

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

MIDWEST EMPLOYERS CASUALTY)	
COMPANY,)	
)	
Plaintiff,)	
)	
v.)	No. 4:07-CV-00870-CDP
)	
LEGION INSURANCE COMPANY)	
(IN LIQUIDATION),)	
)	
Defendant.)	
)	

**MIDWEST EMPLOYERS CASUALTY COMPANY’S MEMORANDUM
IN SUPPORT OF ITS MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS**

Midwest Employers Casualty Company (“MECC”) submits the instant Memorandum in further support of its Motion to Compel the Production of Documents.

I. Background

On April 30, 2007, MECC filed its Petition, or in the Alternative, Complaint for Declaratory and Injunctive Relief (“Complaint”) against Legion. MECC’s Complaint seeks, among other relief, a declaration that under the forty-three contracts at issue, MECC provided Legion with reinsurance coverage on a “losses occurring” basis. On December 7, 2007, Legion answered MECC’s Complaint and counterclaimed. Legion contends that the attachment basis of the forty-three contracts at issue is “risks attaching.”¹ The dispute with respect to the attachment basis of the contracts at issue is by far the most financially significant dispute between the parties.

¹ Reinsurance that attaches on a “losses occurring” basis covers losses that occur during the reinsurance contract period. By contrast, reinsurance that attaches on a “risks attaching” basis covers losses whenever they occur so long as the underlying insurance policy became effective during the reinsurance contract period.

MECC served Legion with its First Set of Requests for the Production of Documents on January 18, 2008. (Attached hereto as Exhibit A.) Legion responded to MECC's Document Requests on February 29, 2008. (Attached hereto as Exhibit B.) After meeting and conferring, the parties have reached an impasse with respect to the issues addressed below.²

II. Requests For Which an Order Compelling Production Is Sought

Legion is refusing to produce certain categories of documents that are highly germane to the issues involved in this litigation. "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . ." Fed. R. Civ. P. 26(b)(1). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Legion has no reasonable ground for contending that the requests discussed below are not reasonably calculated to lead to the discovery of admissible evidence.

On the contrary, Legion is attempting to avoid producing documents that will demonstrate whether Legion acted consistently with its current contention that it purchased reinsurance from MECC that applies on a "risks attaching" basis. Because that issue is the very cornerstone of the parties' dispute, MECC is entitled to documents that will demonstrate whether Legion booked, took credit for, and expected to receive reinsurance recoverables on either a "risks attaching" or a "losses occurring" basis. Legion is also attempting to avoid producing documents that will demonstrate how often and under what circumstances Legion purchased

² During the Rule 16 Conference held on December 20, 2007, the parties asked the Court to refer this matter to mediation. On March 11, 2008, the parties designated Kenneth R. Feinberg to serve as the Neutral for the mediation. On March 20, 2008, the parties sought leave of the Court for an extension for completion of the mediation. The Court granted the parties' Joint Motion for Extension of Time to Complete Mediation on March 21, 2008. The parties are scheduled to go to mediation in Washington, D.C. on May 27-28, 2008 (the "Mediation"). On purpose of this Motion is to compel the production of documents in time for use during the mediation.

reinsurance for program business on a “losses occurring” basis.³ These documents are highly relevant because Legion alleged in its pleadings that it “typically” purchased program business on a “risks attaching” basis in an apparent effort to bolster its position that the contracts at issue in this case also attach on a “risks attaching” basis. (Legion’s Answer at ¶ 26; Legion’s Counterclaim at ¶¶ 3-4.) Thus, the question of how often and under what circumstance Legion did not follow what it has described as its “typical” behavior and purchased reinsurance for program business on a “losses occurring” basis is squarely within the scope of discovery vis-a-vis Legion’s own allegations.

MECC Request No. 22

MECC Request No. 22 calls for the production of board minutes that relate to the attachment basis of reinsurance that Legion considered or purchased for program business. In an April 3, 2008 letter to Legion, MECC further limited its request to the time period of 1994-2002. (MECC’s April 3, 2008 Letter at 2, attached hereto as Exhibit C.)⁴ Legion has objected to the request as “overly broad, unduly burdensome and expensive, and not reasonably calculated to lead to the discovery of admissible evidence.” (Exhibit B at 14.) Legion has agreed to produce responsive documents only insofar as they relate to the “Accounts” reinsured by MECC.⁵ (*Id.*) But Legion has stated that it “will not be producing board minutes at which the attachment basis

³ “Program,” in this context, refers to groupings of commercial risks (e.g. restaurateurs and food service operators) that were collectively underwritten and insured, and combined into a single Legion account.

⁴ MECC notes Judge Perry’s instruction on her web page not to attach meet and confer letters to motions. MECC has not attached correspondence between the parties for the purpose of the certification that MECC has sincerely attempted in good faith to meet and confer and resolve discovery issues without the Court’s involvement, but only to show MECC’s modification of certain of its document requests and Legion’s written responses thereto.

⁵ “Accounts” is defined by Legion in its Interrogatories to refer to the individual companies, associations, agency captives and programs insured by Legion for which MECC provided facultative reinsurance to Legion pursuant to the forty-three contracts at issue in this dispute.

for all reinsurance programs during the 1994-2002 time period was discussed.” (Legion’s April 29, 2008 Letter at 2, attached hereto as Exhibit D.)

Legion’s attempt to limit its production to the Accounts MECC reinsured unreasonably restricts the scope of discovery. Legion claims that:

- “program business is typically written on a ‘risks attaching basis’” (Legion’s Answer ¶ 26);
- “MECC knew that the Legion program business was traditionally written consistent with the industry practice” and that the reinsurance contracts at issue in this dispute thereby also “would follow this practice” (*id.*);
- “MECC and its affiliated companies . . . were well aware of the alternative market and alternative market products, including (but not limited to) reinsurance of ‘programs’ on a risks attaching basis” (Legion’s Counterclaim ¶ 3); and
- “MECC was well aware of Legion’s business model, its involvement in ART Vehicles and its use of risk attaching as a basis for attachment in Legion programs” (*id.* ¶ 4).

Evidently, Legion intends to rely on its allegation about what is “typical” in the industry as well as its own business model with respect to program business to support its contention that the reinsurance contracts at issue apply on a “risks attaching” basis. Yet, it apparently wants to do so without producing its own records that are relevant to demonstrating its actual practices.

Given Legion’s allegations, MECC should be permitted to discover deliberations of Legion’s Board about the attachment basis for reinsurance of program business regardless of whether the programs are ones MECC reinsured. MECC is entitled to discover minutes reflecting discussions related to the attachment basis for program business, particularly in light of

Legion's allegations that MECC was aware of Legion's business model of "typically" buying reinsurance for program business on a "risks attaching" basis.

Further, the suggestion that the number of board meetings held between 1994 and 2002 could render the review and production of a subset of those minutes unduly burdensome lacks credibility. It is unlikely that Legion's board would have met more than a few times a year and the minutes of those meetings are unlikely to be voluminous. MECC's Request No. 22, as modified, is therefore narrowly tailored to discover the minutes of Legion's Board that relate to the attachment basis of reinsurance considered or purchased for program business during the period MECC and Legion entered into the contracts at issue. Accordingly, MECC respectfully requests the Court to compel Legion to produce all board minutes from 1994-2002 that relate to the attachment basis of reinsurance considered or purchased for program business.

MECC Request No. 24

MECC Request No. 24 calls for documents evidencing reinsurance for program business purchased by Legion on a "losses occurring" basis. MECC narrowed this request in its April 3 letter to seek only copies of such reinsurance contracts themselves. (Exhibit C at 3.) Legion has objected to the request as "overly broad, unduly burdensome and expensive, and not reasonably calculated to lead to the discovery of admissible evidence." (Exhibit B at 15.) Based on this objection, Legion has stated that it will only produce documents limited to the Accounts and, if requested, would permit MECC to select a random sample from among all contracts incepting from 1994 through 2002. (*Id.*) In a subsequent conversation between counsel, MECC reiterated that MECC was not seeking all of Legion's reinsurance contracts for program business, but only those that attached on a "losses occurring" basis. Legion indicated that it understood the request, but still refused to comply. Upon MECC's further inquiry, Legion also made clear that it would

refuse to produce the requested documents irrespective of whether Legion had kept track of the attachment basis of the reinsurance that it purchased for program business such that it could readily identify the contracts that attached on a “losses occurring” basis. By this statement, Legion concedes that its refusal to produce the “losses occurring” contracts is not actually grounded on the burdensomeness of identifying the relevant contracts.

Given Legion’s allegations that it “typically” purchased reinsurance for program business on a “risks attaching” basis and that its business model was to purchase reinsurance for program business on the same basis, MECC is entitled to discover any documents that evidence reinsurance for program business purchased by Legion on a “losses occurring” basis. More specifically, MECC is entitled to know how often and under what circumstances Legion purchased reinsurance for program business on a “losses occurring” basis in light of its alleged “business model” of buying it on a “risks attaching” basis. Moreover, Legion’s assertion that the volume of contracts responsive to this request renders it unduly burdensome is directly at odds with its allegations in its pleadings that it “typically” purchased reinsurance for program business on a “risks attaching” basis. Accordingly, MECC respectfully requests the Court to compel Legion to produce all contracts evidencing reinsurance for program business purchased by Legion on a “losses occurring” basis.

MECC Request No. 28

In its April 3 letter, MECC narrowed its Request No. 28 to seek “reinsurance lay off sheets and other documents evidencing the attachment basis of the reinsurance” Legion purchased from MECC. (Exhibit C at 4.) In its April 29 letter, Legion explained that it does not have lay off sheets, but indicated that it “has produced documents concerning the attachment basis of the reinsurance for the Art Vehicles for the Accounts.” (Exhibit D at 3.) Because

Legion only indicated that it has already produced *some* responsive documents, in a conversation between counsel MECC sought clarification of Legion's position with respect to the request for *all* documents relating to the attachment basis of reinsurance purchased from MECC.

Unfortunately, Legion refused to clarify its position. Legion indicated only that it would produce the documents that it is required to produce under the Federal Rules of Civil Procedure, but refused to specify whether it had any objections to this particular request or whether it would produce all non-privileged responsive documents in its possession, custody or control.

Given that the attachment basis of the reinsurance that Legion purchased from MECC is at the very heart of this case, it would plainly be unreasonable for Legion to withhold documents responsive to this request, as modified. Accordingly, MECC respectfully requests the Court to compel Legion to produce all documents evidencing the attachment basis of the reinsurance that Legion purchased from MECC.

MECC Request No. 31

MECC Request No. 31 seeks the production of documents evidencing Legion's payment of or liability for losses that Legion alleges are reinsured by MECC but for which Legion contends MECC has not paid in full the amount Legion contends it owes. Legion objects to the request as "overly broad, unduly burdensome and expensive, and not reasonably calculated to lead to the discovery of admissible evidence," and has indicated that it would produce only "a statistical sampling." (Exhibit B at 20.)

Legion's attempt to limit its production unreasonably restricts the scope of discovery. As a fundamental principle of reinsurance law, before any reinsurance obligation can arise, Legion must establish that it has either paid or is liable to pay losses that are reinsured by MECC. *See, e.g., North River Ins. Co. v. ACE Am. Reinsurance Co.*, 361 F.3d 134, 142 (2d Cir. 2004).

Apparently understanding this, Legion altered its position in its April 29 letter and now contends that it has previously provided evidence of Legion's payment of or liability for losses that it contends are reinsured by MECC. (Exhibit D at 3.) Specifically, Legion points to "POINT Payment Detail" that it had previously provided to MECC approximately two years ago. (*Id.*) Some of the information that Legion provided was sufficient to justify payment and MECC promptly paid Legion accordingly. After receiving the POINT data that Legion sent, MECC wrote to Legion identifying gaps in the information that MECC needed to verify that Legion had paid or was liable for certain claims. Since that time, when MECC has been able to obtain the appropriate verification, it has paid those losses accordingly. However, with respect to other claims, Legion has been uncooperative in providing the requisite substantiation of payment or liability that triggers a reinsurance obligation. (MECC's Answer to Counterclaim ¶¶ 23-40.)

With respect to claims that Legion contends MECC has yet to pay, Legion has yet to provide the requested information. All MECC is asking for are documents verifying (1) that the amounts reported on Legion's loss runs were paid (either by Legion, or the relevant TPA, MGA or state guaranty association thereby establishing Legion's liability) and (2) that the amounts paid relate to policies that MECC reinsures. These are the documents requested by MECC Request No. 31.

Moreover, such documentation will be required for Legion to establish its case for damages. This is true even independent of MECC's Request No. 31. And pursuant to Fed. R. Civ. P. 26(a)(1) Legion is required to produce the documents that establish its claims for damages.

For the foregoing reasons, MECC respectfully requests the Court to compel Legion to produce all documents evidencing Legion's payment of or liability for losses that Legion alleges

are reinsured by MECC but for which Legion contends MECC has not paid in full the amount Legion contends it owes.

MECC Request No. 35

MECC Request No. 35 seeks documents relating to Legion's booking of or accounting for reinsurance purchased from MECC. Legion refuses to produce documents responsive to this request, objecting to the request as "overly broad, unduly burdensome and expensive, and not reasonably calculated to lead to the discovery of admissible evidence." (Exhibit B at 22.)

Insurers take credit for reinsurance receivables on their books as an asset. The documents that MECC seeks by this request will show whether Legion booked the reinsurance as attaching on a "risks attaching" or a "losses occurring" basis, thus demonstrating Legion's expectations as to the attachment basis of the reinsurance it bought from MECC. Because such documents are squarely probative of the core issues in this case, Legion has no legitimate basis for withholding the requested documents. Accordingly, MECC respectfully requests the Court to compel Legion to produce all documents relating to Legion's booking of or accounting for reinsurance purchased from MECC.

MECC Request No. 36

MECC amended its Request No. 36 in its April 3 letter to seek actuarial support (including actuarial workpapers and documents related thereto) for Legion's last Schedule F statutory filing related to Legion's projection of MECC's ultimate liability and any subsequent projection of MECC's ultimate liability.⁶ (Exhibit C at 5.) Legion objects that the request is "not reasonably calculated to lead to the discovery of admissible evidence." (Exhibit D at 4.)

⁶ Insurers are required to file an annual financial statement with state insurance departments, which include a Schedule F. Schedule F provides details of the reinsurance arrangements of the insurance company, including a projection of ultimate loss ceded to each of the company's reinsurers with respect to losses on policies issued by the company.

However, in projecting MECC's ultimate liability to Legion, as it was required to do on its Schedule F statutory filings, Legion would necessarily have projected losses on either a "losses occurring" or a "risks attaching" basis. In deriving a projection of MECC's ultimate liability, Legion would have had to include in its projection of MECC's liability only losses that it projected would occur within the reinsurance contract period if it understood the attachment basis to have been "losses occurring." Conversely, it would have had to include losses that it projected would occur beyond the termination of the reinsurance contract period if it understood the attachment basis to have been "risks attaching." Because such documents are squarely probative of how Legion viewed the attachment basis of the reinsurance at issue, Legion has no reasonable basis for withholding such documents.

Accordingly, MECC respectfully requests the Court to compel Legion to produce all actuarial support (including actuarial workpapers and documents related thereto) for Legion's last Schedule F statutory filing related to Legion's projection of MECC's ultimate liability and any subsequent projection of MECC's ultimate liability.

MECC Request No. 37

MECC Request No. 37 seeks documents relating to ceded reinsurance receivables for Legion policies or Accounts reinsured by MECC. Legion refuses to produce documents responsive to this request, objecting to the request as "overly broad, unduly burdensome and expensive, and not reasonably calculated to lead to the discovery of admissible evidence." (Exhibit B at 22.) In its April 3 letter and in a subsequent phone conversation between counsel, MECC pointed out that, through this request, MECC is seeking documents that will show the reinsurance payments that Legion expected to receive from MECC by claim, program and year. (Exhibit C at 5.) Legion indicated that it understood the request, but still refused to comply.

The requested documents are highly relevant because, through the ceded reinsurance receivables, MECC would discover evidence probative of Legion's expectations as to whether the reinsurance at issue attached on a "losses occurring" or "risks attaching" basis. If Legion expected to collect reinsurance receivables pursuant to a reinsurance contract long after the expiration of the contract, that would evidence Legion's expectation that the contract would respond on a "risks attaching" basis. But, if Legion's anticipated reinsurance receivables pursuant to a given reinsurance contract dropped off after the expiration of that contract, that would evidence Legion's understanding that the contract responded on a "losses occurring" basis. Clearly such documents are squarely relevant to the core issues of this case and Legion has no reasonable basis for withholding such documents. Accordingly, MECC respectfully requests the Court to compel Legion to produce all documents relating to ceded reinsurance receivables for Legion policies or Accounts reinsured by MECC by claim, program and year.

III. Conclusion

For the foregoing reasons, Midwest Employers Casualty Company respectfully requests the Court grant its Motion to Compel the Production of Documents and, pursuant to Rule 37(a)(5), to order Legion to pay the expenses that MECC incurred in bringing the instant motion.

Dated: May 2, 2008

Respectfully submitted,

MIDWEST EMPLOYERS CASUALTY
COMPANY,

By: /s/ Herbert R. Giorgio

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of May, 2008, the foregoing was served electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record.

/s/ Herbert R. Giorgio