic

must have included bad faith. *See* *Am*

where suspicions about potential collusion

ould undermine the entire purpose of the
reinsurer to resurrect and prosecute against
cedent's policyholder relinquished due
A, 52 F.3d at 1206 (reinsurers cannot "re
insurer and its insured"); *Seven Provin*
company knew that its settlement decisions
here would be little incentive to settle

typical follow-the-settlements requirements
within the applicable policies"); *Travelers*
the majority view . . . is that the [follow the
settlement allocations"); *Ace*, 361 F.3d at 1
s doctrine extends to a cedent's post-
cepted, the arguments Reinsurers advanced
e settlements, protracted litigation, del

John N. Ellison

Jill N. Averett

REED SMITH LLP

599 Lexington Avenue

New York, NY 10022

(212) 205-6005

Amy Bach

UNITED POLICYHOLDERS

381 Bush Street, 8th Floor

San Francisco, California

Telephone: (415) 398-1000

Facsimile: (415) 677-1000