IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOEL S. ARIO, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA, Petitioner,	:	
V.	:	No. 269 M.D. 2001
RELIANCE INSURANCE COMPANY, Defendant.	:	

IN RE: REPUBLIC WESTERN INSURANCE COMPANY'S PETITION TO FILE CONFIDENTIAL ARBITRATION MATERIALS AND AWARD UNDER SEAL

THE LIQUIDATOR'S MEMORANDUM CONCERNING THE CONFIDENTIALITY OF ARBITRATION MATERIALS AND AWARD UNDER SEAL

Joel S. Ario, Insurance Commissioner of the Commonwealth of Pennsylvania in his official capacity as Statutory Liquidator of Reliance Insurance Company (In Liquidation) ("Reliance") submits this Memorandum in response to the Court's Order of June 24, 2009 ("Order"), seeking specific justification for confidential treatment of certain documents submitted by the parties in connection with the "Petition of Republic Western Insurance Company For Leave to Intervene, For Relief From Stay, For Leave to File a Declaratory Judgment Action, To Declare Right of Setoff and For Injunctive Relief." ("Republic Western's Petition").

Republic Western's original Petition and its reply appended sixteen documents which constituted confidential arbitration material ("Confidential Arbitration Material") pursuant to a Confidentiality Agreement executed by the parties and the three member Panel at the outset

of the underlying arbitration.[1] Accordingly, pursuant to the Confidentiality Agreement, Republic Western moved to file and maintain these documents under seal in its "Petition to File the Confidential Arbitration Materials and the Award under Seal." ("Republic Western's Confidentiality Petition"). In response to Republic Western's two petitions, Reliance attached one additional document ("April 15 Clarification Email") under seal, and joined in Republic Western's Confidentiality Petition to the extent that Republic Western sought protection of any Confidential Arbitration Material under the Confidentiality Agreement. Both parties concur in seeking confidentiality and no other persons are seeking access to these documents.

The grounds for Reliance's request with respect to the April 15 Clarification Email (specifically) and the Confidential Arbitration Material (generally) is that the material was exchanged or arose in the context of a private commercial arbitration. In reinsurance disputes in particular, arbitral confidentiality is one of the core expectations of the parties—it encourages free, full, and open communication between the parties and the Panel throughout the proceedings, permits the removal of formalities associated with litigation, allows the participation of the Panel in the resolution of the dispute through the exercise of its expertise and experience, and encourages the creation of business solutions, as opposed to purely legal or technical results, without any concern for precedential effect in other proceedings.[2] *See* Staring, Graydon S., Law of Reinsurance, Sec. 22:6(2) (1993) (confidentiality is the "cornerstone" of the

[1] The underlying arbitration is discussed in the Petition submitted to the Court but is not the subject of review in Republic Western's petition.

[2] Reinsurance arbitrators often do not follow the technical rules of evidence or rules of procedure that would ordinarily be followed in a court of law. This concept is embodied in many reinsurance contracts, which expressly relieve the arbitration panel from following "the strict rules of law" and admonish them to construe the underlying contracts as "honorable agreements."

reinsurance process.); ARIAS-US,[3] Practical Guide to Reinsurance Procedure, § 3.8, Comment C ("It is generally agreed through the industry that reinsurance arbitrations are and should be confidential in most circumstances, even in the absence of a complete agreement"). Accordingly, with respect to the document for which Reliance claimed protection (the April 15 Clarification Email), the parties' expectation of privacy, as embodied in the Confidentiality Agreement, enabled the Panel to reveal its thought process in reaching the Arbitration Award and to comment on whether the Panel intended, by its Award, for Republic Western to withhold a portion of the payment the Panel had ordered to be made to Reliance.

Moreover, since the Panel Members, along with the parties, are also signatories of the Confidentiality Agreement, they too have an expectation of privacy in the reinsurance arbitration. According to the ARIAS-US, Practical Guide to Reinsurance Procedure § 3.8, Comment A: "[t]he confidentiality of arbitration proceedings should be memorialized in either an agreement by the parties *and the Panel, or an order entered by the Panel*, setting forth the terms and scope of the confidentiality." (emphasis added). Reinsurance arbitrators are typically experienced professionals in the industry who are appointed by companies and attorneys to preside over their private reinsurance disputes. As referenced above, Panel members rely on the fact that their communications, statements, and thought processes will be kept confidential. According to the ARIAS-US, Code of Conduct – Canon VI, "[a]rbitrators should be faithful to the relationship of trust and confidentiality inherent in their position." Comment 4 of the Canon VI states: "[u]nless otherwise agreed by the parties or by applicable rules, arbitrators are not obligated to return or retain notes taken during the arbitration. *Notes, records and recollections*

[3] ARIAS-US is one of the leading reinsurance arbitration organizations, whose membership includes arbitrators, umpires, companies and attorneys engaged in the practice of reinsurance arbitrations.

of arbitrators are confidential and shall not be disclosed to the parties, the public, or anyone else, unless (1) all parties and the panel agree to such disclosure, or (2) a disclosure is required by law." (emphasis added). Thus, not only do the parties have an expectation of confidentiality, but the Panel members also have an expectation that their thought processes will be kept confidential.

A federal court recently ruled that the expectation of privacy engrained in reinsurance arbitrations was a sufficient justification to seal reinsurance information and would overcome the common law presumption of public access to judicial records. In weighing the interests of the parties as against the public interest, the court considered a number of factors,[4] and found:

> [T]he purpose behind sealing the Award is legitimate. The Parties entered into a Confidentiality Agreement and it is the practice in the reinsurance industry to keep arbitration proceedings, including final awards, confidential. .... [U]pholding the terms of the Confidentiality Agreement will promote the voluntary execution of private execution of private agreements; a sound public policy objective.

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[4] "These factors included:

(1) whether disclosure will violate any privacy interests;

(2) whether the information is being sought for a legitimate purpose or for an improper purpose;

(3) whether disclosure of the information will cause a party embarrassment;

(4) whether confidentiality is being sought over information important to public health and safety;

(5) whether the sharing of information among litigants will promote fairness and efficiency;

(6) whether a party benefitting from the order of confidentiality is a public entity or official; and

(7) whether the case involves issues important to the public."

Century, quoting Shingara v. Skiles, 420 F.3d 301, 306 (3d Cir. 2005).

Century Indemm. Co. v. Certain Underwriters at Lloyd's, London, 592 F. Supp.2d 825, 828 (E.D. Pa. 2009). *See Salley v. Option One Mortg. Corp.*, 925 A.2d 115, 130 (Pa. 2007)("We have a strong public policy in this state in favor of resolving disputes by arbitration....").[5]

This balancing approach used in *Century* is similar to that used in Pennsylvania state courts. Like the federal courts, the Pennsylvania courts have acknowledged that while there is a "presumption of openness" attached to a public judicial document, it is not absolute. *Commonwealth v. Upshur*, 592 Pa. 273 (2007) (criminal prosecution); *Commonwealth v. Fenstermaker*, 515 Pa. 501 (1987) (criminal prosecution). The test is to determine if the "personal interest in secrecy outweighs the traditional presumption of openness." *R.W. v. Hampe*, 426 Pa. Super. 305, 310 n. 3 (1993), *citing*, *Bank of America Nat'l Trust & Savings Ass'n. v. Hotel Rittenhouse Ass'n*, 800 F. 2d 339 (3d Cir. 1986).[6] *See Katz v. Katz*, 356 Pa. Super. 461, 514 A.2d 1374 (1986) (court protects divorce proceedings); *In the Interest of: M.B.*, 819 A.2d 59 (Pa. Super. 2003) (protection of juvenile proceedings); *Stenger v. Lehigh Valley*

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[5] In addition, confidentiality in reinsurance arbitrations is also appropriate because of the protection regularly accorded to confidential proprietary information. *See, e.g.*, 65 P.S. § 67.708(b)(11) (exception in Pennsylvania's "Right to Know" act for "trade secret or confidential proprietary information"); *Joon Assocs. v. House of Blues Tours & Talent, Inc.*, No. 05-CV-6621, 2006 U.S. Dist. LEXIS 68170, at *9 (E.D. Pa. Sept. 21, 2006) (confidential commercial information protected from disclosure because release to competitors would cause harm); *see also Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 166 (3d Cir. 1993) ("Documents containing trade secrets or other confidential information may be protected from disclosure."). While Reliance has less interest in protecting disclosure of its business practices, because it is no longer in business, it bears noting that Reliance nevertheless has a strong privacy concern regarding its collection practices to recover reinsurance balances—the largest asset of the Estate—including positions Reliance takes with respect to reinsurers' arguments, and its litigation and settlement strategies. *Cf. Carter v. City of Philadelphia*, No. 97-4499, 2000 U.S. Dist. LEXIS 4933, at *7-8 (E.D. Pa. April 10, 2000) (policies of the District Attorney's office kept under seal because disclosure would reveal confidential strategic information about the office of the District Attorney's inner workings). This point will be significant regarding other submissions by Reliance to this Court, including the motion to confirm the Arbitration Award that Reliance expects to file with this Court. In the end, it is in the best interest of the Estate and its creditors to maintain confidentiality because it promotes the Liquidator's statutory duty to marshal assets of the insolvent insurance company for the benefit of its creditors.

[6] According to *Hampe*, there is also a second test under a First Amendment constitutional analysis, which is generally applied in cases where "the press intervenes in a private action to ensure its access to judicial proceedings." *Id.* at 310, n. 3 (citation omitted). Accordingly, this analysis is unnecessary here. Moreover, in

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Hosp., 382 Pa. Super. 75, 554 A.2d 954 (1989) (pre-trial discovery relating to patient who contracted AIDS while transfused at a hospital). *But see Storms v. O'Malley,* 779 A.2d 548 (Pa. Super. 2001) (holding lower court did not abuse its discretion in refusing to seal the settlement agreement upon a finding that there was no proof of serious injury to minor's interest and that public policy in settlement did not outweigh the public's interest in open court proceedings; the settlement agreement did not contain a confidentiality clause). *See Century*, applying "factors to consider" in determining whether to seal judicial records.

The discussion by the Superior Court in *Stenger* is instructive as to how the balance should be struck. In *Stenger,* the Court was called upon to address whether a newspaper should have access to pre-trial discovery. The Court held that discovery documents generated in a civil case were not "judicial records" to which the newspaper had a common-law right of access. The Court observed that pre-trial discovery "is essentially a private process" and pretrial depositions and interrogatories are not "public components of a civil trial." *Id.* at 89 (citations omitted). Deciding that the pre-trial discovery was "wholly private to the litigants," the Court held that making such information "readily available to the public" would have detrimental consequences to the discovery process. *Id.* at 89. It would be "grievous," and the "entire litigation procedure would suffer." *Id.* These same concerns—the expectation of confidentiality by the parties in their disclosures of information outside of the court during a non-public proceeding, and the concern as to the chilling effect of disclosing such information in the litigation process—are analogous to the issues raised in the reinsurance context. The arbitration

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Pennsylvania, if the issue can be resolved under the common law approach, there is no need to engage in the constitutional analysis. *Id.* (citation s omitted).

was not public, nor ever intended to be. Like pre-trial discovery in *Stenger*, the arbitration was "wholly private" to Republic Western and Reliance.

Certainly, there can be no overriding public interest in access to confidential records arising from a dispute over commercial conduct in respect of arcane reinsurance contracts conducted through confidential arbitration proceedings.[7] The public purpose of maintaining "openness" to "enhance the quality of justice dispensed by officers of the court and thus contribute[s] to fairer administration of justice," which lies at the core of permitting access to judicial records, *Hampe* at 311, is nowhere implicated in the conduct of private disputes conducted by agreement outside the court system. "The common law rule, which confers a public right of access to court records, is that every person is entitled to access `provided he has an interest therein for some useful purposes and not for mere curiosity.'" *Hutchison v. Luddy*, 417 Pa. Super. 93, 112 (1992).

Moreover, the substance of the dispute presented to the arbitration Panel and embodied in the Confidential Arbitration Material is not before this Court. Here, the only narrow issue before this Court is whether Republic Western may intervene in the liquidation proceeding to assert a right to offset. The only parties who have an interest in the information are Reliance and Republic Western and they are in agreement that the information should be sealed. If, for some reason, a third-party seeks access to this confidential information at a later time, then their interest may be weighed against the interest of the Panel, Reliance and Republic

[7] The fact that the arbitration was instituted by the Liquidator as a fiduciary for Reliance does not elevate this private contract dispute into a matter of governmental interest to the public. Thus, in *Century*, although the court considered whether one of the parties was a "public entity or official," *see infra* n. 3, that one particular factor should not be determinative here because here, the documents sought to be protected relate to the enforcement of a private reinsurance relationship between Reliance and Republic Western. Moreover, enforcement is in the best interest of the Reliance Estate and its creditors as it helps Reliance collect reinsurance funds, which is the biggest asset of the Estate.

Western in keeping the arbitration information private. The fact remains, however, that no other party has come forward with any interest in this private arbitration information and it is unlikely that a party will do so.

The lack of any present countervailing public interest underscores the importance of preserving the historic tradition of confidentiality in reinsurance arbitrations, particularly as it relates to the Liquidator's enforcement efforts. If confidentiality is not upheld, it is more than likely that arbitrations will be less open, less efficient, more formalistic, all of which impede the Liquidator's efforts to collect its most valuable asset, reinsurance.

For the foregoing reasons, Reliance respectfully requests that the Exhibits submitted in connection with Republic Western's Petition by both Republic Western and Reliance be maintained under seal in accordance with the Confidentiality Agreement executed by the parties and the Panel at the outset of the arbitration. The interests of Reliance and Republic Western in maintaining a private arbitral forum for their reinsurance contract disputes, and the salutary public goal of encouraging arbitrations that this promotes, outweigh any possible public interest in access to documents exchanged in the arbitration or rulings by the Panel.

Respectfully submitted,

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Date: July 9, 2009