

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

AMERISURE MUTUAL INS. CO.,

Plaintiff,

Case No. 2:18-cv-11966

vs.

Hon. Stephen J. Murphy, III

TRANSATLANTIC REINSURANCE CO.,

Defendant.

REPORT AND RECOMMENDATION OF SPECIAL MASTER

INTRODUCTION

On June 21, 2018, Plaintiff, Amerisure Mutual Insurance Company, (“Amerisure”) filed suit against Defendant, Transatlantic Reinsurance Company (“TransRe”). Amerisure alleges that it issued two (2) umbrella policies to Armstrong Machine Works, Armstrong Video Products, a division of Armstrong Machine Works (“Armstrong”), and that it has made certain loss and loss expense payments, pursuant to the terms and conditions of the policies. (Compl. at 27). Amerisure alleges that TransRe issued two (2) facultative reinsurance agreements reinsuring Amerisure for loss and loss expense payments made by it under the umbrella policies. (Compl. at 33). Amerisure alleges that TransRe has breached the terms

and conditions of the facultative reinsurance agreements by failing to reimburse Amerisure for loss and loss expense payments incurred by Amerisure in connection with defending and indemnifying Armstrong with respect to various asbestos claims. (Compl. at 72-74). Amerisure seeks, among other things, money damages and a declaration of rights under the facultative reinsurance agreements requiring TransRe to reimburse Amerisure for the loss and loss related expenses incurred by it for defending and indemnifying Armstrong. TransRe, on the other hand, asserts that it has no liability to Amerisure for any portion of the loss and loss expense payments incurred by Amerisure to date, or incurred in the future.

On September 14, 2018, Amerisure and TransRe filed a Joint Discovery Plan. A Rule 16 Scheduling Conference occurred on September 25, 2018, wherein the parties discussed whether it would be appropriate to bifurcate the proceedings. Following the Scheduling Conference, the Court issued an Order on September 29, 2018, appointing a Special Master. The Court requested a recommendation as to whether the proceedings should be bifurcated. Fed. R. Civ. P. 53(a)(1)(C).

BACKGROUND

A. The Insurance Program

Amerisure issued a general liability policy (the “Primary Policy”) to Armstrong for the period January 1, 1980 to January 1, 1983, under Policy No. SRMG47-4-48147-2, which included an annual loss coverage for “Bodily Injury Liability” of “\$500,000 each occurrence” and “\$1,000,000 aggregate”. Amerisure issued an umbrella liability policy (the “1981 Umbrella Policy”) above the Primary Policy, which was effective January 1, 1981 through January 1, 1982, under Policy No. SRFMG29-4-48147-1, which included a \$15,000,000 each occurrence limit of liability for personal injury and property damage and a \$15,000,000 limit of liability in the aggregate. Amerisure renewed the umbrella policy effective January 1, 1982 through January 1, 1983 under Policy No. SRFMG29-2-48147-1, but increased the each occurrence limit of liability to \$30,000,000 and \$30,000,000 in the aggregate (the, “1982 Umbrella Policy”).

B. The Reinsurance Program

Effective January 1, 1981 through January 1, 1982, Amerisure and TransRe entered into a facultative reinsurance contract (the “1981 Facultative Certificate”) under Certificate No. C81-36268, whereby TransRe agreed to reinsure a portion of Amerisure’s limit of liability for the 1981

Umbrella Policy. TransRe renewed the Certificate from January 1, 1982 through January 1, 1983, under Certificate No. C82-3184, agreeing to again reinsure a portion of Amerisure's umbrella limit of liability for the 1982 Umbrella Policy. A Schedule of primary and umbrella insurance, as well as reinsurance contracts are attached as **Exhibit A**.

C. Asbestos Claims

Commencing in the 1990's, Amerisure alleges that asbestos claims were filed against Armstrong and tendered to Amerisure for defense and indemnity. (Compl. at 55). Amerisure alleges that it entered into cost sharing agreements with other Armstrong primary and umbrella/excess insurers for the purpose of defending and indemnifying Armstrong for such claims. (Compl. at 56). Amerisure alleges it has made or expects to make payments under the umbrella policies issued to Armstrong now that the applicable Primary Policy's limit of liability has been exhausted. (Compl. at 57-59).

D. Amerisure's Notice of Loss and Reinsurance Recoverable Invoices to TransRe

On March 26, 2014, Amerisure provided a loss notification (the "Notice of Loss") to TransRe in relation to certain asbestos claims pending against Armstrong. (Compl. at 60). Amerisure alleges it has paid the first \$1,000,000 in loss settlements under the 1981 Umbrella Policy in addition

to related loss expenses. Amerisure alleges that it has invoiced TransRe under the 1981 Facultative Certificate for loss and loss expense payments allegedly due it. As of the filing of the Complaint, Amerisure alleges it has an outstanding balance due from TransRe on the 1981 Facultative Certificate of \$935,574.41, and that it is reasonably likely its loss and loss expense payments will pierce the 1982 Facultative Certificate (Compl. at 67 and 68). TransRe has not paid the invoices.

DISCUSSION

Amerisure asserts it should be reimbursed by TransRe under the 1981 and 1982 Facultative Certificates because: (i) loss payments made by Amerisure are the only payments that exhaust the limits of liability of the 1981 and 1982 Umbrella Policies; (ii) TransRe is obligated to reimburse Amerisure for its share of loss payments incurred by Amerisure, pursuant to the 1981 and 1982 Facultative Certificates; and (iii) TransRe must pay for its share of the loss expense payments incurred by Amerisure, since such payments are “in addition to” the limits of liability under the 1981 and 1982 Umbrella Policies and are covered under the 1981 and 1982 Facultative Certificates (collectively, the “Contractual Issues”). TransRe counters by alleging that the 1981 and 1982 Reinsurance Certificates include a limit of liability under the “REINSURANCE ACCEPTED” section

of the Certificates' Declaration Sheets, which state that the limit of liability is the most TransRe is obligated to pay whether such limit of liability is exhausted by loss payments and/or loss expense payments. Apart from the parties' dispute relating to these Contractual Issues, TransRe asserts two (2) other defenses to Amerisure's pending claims. First, Amerisure breached the doctrine of *Uberrima fides* meaning utmost good faith -- that all parties to a reinsurance contract must deal in good faith, making a full declaration of all material facts during the underwriting of a reinsurance contract. (Ans. Fifth Aff. Defense). Further, TransRe alleges that Amerisure failed to provide prompt notice of claims to TransRe, which prejudiced TransRe's position, thereby excusing its obligation to reimburse Amerisure under the 1981 and 1982 Facultative Certificates. (Ans. Second Aff. Defense).

Bifurcation

Amerisure has filed a motion suggesting the court should bifurcate the proceedings (and presumably, discovery related to the respective proceedings) by requesting the court first resolve the Contractual Issues between the parties. Namely, whether the limits of liability within the 1981 and 1982 Facultative Certificates are exhausted only by loss payments; whether loss expense payments are "in addition to" the limits of liability and

are covered under the 1981 and 1982 Facultative Certificates; and whether declaratory judgment expenses incurred by Amerisure are covered under the 1981 and 1982 Facultative Certificates. Amerisure requests the court implement a Phase I Discovery Plan, which would limit discovery and allow expert testimony on the custom and practice in the insurance industry related to the Contractual Issues and resolve them either in a limited evidentiary hearing, or via cross-motions for summary judgment.

Amerisure argues that Phase I Discovery Plan proceeding is the most efficient manner to resolve the Contractual Issues between the parties without prejudice to either party or the remaining proceedings. TransRe disagrees. Essentially, TransRe suggests that resolution of its liability for what Amerisure has billed under the 1981 and 1982 Facultative Certificates, and will bill in the future, will not resolve the issue of whether TransRe is even liable, in the first instance, for any payments billed to TransRe. According to TransRe, resolution of the Contractual Issues would leave unanswered the questions of whether Amerisure breached doctrine of *Uberrima fides* or failed to provide prompt notice of the subject claims.

The burden rests with the moving party to show that bifurcation is necessary and appropriate. *Hines v. Overstock.com, Inc.*, 210 U.S. Dist.

LEXIS 70205 (E.D.N.Y. July 13, 2010). The court has discretionary authority under Fed. R. Civ. P. 26(c) and (d) to limit the scope of discovery or to order that discovery be conducted in a particular sequence. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79-80 (1988). Further, under Fed. R. Civ. P. 42(b), a court may bifurcate a trial “in furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy.” Only one of these criteria need be met to justify bifurcation. *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1177 (7th Cir.) *cert den.*, 464 U.S. 891 (1983). Fed. R. Civ. P. 42(b) suggests that a court may even bifurcate a trial on its own motion and that the appropriateness of bifurcation depends on the facts and circumstances of each case. *Idzajt v. Pennsylvania Railroad Co.*, 456 F.2d 1228 (3d Cir. 1972).

While resolution of the Contractual Issues would be significant, it would not, as a threshold matter, resolve all of the disputes between the parties. For example, if the Contractual Issues were resolved in favor of Amerisure, the court would have concluded that Amerisure’s loss payments exhaust the 1981 and 1982 Umbrella Policies’ limits of liability, loss payments are “in addition to” the respective limits of liability and are

covered under the 1981 and 1982 Facultative Certificates and that declaratory judgement expenses incurred by Amerisure are also covered. On the other hand, if the court resolved the Contractual Issues in favor of TransRe, the court would have concluded for the purposes of the 1981 and 1982 Facultative Certificates that the REINSURANCE ACCEPTED limits of liability are exhausted by loss payments and loss expense payments (or, that loss expense payments are not covered at all), and that declaratory judgment expenses are also not covered. Either way, the Court would still be left with TransRe's claim against Amerisure that it breached the duty of utmost good faith during the underwriting of the 1981 and 1982 Facultative Certificates, and Amerisure failed to provide prompt notice of claims to TransRe.

Amerisure concedes that its proposed Phase I Plan would likely include document production, related depositions and expert reports associated with, presumably, the underwriting intent or meaning of the applicable policy or reinsurance language. Such being the case, it would seem to be efficient and appropriate to undertake, contemporaneously, the similar discovery associated with TransRe's claim that it was allegedly misled during the underwriting of the 1981 and 1982 Facultative Certificates. The parties' intent, custom and practice, and the underwriting

of the 1981 and 1982 Facultative Certificates seem to be sufficiently related to the Contractual Issues; and therefore, it would be inefficient to bifurcate the Contractual Issues from the misrepresentation claim of TransRe.

Amerisure's bifurcation approach would resolve the significant contract disputes. However, it will not resolve the potentially dispositive threshold issue of *Uberrima fides*. Amerisure refers the Special Master to *Ohio Ins. Co. v. Employers Reinsurance Corp.*, 694 F.Supp.2d 794 (S.D. Ohio, 2010) in support of its argument. However, *Ohio Ins. Co.* involved a stipulated order between the parties agreeing to bifurcation; a situation that does not exist in the present case.

CONCLUSION AND RECOMMENDATION

The Contractual Issues are not threshold matters that would fully resolve this litigation. While they are significant and substantive to the overall resolution of the case, they leave unresolved TransRe's remaining claims of misrepresentation and late notice; both of which may bar Amerisure's recovery under the 1981 and 1982 Facultative Certificates. While Amerisure's request is logical, it does not lend itself to resolving potentially dispositive and threshold issues. In this instance, Amerisure's motion for bifurcation would not further convenience, avoid prejudice, or be conducive to an expeditious and efficient resolution of this case.

For the reasons stated above, I would recommend the Court **DENY**
Amerisure's Motion for Bifurcation.

/s/ Michael G. Costello
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November 29, 2018

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Honorable Stephen J. Murphy, III

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EXHIBIT A

Report and Recommendation of Special Master

1/1/80 – 1/1/83

<p>Key: Blue – Facultative Green – Umbrella Yellow – Primary</p>	<p>1/1/81 – 1/1/82 Transatlantic Re Facultative Certificate No. C81-36268</p> <p>Policy Limit: \$15,000,000 each occurrence and in the aggregate, where applicable, x of primary.</p> <p>Company Retention: \$50,000 part of \$1,000,000 each occurrence and in the aggregate where applicable x of primary.</p> <p>Reinsurance Accepted: \$2,000,000 P/O \$4,000,000 each occurrence and in the aggregate x of \$1,000,000 each occurrence and in the aggregate where applicable x of primary.</p>	<p>1/1/82 – 1/1/83 Transatlantic Re Facultative Certificate No. C82-38184</p> <p>Policy Limit: \$30,000,000 each occurrence and in the aggregate, where applicable, x of primary.</p> <p>Company Retention: Primary and \$50,000 part of \$1,000,000 each occurrence and in the aggregate where applicable, x of primary.</p> <p>Reinsurance Accepted: \$2,000,000 part of \$15,000,000 each occurrence and in the aggregate, where applicable, x of \$5,000,000 each occurrence and in the aggregate, where applicable, x of primary.</p> <p>Layer B) \$2000,000 part of \$10,000,000 each occurrence and in the aggregate, where applicable, x of \$20,000,000 each occurrence and in the aggregate, where applicable, x of primary.</p>
	<p>1/1/81 – 1/1/82 MMIC Umbrella SRFMG29-4-48147-1 1/1/81 – 1/1/82 \$15,000,000 per occurrence \$15,000,000 per aggregate</p>	<p>1/1/82 – 1/1/83 MMIC Umbrella SRFMG29-2-48147-1 1/1/82 – 1/1/83 \$30,000,000 per occurrence \$30,000,000 per aggregate</p>
<p>MMIC Primary SRMG47-4-48147-2 \$500,000 per occurrence \$1,000,000 per aggregate</p>	<p>MMIC Primary SRMG47-4-48147-2 \$500,000 per occurrence \$1,000,000 per aggregate</p>	<p>MMIC Primary SRMG47-4-48147-2 \$500,000 per occurrence \$1,000,000 per aggregate</p>
1/1/80 – 1/1/81	1/1/81 – 1/1/82	1/1/82 – 1/1/83