

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

MIDWEST EMPLOYERS CASUALTY)
COMPANY,)

Plaintiff,)

vs.)

JOEL S. ARIO, ACTING INSURANCE)
COMMISSIONER OF THE)
COMMONWEALTH OF)
PENNSYLVANIA, IN HIS OFFICIAL)
CAPACITY AS STATUTORY)
LIQUIDATOR OF LEGION)
INSURANCE COMPANY)
(IN LIQUIDATION),)

Defendant.)

No. 4:07-cv-00870-CDP

**RESPONSE OF JOEL S. ARIO, ACTING INSURANCE
COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA
IN HIS OFFICIAL CAPACITY AS STATUTORY LIQUIDATOR
OF LEGION INSURANCE COMPANY (IN LIQUIDATION)
TO MIDWEST EMPLOYERS CASUALTY COMPANY'S
MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS**

For the reasons set forth below, Defendant Joel S. Ario, Acting Insurance Commissioner of the Commonwealth of Pennsylvania in His Official Capacity as Statutory Liquidator of Legion Insurance Company (In Liquidation) ("Liquidator"), by and through his attorneys, hereby responds to the Motion to Compel the Production of Documents of Midwest Employers Casualty Company ("MECC"), and respectfully requests that this Court deny MECC's motion.

I. INTRODUCTION

The origins of this dispute lie in MECC's decision to withhold payment to Legion Insurance Company (In Liquidation) ("Legion") on reinsurance contracts entered into between

the parties. Specifically, MECC has refused to pay Legion under forty-three reinsurance certificates, which are part of a single integrated alternative risk transfer (“ART”) Vehicles. ART Vehicles were products provided by Legion (and other insurance and reinsurance companies) to provide different risk financing options as an alternative to traditional insurance to individual companies or groups (associations, agency captives and programs). In exchange for premium, MECC reinsured Legion in respect of Legion’s direct workers compensation and employers liability insurance policy or policies issued. The specific issue in this litigation is the coverage of the reinsurance contracts. Legion asserts that the coverage is on a risk attaching basis, whereas it is MECC’s position that the reinsurance contracts provide coverage to Legion on a loss occurring basis. Irrespective of the type of coverage, MECC continues in its refusal to make payment on the amount due and owing the Liquidator.

Here, MECC seek documents neither relevant to the issues before the Court nor reasonably calculated to lead to the discovery of admissible evidence. The production of documents sought by MECC would constitute an undue burden and great expense on the Liquidator, due to the broad scope of the documents sought by MECC. In fact, MECC’s discovery demands are so broad and expansive as to demand documents spanning the entirety of Legion’s existence as a business. The Liquidator’s objections and responses, and the documents thus far produced, are fully compliant with the Federal Rules of Civil Procedure.

II. ARGUMENT

A. MECC’s Specific Requests to Compel Production of Documents

1. MECC Has Not Proven Relevance

MECC has not provided sufficient specificity to make a threshold showing of relevance for this Court to compel the production of documents with a scope so broad as to encompass *all* of the business written by Legion, whether involving this matter or not. Rather,

MECC merely makes a general claim that these documents are “highly germane to the issues involved in this litigation.” (*See* Memorandum in Support of Motion to Compel Production of Documents, at p.2). MECC’s flawed argument relies upon its claim that the Liquidator is not producing documents that will demonstrate whether Legion wrote all of its business on a risk attaching basis. To support this claim, MECC cites to three specific paragraphs in the Liquidator’s Answer and Counterclaim.

In its Complaint, MECC first pleaded a definition of “risk attaching.” (*See* MECC Complaint, at ¶26). Accordingly, in its Answer to MECC’s Complaint, the Liquidator denied MECC’s definition as stated, asserting that, generally, “program business is typically written on a ‘risks attaching basis,’ because multiple policies are issued during the term of the program.” (*See* The Liquidator’s Answer, at ¶26). The Liquidator then asserted that “MECC knew that the Legion program business was traditionally written consistent with the industry practice and that the ART Vehicles issues to the Accounts and reinsured by the Certificates would follow this practice.” (*Id.*). Moreover, in its Counterclaim, the Liquidator asserted that MECC was aware that reinsurance on programs, such as those at issue, were typically written on a risk attaching basis and that MECC knew that Legion used risk attaching as a basis for attachment in Legion programs. (*See* The Liquidator’s Counterclaim, at ¶¶3-4).

MECC’s assertion that “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” (*see* Memorandum in Support of Motion to Compel Production of Documents, at p.2) misstates the premise and pertinence of the allegations in the Liquidator’s Answer and Counterclaim cited by MECC in support of its argument that such an overbroad request for documents are relevant. Based upon the paragraphs

cited by MECC in its motion, the Liquidator was making the point as to the knowledge of MECC, not Legion, in entering into the reinsurance contracts. Therefore, what *Legion* did in writing its business with other reinsurers is irrelevant; only MECC's knowledge of what was the practice of Legion (and the industry) is relevant.

2. To Compel The Production Of Documents Would Be Unduly Burdensome

Compelling the Liquidator to produce every document requested by MECC would constitute an undue burden. Simply because there is an issue as to whether the forty-three reinsurance certificates provided coverage on a risk attaching basis or loss occurring basis does not mean that MECC is entitled to every single piece of paper, regarding all of the programs ever written by Legion, which contain the phrases "risk attaching" or "loss occurring." This is particularly the case because Legion proposed a commercially reasonable alternative.

Following the Liquidator's objections and responses to MECC's requests, and a discussion by counsel regarding same, the Liquidator provided a list of every program written by Legion between 1994 and 2002 and proposed that MECC choose a representative sample of the programs. (*See* Letter from Isla Long to Louis J. Aurichio, dated March 24, 2008, attached hereto as Exhibit A).¹ Such a response by the Liquidator is certainly not consistent with MECC's claim in its motion that the Liquidator is attempting to not produce any documents. The Liquidator stated that it will provide a representative sampling of the more than 1,000 programs written based on the selection of a reasonable sample by MECC. MECC's response to Ms. Long's letter was to *limit* its various requests to *all* documents within the time period of 1994 to 2002.

¹ MECC did not include Ms. Long's letter and offer of a representative sample in its recitation of facts in its motion.

This Court should balance the undue burden that would be placed on the Liquidator with MECC's right to obtain discoverable documents, which is the reason the Liquidator proposed an equitable manner for MECC to review documents through a representative sampling. Moreover, MECC will be free to question Legion representatives during deposition regarding their knowledge of programs written on a risk attaching or loss occurring basis. If any such programs are identified, MECC will request same, and the reinsurance contracts will be produced. Yet for the Liquidator to review every contract at this time is beyond its capabilities. These requests should be denied.

Regarding the specific requests addressed in MECC's motion, the Liquidator responds as follows:

a. Request No. 22

MECC seeks to compel the production of Board of Directors meetings for Legion.² Such a demand is overly broad and irrelevant to this matter. The Liquidator has agreed to produce Legion board minutes in which the attachment basis of the ART Vehicles for the Accounts is discussed, to the extent reinsured by MECC or other reinsurers. Nevertheless, the Liquidator conducted a search of Legion board minutes and none for the period 1994 to 2002 referenced the attachment basis issue.

b. Request No. 24

In request No. 24, MECC seeks the production of documents evidencing Legion's purchase of reinsurance on a loss occurring basis, whether or not related to the business Legion entered into with MECC. To produce the documents sought by MECC in its motion, the

² MECC has apparently withdrawn its request for Board of Directors minutes for MRM, as contained in its original requests.

Liquidator would be required to review between 5,000 and 6,000 contracts unrelated to MECC, an expensive and unduly burdensome task, particularly considering that the Liquidator has already produced 38,168 pages of documents, and its document production is ongoing.

c. Request No. 28

In its motion, MECC curiously seeks to compel the production of documents that the Liquidator has stated will be produced, namely, documents concerning the attachment basis of the reinsurance for the ART Vehicles for the Accounts.³ MECC does not dispute this in its motion. Yet, MECC claims that the Liquidator is not entitled to even state that it will produce documents pursuant to the Federal Rules of Civil Procedure. MECC suggests that the Liquidator either has or will withhold documents responsive to this request. Again, this puzzling claim clearly exemplifies the premature nature of a motion that is not based upon documents produced. MECC makes no effort to meet its required burden that the Liquidator should be compelled to produce these documents. The Liquidator should not be compelled to produce documents due to a reasonable and sufficient statement that such documents will be produced pursuant to the Federal Rules of Civil Procedure. This request should be denied.

d. Request No. 31

In its motion, MECC asks this Court to compel the production of documents regarding the payment or liability for losses that Legion alleges are reinsured by MECC. These documents were *already produced* by the Liquidator. This request is further proof of MECC not providing the sufficient specificity required for a motion to compel. In its motion, MECC's argument relies upon facts not established nor made by example of documents. MECC does not,

³ MECC apparently does not now claim that the Liquidator should be compelled to produce "layoff sheets," which Legion did not use.

as required, provide specific documents provided by the Liquidator, with an explanation of the documents it claims the Liquidator has not produced. Perhaps this is due to counsel for MECC not having fully reviewed all of the documents provided by the Liquidator evidencing payment for losses, or liability of losses, which are reinsured by MECC. Nonetheless, MECC has clearly not met its burden as to why it is entitled to *again* receive documents and information previously produced by the Liquidator. This request should be denied.

e. Request No. 35

In request No. 35, MECC seeks the production of all accounting documents for any business ever written with MECC. To produce these documents, the Liquidator would be required to review *every* accounting document and/or statement ever produced for business that relates to reinsurance purchased with MECC, an expensive and unduly burdensome task.

f. Request No. 36

In request No. 36, MECC seeks to compel the production of actuarial workpapers “for Legion’s last Schedule F statutory filing relating to Legion’s projection of MECC’s ultimate liability and any subsequent projection of MECC’s ultimate liability.” (*See Memorandum in Support of Motion to Compel Production of Documents*, at p.9.) There are no actuarial workpapers for Schedule F filing that provide supporting documentation on a reinsurer level, meaning, that there will be no reports that discuss coverage either on a risk attaching or loss occurring basis. MECC’s request should be denied.

g. Request No. 37

MECC has not met its burden to establish the relevance for compelling the production of reserve documents. As it has throughout its motion, MECC makes extremely general, broad statements that the documents sought would be probative of “Legion’s expectations.” Yet, it is for MECC to prove that the reinsurance contracts at issue were written

on a loss occurring basis and it is MECC that is charged with the knowledge that Legion wrote its business typically on a risk attaching basis. The documents sought by MECC are not relevant to show MECC's knowledge. Specifically, case reserves are an educated estimate of the amount the company believes the claim will be settled for (what amount will ultimately be paid whether on a risk attaching or loss occurring basis), whereas reinsurance receivables are an accounting/billing item reflecting the amount of paid loss and expenses that is due from a reinsurer or reinsurers; neither of which will provide the information sought by MECC. In addition, to require the Liquidator to produce such documents would be an expensive and undue burden providing no benefit to MECC. This request should be denied.

III. CONCLUSION

For the foregoing reasons, the Liquidator respectfully requests that MECC's Motion to Compel the Production of Documents be denied.

Respectfully submitted:

JOEL S. ARIO, ACTING INSURANCE
COMMISSIONER OF THE COMMONWEALTH
OF PENNSYLVANIA, IN HIS CAPACITY AS
LIQUIDATOR OF LEGION INSURANCE
COMPANY (IN LIQUIDATION)

By: /s/ Eric D. Martin
One of his attorneys

Deborah F. Cohen
Isla L. Long
PEPPER HAMILTON LLP
3000 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103-2799
215-981-4000
215-981-4750 (fax)

Eric D. Martin # 67275
Husch Blackwell Sanders LLP
720 Olive Street
Suite 2400
St. Louis, MO 63101
Phone: 314-346-6000
Fax: 314-345-6060

Dated: May 14, 2008

CERTIFICATE OF SERVICE

The undersigned certifies that on May 14, 2008, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon:

Herbert R. Giorgio
BRYAN CAVE LLP
211 N. Broadway
Suite 3600
St. Louis, MO 63102-2750

Lloyd A. Palans
BRYAN CAVE LLP
211 N. Broadway
Suite 3600
St. Louis, MO 63102-2750

Christopher M. Durcan
BUTLER RUBIN SALTARELLI & BOYD LLP
70 West Madison, Suite 1800
Chicago, IL 60602

Christopher J. Lawhorn
BRYAN CAVE LLP
211 N. Broadway
Suite 3600
St. Louis, MO 63102-2750

James I. Rubin
BUTLER RUBIN SALTARELLI & BOYD LLP
70 West Madison, Suite 1800
Chicago, IL 60602

Joseph P. Noonan
BUTLER RUBIN SALTARELLI & BOYD LLP
70 West Madison, Suite 1800
Chicago, IL 60602

Louis J. Aurichio
BUTLER RUBIN SALTARELLI BOYD LLP
70 West Madison, Suite 1800
Chicago, IL 60602

/s/ Eric D. Martin
