Tortious Interference with Contract – Insured's Access to Reinsurers?

By
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I. Introduction

It is black letter law that insured's have no right of action against reinsurers absent a cut-through or guaranty endorsement[2] or the reinsurer effectively taking over the duties of the ceding insurer and interacting directly with the insured[3]. This is because the insured lacks privity with the reinsurer *i.e.* is not a party to the reinsurance contract. However, tortious interference with contact may provide a pathway to recover from a reinsurer that interferes with the contract between the insured and insurer. The purpose of this article is to explore selected caselaw on point.

II. Tortious Interference Cases That Survived a Motion to Dismiss

Hartford Steam Boiler Inspection & Insurance Co. v. International Glass Products, LLC, 2016 U.S, Dist. LEXIS 135045(W.D. Pa.) is a case in which Hartford Casualty Insurance Co., ("Hartford") the policy-issuing company, ceded 100% of the risk on equipment breakdown to Hartford Steam Boiler ("HSB") which also handled the investigation and payment of claims on that business. HSB denied a claim and the insured brought suit against HSB for tortious interference with the insurance policy issued by Hartford. The court noted:

> Under Pennsylvania law, a tortious interference with contractual relations claims has four elements: (1) the existence of a contractual, or prospective contractual relationship between the complainant and a third party; 2) purposeful action of the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of a privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct.[4]

The court denied HSB summary judgement on the basis that there were genuinely disputed facts concerning the second and third elements above:

> [The insured] has produced evidence which, if credited, could support an inference that HSB acted outside the scope of its agency relationship by dictating the outcome of important discretionary decisions and by placing its own interests ahead of [cedent's] fiduciary obligations in the adjustment of [the insured's} loss.[5]

The recent case of *Casa Besilu LLC v. Federal Insurance Co.,* 2021 U.S. Dist. LEXIS 78967 (S.D. Fl.) is an example of a "reverse flow" reinsurance program *i.e.* one in which the insured approaches the reinsurer first and the reinsurer arranges from a primary, policy-issuing company. The insured approached the reinsurers for various coverages, including flood for an estate in the Bahamas. The reinsurers arranged for a local company to issue the policy and the risk was ceded to the reinsurers. Unfortunately, flood coverage was not added to the policy and the estate was destroyed by a combination of flood and wind damage. The insured alleged that the reinsurers tortiously interfered with the settlement of the insured's claim against the Bahamian insurer. Since the insured's action was for tortious interference with the insurance policy, and not on the reinsurance contracts, the court denied the reinsurers' motion to dismiss.

An earlier case, cited in *Casa Besilu*, is *Law Offices of David Stern, P.A. v. Scor Reinsurance Corp.*, 2005 U.S. Dist. LEXIS 1548 (S.D. Fl.) The insurer issued a professional liability to a law firm and the policy was reinsured excess of $150,00 per occurrence with the reinsurer which allegedly controlled claim handling through a third-party administrator. A professional liability claim was apparently settled at a mediation but the ceding insurer declined to pay it and then was placed in rehabilitation. The insured sued the reinsurer for tortious interference alleging that the reinsurer used the third-party administrator to cause the ceding insurer to breach the policy and not pay the claim. The court declined to dismiss the tortious interference claim stating that:

> [T]he jury could . . . determine that [the reinsurer] knew of, and intentionally and unjustifiably interfered with the contractual relationship between Plaintiffs and [the cedent] resulting in damage to Plaintiffs as a result of [the cedent's] breach of that relationship.[6]

Robertson Stephens, Inc. v. Chubb Corp., 473 F. Supp.2d 265 (D. R.I. 2007) involved a captive insurer owned by the insured and a reinsurer that was also the claims administrator under a contract with the cedent that was separate from the reinsurance contact. A liability claim was wrongly denied but belatedly paid after the insured had defended itself. The insured was seeking to be indemnified for legal expenses. One of the insured's allegations was that the claims administrator improperly performed its duties because its interests as a reinsurer was to reduce claims costs. The court found that this allegation was sufficient to survive a motion to dismiss.

III. Tortious Interference Cases That Did Not Survive a Motion to Dismiss

Bonds issued by an insurer that later became insolvent were at issue in *Jurupa Valley Spectrum, LLC v. National Indemnity Co.,* 555 F.3d 87 (2d Cir. 2009). Risk on the bonds was ceded to the reinsurer which

retained a claims administrator to investigate and pay claims. The insured made various allegations as a means of collecting from the reinsurer including an argument that the claims administrator tortiously interfered with the reinsurance contract. The court found that the insured could not maintain an action for tortious interference with a contract to which the insured was not a party.

McCulloch v. Hartford Life & Accident Insurance Co., 363 F. Supp.2d 169 (D. Ct. 2005) involved a contested disability claim. Educators Mutual Life Insurance Company ("Educators") issued a disability policy later effectively sold the business to Hartford Life Insurance Company ("Hartford") by assigning all of its rights and paying outstanding reserves to Hartford. Hartford later determined that the insured was no longer disabled and cut off benefits. The insured claimed that Hartford interfered with the original policy between her and Educators. The court dismissed the tortious interference claim holding:

> Under Connecticut law, a claim for tortious interference with business expectancies requires a showing that a third party adversely affected the contractual relations of two other parties and that such interference was motivated by some improper. means or motive, such as maliciousness fraud or ill-will. However, a direct party to a contract cannot be held liable for contractual interference. Hartford was a direct party to [the insured's] insurance contract because, pursuant to the reinsurance agreement, it was the assignee of her policy.[7]

Resolute Management Inc. v. Transatlantic Reinsurance Company, 29 N.E.2d 197 (App.Ct. Mass 2015) involved National Indemnity Company ("NICO") which assumed books of business from several insurers and appointed Resolute Management, Inc. ("Resolute") to handle claims and collect reinsurance recoverable from Transatlantic Reinsurance Company ("TransRe"). When TransRe declined to pay reinsurance recoverables Resolute brought an action for tortious interference. The court dismissed this claim on the basis that Resolute was not a party to the contracts with which TransRe allegedly interfered.

IV. Comments

Since none of the above cases went to a verdict, the lessons to be learned are limited. However, the most likely scenario in which a reinsurer could be held liable for tortious interference is a complete fronting transaction or portfolio transfer in which the reinsurer controls claims. Should a claim be wrongly denied, at the direction of the reinsurer or its agent, then the reinsurer may be held liable for tortious interference with the insurance policy in an attempt to reduce claim costs.

ENDNOTES

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[2] Robert M. Hall, *Cut-Through and Guarantee Clauses,* X Mealey's Reins. Rpt. No. 21 at 8 (2000) also available at the author's website: bob@robertmhall adr.com.

[3] Robert M. Hall, *Fronting and Direct Actions Against Reinsurers: The Final Chapter?* IXX Mealey's Reins. Rpt. No. 1 at 35 (2008) also available at the author's website: bob@robertmhalladr.com.

[4] 2016 U.S. Dist. LEXIS 13505 *108.

[5] *Id.* *108.

[6] 2005 U.S. Dist. LEXIS 1548* 20 (S.D. Fl.)

[7] 363 F. Supp. 2d 169 at 180 (D. Ct.2005) (citations omitted).