This page was exported from - The Arbitration Law Forum
Export date: Fri Jan 28 9:20:29 2022 / +0000 GMT

What is the Statute of Limitations for a Reinsurance Claim under New York Law and When does it Begin to Run?

Part III.A

Continental Casualty Co. v. Stronghold Ins. Co.: Background

In Part II (here) we reviewed New York law pertinent to express conditions and how they can delay the accrual of the statute of limitations if the plaintiff has not satisfied them.

Now let's turn to the U.S. Court of Appeals for the Second Circuit's decision in *Continental Cas. Co. v. Stronghold Ins. Co*., 77 F.3d 16 (2d Cir. 1996), a case that features a fairly comprehensive recitation of New York's reinsurance-related statute-of-limitations accrual rules as they existed in 1996, but did not apply New York's express-condition rules consistently with controlling, New York Court of Appeals authority. This Part III.A summarizes what transpired in *Stronghold* and Part III.B will explain why we think the case not correctly decided.

The Stronghold Facts

Stronghold was a dispute between a United States cedent (the ?Cedent?) and its London-Market reinsurers (the ?London Reinsurers?) that arose under certain excess-of-loss treaties reinsuring medical malpractice liability policies the Cedent had issued to its hospital insureds.

In the 1980s the Cedent settled several medical malpractice liability claims on behalf of its insureds, but did not notify London Reinsurers of the underlying losses that resulted in the settlements, or present their reinsurance claims to the London Reinsurers, until sometime after the underlying claims were settled. The record apparently did not specify the date or dates on which the Cedent first notified the London Reinsurers of the settlements and demanded payment from the London Reinsurers.

The excess-of-loss treaties (the ?Reinsurance Contracts?) provided that the London Reinsurers were "liable only for the excess of loss" incurred by the Cedent in excess of specified retentions of ?ultimate net loss.? The contracts defined ?ultimate net loss," as ?the sums actually paid in cash in settlement of losses [for] which [the Cedent] is liable." They also featured notice of loss provisions that said ?Loss, if any, under" a policy is "to be reported to [the London Reinsurers] as soon as practicable."

The London Reinsurers denied each of the reinsurance claims during the period 1987-1990, and in 1991 the Cedent commenced an action for breach of contract in the United States District Court for the Southern District of New York. The London Reinsurers defended on late notice and statute-of-limitations grounds.

As respects the date on which the statute of limitations began to run on each reinsurance claim, the London Reinsurers argued that each claim accrued when the Cedent settled the claim with its insured. Each claim was settled more than six years before the Cedent commenced its action. According to the London Reinsurers, the Cedent was entitled to indemnity immediately upon payment of each settlement, even thought it did not demand payment from the London Reinsurers until a much later date. Alternatively, the London Reinsurers argued that even if their indemnity obligation was conditioned on the Cedent's presentation of a reinsurance claim for payment, each of the Cedent's individual breach of contract of contract claims accrued on the date it became entitled to demand payment from the London Reinsurers, and that occurred each time the Cedent settled an underlying claim.

The Cedent argued that the claims accrued when the London Reinsurers allegedly breached the reinsurance contracts by refusing to pay the claims. Since the London Reinsurers did not refuse to pay the claims any earlier than 1987, and the Cedent commenced its lawsuit in 1991, the lawsuit would not be barred by the statute of limitation under the Cedent's date-of-accrual theory.

Back in 1991, as some readers may recall, the New York Court of Appeals had not yet decided whether a reinsurer could successfully defend on late notice grounds without establishing prejudice. But in 1992, the London Reinsurers' litigation strategy was dealt a painful blow when the New York Court of Appeals held, in *Unigard Sec. Ins. Co. v. North River Ins. Co.*, 79 N.Y.2d 576 (1992), that unless a late notice provision expressly conditions a reinsurer's liability for the claim on timely notice?i.e., the late notice provision is an express condition, not simply a promise?a reinsurer must establish prejudice to be relieved of liability based on the cedent's failure to provide timely notice of a claim or occurrence.

Answering a question certified to it by the United States Court of Appeals for the Second Circuit, New York's highest Court explained that, to be express conditions, contractual provisions must unambiguously evidence the parties' intent to make performance of a duty conditional.[1] The New York Court of Appeals also held that the notice provision before it?which required ?[p]rompt notice . . . of any occurrence or accident which appears likely to involve this reinsurance'??was not an express condition, and that accordingly, the reinsurer in that case could not be relieved of liability for the cedent's late notice of the loss or losses sustained and reported by the insureds, unless the reinsurer could prove it suffered prejudice as a result of the late notice.

Not too long after the New York Court of Appeals' landmark reinsurance-law decision answering the Second Circuit's certified question, the Second Circuit issued its own landmark decision in the *Unigard case,* holding, among other things, that the reinsurers were unable to establish either prejudice?i.e., ?economic injury??resulting from late notice or that the cedent acted in bad faith in failing to provide timely notice (which would have relieved the reinsurer from liability even without a showing of prejudice).[2]

The London Reinsurers apparently concluded that they could not establish the requisite prejudice to prevail on their late notice defense, a decision which apparently prompted the parties to enter into a stipulation designed to facilitate summary judgment on the merits in favor of one party or the other on the statute of limitations issue. To that end the London Reinsurers agreed to waive their late notice and all other defenses other than statute of limitations, and stipulated with the Cedent that: (a) New York law governed; (b) New York's six-year statute of limitations applied; (c) the Cedent satisfied all conditions of the Reinsurance Contracts; (d) the Cedent had settled its claims with its insureds more than six years prior to commencing the action; and (e) the Cedent had commenced the action within six-years of the London Reinsurers' earliest denial of any of the claims.

The parties cross-moved for summary judgment, and the district court ruled in favor of the Cedent, holding that no breach of the Reinsurance Contracts occurred until the London Reinsurers refused to pay the Cedent's claims. The district court granted summary judgment in favor of the Cedent, holding that the Cedent's causes of action did not accrue until the London Reinsurers denied the Cedent's claims.

The London Reinsurers appealed to the United States Court of Appeals for the Second Circuit, which affirmed the district court's judgment.

The Second Circuit's Analysis and Conclusions

The Second Circuit began its analysis by stating that reinsurance contracts are generally ?express contracts for indemnity against loss[,]? and that ordinarily, the statute of limitations "begin[s] to run upon a contract of indemnity[ ] from the time at which the plaintiff is actually damaged[,]? that is, when the cedent or indemnitee pays the loss.[3] The Court then observed?quite correctly?that ?an express contract for indemnity was still a contract[,]? and parties may generally ?agree upon conditions precedent to suit[,]? such as ?filing proofs of loss and allowing the insurance company time to investigate and pay the claim.?[4] The Court said that this contractual reality led to the development of the so-called ?due and payable? rule for determining when an insurance claim accrued under a direct policy containing such an express condition.[5] As we've already discussed (here), whatever the rule may be called in the insurance context, it is the same rule that applies to contracts generally.

Having accurately identified New York's key statute-of-limitations accrual rules, the next issue the court faced was whether the reinsurance contract expressly conditioned the reinsurer's liability on the cedent's demand for payment. The Court concluded that the notice provisions of the reinsurance contracts ? construed in light of the reinsuring and ultimate net loss provisions ? established ?at least one condition that Continental had to satisfy bef(ore its right to indemnity could mature.?[6] The notice provision said "'Loss, if any, under" the [reinsured] policy is "to be reported to [the London Reinsurers] as soon as practicable.'"[7] The Court concluded that the notice provision required Continental to report within a reasonable time ?actual losses ? i.e., payments made on its underlying insurance policies. . . .?[8] The Court, quoting the insuring and ultimate-net-loss provisions, explained that ?the reinsurers are. . . ?liable only for the excess of loss' incurred by Continental over various specified amounts of ?ultimate net loss and. . . ??ultimate net loss' means ?the sums actually paid in cash in settlement of losses [for] which [the Cedent] is liable. . . .? In addition, the Court ?conclude[d] [the cedent] was entitled -- indeed probably obligated -- to wait a reasonable time for the reinsurers to decide whether they would pay or not, and, if so, how much.?[9]

The Court then attempted to distinguish *Unigard*. ?There,? said the Court, ?the New York Court of Appeals faced a reinsurance policy provision requiring notice of potential, as opposed to actual, losses.?[10] The *Unigard* notice provision required the cedent ?to give ?[p]rompt notice . . . of any occurrence or accident which appears likely to involve this reinsurance.'?[11] The Second Circuit said *Unigard* ?held that, unlike cases involving ordinary insurance, failure to comply with this provision was not an absolute defense to the reinsurer's liability under the policy, because the provision was not an express condition precedent.?[12] ?Underlying *Unigard*,? said the Second Circuit, ?was the court's recognition that ?failure to give the required prompt notice is of substantially less significance for a reinsurer than for a primary insurer.'?[13] According to the Second Circuit, ?*Unigard* addressed only the prejudice ? or lack thereof ? caused by late notice of *potential* losses; it said nothing about when the reinsured's *actual* losses under the policy were due and payable.?[14] If ?*Unigard* applies here at all, it stands only for the proposition that the reinsurers cannot escape liability simply because [the Cedent] tarried before advising them that hospitals were making claims on the underlying policies[,]? and [i]t would distort *Unigard* to read it as meaning that the reinsurers had a duty to indemnify [the Cedent] even before [the Cedent] gave notice of the payments it had made to the hospitals.?[15]

Stronghold also explained that where presentation of a claim for settlement is a condition precedent to the reinsurer's obligation to indemnify the cedent must make the demand within a reasonable time because ?a plaintiff should not ?have the power to put off the running of the Statute of Limitations indefinitely.'"[16] ?Thus,? said the Court, ?once Continental suffered losses on the underlying policies, it could not unreasonably delay reporting those losses to the reinsurers.?[17]

But the procedural posture of the case did not require the court to reach the question of whether the cedent's reinsurance claims should have been made at an earlier date. For, ?by abandoning the late notice defense and by actually stipulating that Continental satisfied all conditions under the policies, including the notice provision, the reinsurers. . . conceded that no unreasonable delay happened here.?[18]

Stronghold thus leaves open the issue of what might be a reasonable time for a cedent to delay satisfying a claims-presentation condition. As mentioned in Part I, that period could range from the period by which a cedent would ordinarily present claims of the type at issue, or might even be as long as the statute of limitations calculated from the date from which the cedent could have made the demand, which apparently was the common law rule (albeit one that makes little sense in the context of insurance and reinsurance).
Links to Previous Installments:
Part II

Part I

Links to Later Installments:
Part III.B

Part III.C

Part IV.A

Part IV.B

[1] *Unigard Sec. Ins. Co., Inc. v. North River Ins. Co.*, 79 N.Y.2d 576, 581 (1992).

[2] Unigard Sec. Ins. Co., Inc. v. North River Ins. Co., 4 F.3d 1049, 1069-70 (2d Cir. 1992).

[3]77 F.3d at 19 (citing *Steen v. Niagara Fire Ins. Co.*, 89 N.Y. 315, 325 (1882) (generally, the statute of limitations "begin[s] to run upon a contract of indemnity[ ] from the time at which the plaintiff is actually damaged"); and *Travelers Indemnity Co. v. LLJV D. ev. Corp.*, 227 A.D.2d 151, 154, 635 N.Y.S.2d 179, 183 (1st Dep't 1995) ("it is well settled that a cause of action based upon a contract of indemnification does not arise until liability is incurred by way of actual payment")).

[4]77 F.3d at 19-20.

[5] 77 F.3d at 20.

[6] 77 F.3d at 20.

[7] *Id*.

[8] 77 F.3d at 20.

[9]77 F.3d at 20.

[10] 77 F.3d at 20.

[11] 77 F.3d at 20.

[12] 77 F.3d at 20.

[13] 77 F.3d at 20.

[14] 77 F.3d at 20.

[15] 77 F.3d at 20-21.

[16] 77 F.3d at 21 (quoting *Snyder v. Town Insulation, Inc.*, 81 N.Y.2d 429, 435 (1993) and citing 18 Samuel Williston, Law of Contracts, § 2021A, at 697 (Walter H.E. Jaeger ed., 1978) ("[w]here the plaintiff's right of action depends upon a preliminary act to be performed by himself he cannot suspend indefinitely the running of the Statute of Limitations by delaying performance of this act")).

[17] 77 F.3d at 21 (citing *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 319 (1991) ("the true owner, having discovered the location of its lost property, cannot unreasonably delay making demand upon the person in possession of that property")).

[18]77 F.3d at 21.