

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOEL S. ARIO, Insurance Commissioner of the
Commonwealth of Pennsylvania,

Plaintiff

v.

RELIANCE INSURANCE COMPANY,

Defendant

No. 269 M.D. 2001

RE: Republic West Insurance Company

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: August 7, 2009

In connection with its petition to intervene in order to assert a right to setoff, Republic Western Insurance Company (RepWest) seeks to file under seal certain exhibits attached to its intervention petition. The Liquidator joins in the request to seal the documents, which relate to the arbitration and award on a claim by Reliance Insurance Company (in Liquidation) against Republic Western for payment under reinsurance treaties. After considering the parties' averments and arguments in support of the request to seal the documents and balancing the parties' interests in maintaining the confidentiality of the documents against the presumption that judicial records be open for public inspection, I conclude that the request to place the documents under seal should be granted.

From 1997 through 1999, RepWest reinsured certain workers' compensation policies issued by Reliance. Starting in 2000, Reliance made claims under these reinsurance treaties. In October of 2001, this court placed Reliance

Insurance Company into liquidation under Article V of the Insurance Department Act of 1921.¹ In 2007, having failed to receive payment on the reinsurance claims, the Liquidator demanded arbitration as provided under the applicable treaties. Prior to arbitrating their dispute, the parties and the arbitration panel executed a confidentiality agreement, which provides, in pertinent part, as follows:

2. Except as provided in paragraph 4 below [such as disclosure to retrocessionaires, auditors, compliance with right to know laws], and absent written agreement between parties to the contrary, Reliance and Republic Western agree that all briefs, depositions and hearing transcripts generated in the course of this arbitration, documents created for the arbitration or produced in the proceedings by the opposing party or third-parties, final award and any interim decisions, correspondence, oral discussions and information exchanged in connection with the proceedings (hereinafter collectively referred to as "Arbitration Information") will be kept confidential.

RepWest's Memorandum of Law in support of petitions to file under seal, filed July 9, 2009, Exhibit B.

In accordance with this Agreement, at the time RepWest petitioned to intervene in the liquidation action, it also petitioned, on April 8, 2009, to file the Arbitration Award under seal. Subsequently, on May 13, the Liquidator joined in the request to seal the award and requested that an April 15, 2009 e-mail from a member of the arbitration panel also be sealed. On June 5, RepWest filed an additional petition to place under seal the "Arbitration Materials," comprising of Exhibits A through O, and later amended the request to only Exhibits A through N, which include partial transcripts of proceedings before the arbitration panel, a brief submitted to the panel, e-mail and regular mail correspondence regarding the

¹ Act of May 17, 1921, P.L. 789, added by Section 2 of the Act of December 14, 1977, P.L. 280, *as amended*, 40 P.S. §§ 221.1 – 221.63.

arbitration and partial payment of the award. The Liquidator has joined in requesting that these Arbitration Materials be sealed.

Based on the general recognition that orders to place court filings under seal should not be granted as a matter of routine without considering the countervailing public interests which may be sacrificed by the order,² this court directed each party to file a memorandum setting forth with greater specificity the grounds justifying their confidentiality request with respect to each exhibit. The court's order called for the parties to supply information beyond the broad averments of the petition [to seal the documents] and to "address not only the parties' interests in privacy and the alleged prejudice that may result from public access but also the reasons why the parties' interests in this regard outweigh the public interest." Order dated June 24, 2009.

In response to this directive, RepWest asserts in its memorandum that maintaining confidentiality in accord with the parties' agreement facilitates free and open exchange of information between the parties, encourages arbitration, decreases litigation and, thus, furthers a general public interest in efficient resolution of disputes. RepWest also contends that "consistency and fairness" dictate that the same confidentiality should be afforded to the arbitration materials as is routinely afforded to confidential affidavits accompanying petitions to approve a commutation with a reinsurer. The Liquidator contends that arbitral confidentiality is a core expectation in the resolution of reinsurance disputes; that this expectation is shared by the arbitrators who also executed the confidentiality agreement and who, as practitioners in the field, also have an interest in keeping their thought processes and creative resolutions confidential. The Liquidator also

² See e.g., *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994).

asserts that maintaining confidentiality in reinsurance arbitrations serves the public interest in maximizing judicial economy, in that it encourages and allows creative business solutions to disputes rather than purely legal or technical solutions without a need for concern with any precedential effect these creative solutions may have on other disputes. Citing to *Century Indemnity Company v. Certain Underwriters at Lloyd's London*, 592 F. Supp.2d 825 (E.D. Pa 2009), the Liquidator points to a persuasive analysis in a nearly identical context.

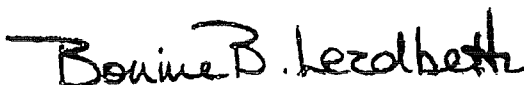
In considering the balance of interests, the district court in *Century* considered whether the arbitration award in a reinsurance dispute should be sealed. The request to seal the award did not include, as it does in the present case, a request to seal transcripts and correspondence related to the arbitration proceeding. Nevertheless, in view of the fact that review of each document sought to be sealed in the present case reveals nothing of greater public interest than that associated with the award alone, the persuasive value of the analysis in *Century* is not diminished by the difference in the scope of the request.

The *Century* Court considered a list of factors culled from the opinion of the Third Circuit in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994), which in particularly pertinent part include: whether disclosure will violate any privacy interests; whether confidentiality is being sought over information important to public health and safety; whether a party benefitting from the order of confidentiality is a public entity or official; and whether the information to be sealed involves issues important to the public. *Century*, 592 F. Supp.2d at 827-28. In *Century*, the court concluded that: (1) there existed a "significant 'business' privacy interest that would affect the [reinsurer] if the award was disclosed;" (2) sealing the award served a "legitimate purpose," given that "the parties entered into

a Confidentiality Agreement” that conforms to “the practice in the insurance industry to keep arbitration proceedings, including final awards, confidential;” (3) “public health and safety issues are not implicated;” (4) “upholding the terms of the Confidentiality Agreement will promote the voluntary execution of private arbitration agreements, which is a sound public policy objective;” and, (5) neither party is a public entity.³ *See id.* at 828. All of these factors apply in favor of granting the petition to seal the documents in the present case.

In the present case, the materials sought to be sealed concern the arbitration of a private business dispute that involved no particular issues of legitimate public interest. Thus, the materials are of no public interest other than that associated with public access to all judicial records generally. This fact balanced against the parties’ articulation of legitimate reasons for sealing the documents weighs in favor of granting their request.

Accordingly, the joint request to seal is granted. The Arbitration Award, the April 15, 2009 e-mail from a panel member and the Arbitration Materials attached to the Petition to Intervene as Exhibits A through N shall be filed under seal.


BONNIE BRIGANCE LEADBETTER,
President Judge

³ While the Insurance Commissioner in his official capacity as Liquidator is not acting as a private person, he steps into the shoes of the insolvent private insurance company, asserting a privacy interest regarding collection of reinsurance balances.

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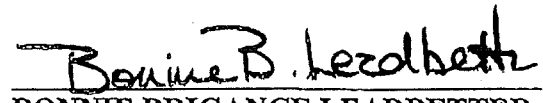
RELIANCE INSURANCE COMPANY,

Defendant

RE: Republic West Insurance Company

ORDER

And now, this 7th day of August, 2009, upon consideration of Republic West Insurance Company's Petition to File Confidential Arbitration Materials under Seal and upon consideration of the Liquidator's joinder therein and for the reasons set forth in the preceding opinion, the Petition is GRANTED. The Chief Clerk is hereby directed to place under Seal: (1) the Arbitration Award marked as "Sealed Exhibit A" to the Petition to Seal filed April 8, 2009; (2) the April 15, 2009 Clarification E-mail marked as "Sealed Exhibit 1" to the Liquidator's Motion to Join in the Petition to File the Arbitration Materials Under Seal and to the Liquidator's Response to the Petition of Republic Western to Intervene both filed May 13, 2009; and the (3) Arbitration Materials marked A through N included in the packet labeled "Sealed Exhibits A through O"¹ to the Petition of Republic Western to File Confidential Arbitration Materials Under Seal filed June 5, 2009.


BONNIE BRIGANCE LEADBETTER,
President Judge

¹ Republic Western withdrew its request to place Exhibit O under seal. **Certified from the Record**

AUG - 7 2009

and Order Exit

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PRINT TIMEAUG. 7. 12:56PM