

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. DIANE KOKEN :
Insurance Commissioner of the :
Commonwealth of Pennsylvania, :
 :
Plaintiff, :
 :
v. :
 :
RELIANCE INSURANCE COMPANY, :
 :
Defendant :

DOCKET NO. 269 MD 2001

RECEIVED AND FILED
PHILADELPHIA
COMMONWEALTH COURT
OF PENNSYLVANIA
JUL 5 3 26 PM '01

ORDER

AND NOW, this day of , 2001, it is hereby ORDERED that
Miami Cruiseline Holdings LLC's Petition to Intervene and for Clarification or Modification
of the Commonwealth Court's May 29, 2001 Order of Rehabilitation is DENIED.

BY THE COURT:

By: _____ J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. DIANE KOKEN	:	
Insurance Commissioner of the	:	
Commonwealth of Pennsylvania,	:	
	:	
Plaintiff,	:	
	:	
v.	:	DOCKET NO. 269 MD 2001
	:	
RELIANCE INSURANCE COMPANY,	:	
	:	
Defendant	:	

**RESPONSE OF M. DIANE KOKEN IN OPPOSITION
TO PETITIONS OF MIAMI CRUISELINE
HOLDINGS LLC TO INTERVENE AND FOR
CLARIFICATION OR MODIFICATION OF ORDER OF
REHABILITATION DATED MAY 29, 2001**

M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, as statutory Rehabilitator of Reliance Insurance Company ("Rehabilitator"), opposes Miami Cruiseline Holding LLC's ("Miami Cruiseline") Petitions to Intervene and for Clarification or Modification of the Order of Rehabilitation dated May 29, 2001 and, in support thereof, states as follows:

I. BACKGROUND

A. The Statutory Scheme in Pennsylvania for Rehabilitation of a Troubled Insurer

1. The Pennsylvania Legislature has enacted the Pennsylvania Insurance Department Act, 40 Pa. Stat. §§ 221.1 - 221.18 (the "Insurance Department Act"), which sets forth a statutory mechanism for the rehabilitation of an troubled insurer domiciled in Pennsylvania.

2. The Insurance Department Act expressly permits the Insurance Commissioner to petition the Commonwealth Court for an order authorizing her to rehabilitate a domestic insurer. See 40 Pa. Stat. § 221.15(a). It requires such rehabilitation order to appoint the Insurance Commissioner as rehabilitator and to "direct the rehabilitator forthwith to take possession of the assets of the insurer . . ." 40 Pa. Stat. § 221.15(c).

3. The Insurance Department Act confers broad powers upon the rehabilitator. Specifically, it confers upon the rehabilitator all the powers of the directors, officers and managers of the insurer and full power to deal with the property and business of the insurer. 40 Pa. Stat. § 221.16. It also confers upon the rehabilitator the power to take any action she deems necessary or expedient to correct the condition or conditions which caused the order of rehabilitation to be entered. Id.

4. The Insurance Department Act also permits the rehabilitator to prepare a plan for the reorganization, consolidation, conversion or other transformation of the insurer in order to rehabilitate the insurer. 40 Pa. Stat. § 221.16(d).

5. The Insurance Department Act further provides that if the rehabilitator has reasonable cause to believe that further attempts to rehabilitate an insurer would be futile or

would substantially increase the risk of loss to creditors, policyholders, she may petition the Court for liquidation of the insurer. 40 Pa. St. § 221.18.

6. To facilitate the performance of the duties of a receiver (which, by definition, includes rehabilitators (see 40 Pa. Stat. § 221.3)), the Insurance Department Act provides that the rehabilitator may at any time:

apply for and the Commonwealth Court may grant, such restraining orders, preliminary and permanent injunctions, and other orders as may be deemed necessary and proper to prevent . . . (iii) interference with the receiver or with the proceeding . . . (vi) the institution of further prosecution of any actions or proceedings; (vii) the obtaining of preferences, judgments, attachments, garnishments, or liens against the insurer, its assets or its policyholders; (viii) the levying of execution against the insurer, its assets or its policyholders

40 Pa. Stat. § 221.5(a). Section 221.5 (b) further provides that "[t]he receiver may apply to any court outside of the Commonwealth for the relief described in subsection (a)"

7. Additionally, the Insurance Department Act specifically permits a rehabilitator to seek a stay of actions that are pending in Pennsylvania and elsewhere against the insurer.

Section 221.17 provides that:

(a) On request of the rehabilitator, any court in this State before which any action or proceeding by or against an insurer is pending when a rehabilitation order against the insurer is entered shall stay the action or proceeding for such time as is necessary for the rehabilitator to obtain proper representation and prepare for further proceedings. The Commonwealth Court shall order the rehabilitator to take such action respecting the pending litigation as the court deems necessary in the interests of justice and for the protection of creditors,

policyholders, and the public. The rehabilitator shall immediately consider all litigation pending outside this Commonwealth and shall petition the courts having jurisdiction over the litigation for stays whenever necessary to protect the estate of the insurer.

40 Pa. Stat. § 221.17. The Insurance Department Act specifically contemplates a rehabilitator's filing of a petition for a stay in other jurisdictions to the extent necessary. Id.

B. Pennsylvania Commonwealth Court's May 29, 2001 Order Placing Reliance into Rehabilitation

8. On May 29, 2001, the Commonwealth Court of Pennsylvania entered an Order ("Rehabilitation Order") placing Reliance Insurance Company ("Reliance"), a national property and casualty insurer that writes insurance policies throughout the United States and beyond, into rehabilitation pursuant to the Insurance Department Act.

9. Consistent with the Insurance Department Act, the Rehabilitation Order appointed M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, and her successors in office, Rehabilitator of Reliance ("Rehabilitator").

10. The Rehabilitation Order, at paragraph 3, directs the Rehabilitator "to take immediate possession of Reliance's property, business and affairs" and "to take such action as the nature of this case and interests of policyholders, certificateholders, creditors or the public may require."

11. The Rehabilitation Order, at paragraph 4, vests in the Rehabilitator full power and authority to perform her duties and responsibilities as rehabilitator of Reliance.

12. To facilitate the Rehabilitator's performance of her duties, paragraph 20 of the Rehabilitation Order enjoins and restrains "[a]ll persons, in the Commonwealth or elsewhere" from, inter alia, "(a) instituting or further prosecuting any action in law or equity against Reliance or the Rehabilitator; (b) obtaining preferences, judgments, attachments, garnishments or liens, including obtaining collateral in any litigation, mediation, or arbitration involving Reliance, the Rehabilitator, or Reliance's assets and property . . ."

13. Paragraph 22 of the Rehabilitation Order directs that "[a]ll actions currently pending against Reliance in the Courts of the Commonwealth of Pennsylvania or elsewhere are hereby stayed."

14. The Rehabilitation Order further enjoins all persons, corporations and other entities, wherever located, from "interfering in any manner with the Rehabilitator's possession, title and rights to the assets and property of Reliance and from interfering in any manner with the conduct of the rehabilitation of Reliance."

C. The Current Status of Reliance's Rehabilitation

15. As Reliance wrote policies throughout the United States, it has litigation pending in virtually every state in the United States.

16. Since this Court's entry of the Rehabilitation Order, the Rehabilitator has been engaged in the monumental task of evaluating the nature and extent of pending litigation against Reliance and/or its insureds, for the purpose of determining Reliance's total financial exposure and in order to determine whether rehabilitation is feasible. This task is absolutely

critical to determining whether Reliance can be rehabilitated or whether liquidation is necessary.

17. The Rehabilitator has not yet completed her evaluation of the cases and her analysis of the magnitude of Reliance's financial exposure in order to determine whether Reliance can be rehabilitated.

18. While the Rehabilitator is continuing her investigation, she estimates that, at the time of this Court's entry of the Rehabilitation Order, there were over 200,000 claims and over 15,000 lawsuits pending against Reliance and/or its insureds. Further, there are over 4,500 outside counsel handling claims throughout the United States, many or most of whom are handling multiple claims or lawsuits.

D. Petitioner Miami Cruiseline's Arbitration Claim against Reliance

19. On May 7, 2001, prior to this Court's entry of the Rehabilitation Order, petitioner Miami Cruiseline filed a claim in arbitration against Reliance before the AAA in New York.

20. In the AAA arbitration, Miami Cruiseline seeks to recover from Reliance approximately \$14 million that it paid to a third party, LVMH Moët Hennessey Louis Vitton, Inc. ("LVMH"), in settlement of a claim, in addition to costs incurred in defending against LVMH'S claims. Miami Cruiseline contends that the claim is covered by the Representations & Warranties Insurance Policy ("Policy") issued by Reliance and that Reliance has breached the Policy. Reliance vigorously disputes coverage of the claim under

the Policy. It contends that the evidence presented in the proceeding between Miami Cruiseline and LVMH demonstrates that the claim is specifically excluded under the Policy.

21. The AAA arbitration is clearly an action against Reliance and, within the express terms of paragraphs 20 and 22 of the Rehabilitation Order, the arbitration is stayed.

22. By letter dated June 22, 2001, at the Rehabilitator's express request, counsel representing Reliance in the arbitration proceeding sent a letter to the AAA requesting the AAA to stay the action and advising it of the Rehabilitation Order. A copy of the June 22, 2001 letter is attached to Miami's Cruiseline's petition as Exhibit "B."

23. The June 22, 2001 letter constitutes the Rehabilitator's request or "petition" that the AAA honor and enforce the stay of "all actions currently pending against Reliance in the Courts of the Commonwealth of Pennsylvania or elsewhere" ordered by this Court.

E. Miami Cruiseline's Filing of its Petition with this Court to Intervene in the Rehabilitation Proceeding and to Modify the Rehabilitation Order

24. Dissatisfied with the Rehabilitation Order which mandates a stay of the AAA arbitration, on June 25, 2001, Miami Cruiseline filed with this Court a "Petition for Expedited Hearing on its Petition to Intervene and Motion for Clarification or Modification of Order of Rehabilitation dated May 29, 2001."

25. In its petition, Miami Cruiseline wrongly contends that the Insurance Department Act and supposedly applicable caselaw do not authorize this Court to stay the AAA arbitration. It further contends that a stay is improper because it "violates" the provision in the Policy requiring arbitration of claims.

II. ARGUMENT

A. Petitioner Has Not Demonstrated his Right to Intervene and its Petitions to Intervene and for Clarification and Modification of the Rehabilitation Order should be Denied

26. Miami Cruiseline's request to intervene in this case should be denied. Miami Cruiseline has not alleged anywhere in its petition the ground upon which it is seeking intervention. Pa. R. Civ. P. 2328 (requiring a petition to intervene to set forth the ground on which intervention is sought). Nor could Miami Cruiseline intervene in this action. Rule 2327 of the Pennsylvania Rules of Civil Procedure provides that a person not a party to an action may be permitted to intervene if:

- (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
- (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
- (3) such person could have joined as an original party in the action or could have been joined therein; or
- (4) the determination of such action may affect any legally enforceable interest of such person whether or not he may be bound by a judgment in the action.

Pa. R. Civ. P. 2327. Miami Cruiseline does not and cannot allege that it falls within any of the four categories enumerated in Rule 2327. Therefore, its proposed intervention must be denied. In re Pennsylvania Crime Comm'n, 453 Pa. 513, 524 n. 11, 309 A. 2d 401, 408 n. 11 (1973).

27. Even if Miami Cruiseline were within one of the categories of persons permitted to intervene, intervention should still be denied because intervention cannot be employed to review what a court has done and to require the demonstration of the legality and propriety of the court's action. See Commonwealth v. Keystone Mut. Cas. Co., 366 Pa. 149, 153-154, 76 A.2d 867, 870 (1950) ("an intervenor must take the suit as he finds it" and should not be allowed to become a party to suit merely to review what the court has done and require demonstration of the legality and propriety of its action). See also Pa. R. Civ. P. 2329(1) ("an application for intervention may be refused, if (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action"). Here, Miami Cruiseline seeks to intervene solely for the improper purpose of challenging the stay that was ordered by this Court. Miami Cruiseline's petition to intervene should therefore be denied.

28. Intervention by Miami Cruiseline should be denied for another important reason. To permit intervention by Miami Cruiseline for purpose of seeking relief from a stay would constitute an "open invitation" to the filing of such petitions by anyone who opposes a stay. Reliance has over 74,000 policyholders. Granting Miami Cruiseline's petition would encourage other policyholders to intervene and would effectively nullify the stay. The

Rehabilitator would have to incur the expense and distraction of responding to such petitions.

B. The Stay Ordered by this Court is Authorized by the Insurance Department Act and is Consistent with the Purposes of Rehabilitation

29. Even if Miami Cruiseline could properly intervene in this case, its petition to modify the Rehabilitation Order should be denied nonetheless. The Insurance Department Act expressly authorizes the Rehabilitator to apply for and for the Commonwealth Court to grant orders enjoining, inter alia: 1) interference with the Rehabilitator; 2) the institution or further prosecution of any actions or proceedings; and 3) the obtaining of preferences and judgments against the insurer. 40 Pa. Stat. § 221.5. Nothing in the Insurance Department Act prohibits this Court from granting such injunctive relief simply because such actions may be pending outside of Pennsylvania.

30. In addition, the Insurance Department Act specifically permits the Rehabilitator to request a stay of litigation pending outside of Pennsylvania "whenever necessary." See 40 Pa. Stat. § 221.17. This statutory provision does not preclude this Court from entering an order staying actions pending outside of Pennsylvania.

31. The stay ordered by this Court is consistent with the purposes of rehabilitation. The Rehabilitator must conduct a thorough investigation of claims involving Reliance assets before she is able to devise a Plan of Rehabilitation that deals with all policyholders, claims, creditors and others in a fair and equitable manner, and one which

does not involve a "race to the courthouse" or "race to judgment" that might be detrimental to Reliance and its constituents. As alleged above, there are over 200,000 claims and 15,000 lawsuits against Reliance and its insureds. There are over 4500 outside counsel representing Reliance and/or its insureds. It was in recognition of the magnitude of the task that led to the Insurance Commissioner seeking and this Court granting a stay of all actions against Reliance, including those pending outside of Pennsylvania. *Id.* at ¶ 12.

C. The Stay Does Not Violate the Arbitration Clause Contained in the Policy

32. Contrary to Miami Cruiseline's contention, the stay ordered by the Commonwealth Court does not violate the Policy provision allegedly requiring arbitration of disputes. The Rehabilitation Order merely stays the arbitration. It does not preclude arbitration. Indeed, if it is determined that Reliance can be rehabilitated, the stay could be lifted, and Miami Cruiseline may be able to proceed with its arbitration against Reliance. *See, e.g., Foster v. Philadelphia Manufacturers*, 140 Pa. Commw. 186, 190, 592 A.2d 131, 133 (1991) (rehabilitation plan may provide for submission of claims to arbitration). The Rehabilitation Order simply prohibits Miami Cruiseline from proceeding with the arbitration at this time and does not abrogate the Policy provision requiring arbitration of claims. Accordingly, the stay should be enforced and Miami Cruiseline's motion to clarify or modify the Rehabilitation Order should be denied.

D. Private Agreements to Arbitrate Cannot Trump the Stay Ordered by this Court

33. Even if the stay were violative of the arbitration provision, which it is not, a contractual provision requiring arbitration of claims cannot trump a stay entered in favor of an insurer in a rehabilitation setting. Pursuant to the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. § 1011 *et seq.*, the Insurance Department Act and its stay provisions reverse-preempt the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "FAA") which favors arbitration. The McCarran-Ferguson Act provides that "no Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b) (1994). The McCarran-Ferguson Act reverses the ordinary rules of preemption which holds that federal law preempts state law by virtue of the Supremacy Clause. In re Advanced Cellular Systems, 235 B.R. 713, 719 (D.P.R. 1999). The United States Supreme Court held that a federal statute is reverse-preempted under the McCarran-Ferguson Act if (1) it does not "specifically relate [] to the business of insurance"; (2) the state statute was enacted "for the purpose of regulating the business of insurance"; and (3) the federal statute would "invalidate, impair or supersede" the state statute. United States Dept. of Treasury v. Fabe, 508 U.S. 491, 501 (1993).

34. In a case precisely on point, the Court of Appeals for the Tenth Circuit in Davister Corp. v. United Republic Life Insurance Co., 152 F.3d 1277 (10th Cir 1998) cert. denied, 525 U.S. 1177 (1999), held, citing Fabe, that Utah's statutory stay of proceedings

against an insurer in liquidation was enacted to regulate the business of insurance and, under the McCarran-Ferguson Act, trumped federal policy favoring arbitration under the FAA. See also In re Advanced Cellular Systems, 235 B.R. 713 (Puerto Rico's insolvency statute which provides that "no action at law shall be brought against the insurer or the liquidator" trumps bankruptcy court's jurisdiction over turnover claims); Munich American Reinsurance Co. v. Crawford, 141 F. 3d 585 (5th Cir. 1998) (Oklahoma statute providing for injunction against any action interfering with an insolvency proceeding reverse pre-empted the FAA under the McCarran-Ferguson Act), cert. denied, 525 U.S. 1016 (1998); Murff v. Professional Medical Ins. Co., 97 F. 3d 289, 291 (8th Cir. 1996) (Missouri statute providing for a stay of all actions against an insolvent insurer is "a law regulating the business of insurance"). As in Davister, the FAA, which would require enforcement of arbitration agreements, impairs and impedes the rehabilitation process and the stay which is integral to that process. The FAA is reverse preempted by the stay provisions of the Insurance Department Act, and the stay ordered by this Court should be enforced despite the parties' agreement to arbitrate their dispute.

35. The cases Miami Cruiseline relies upon in its motion, Foster v. Philadelphia Manufacturers, 592 A.2d 131, 133 (Pa. Commw. 1991); Foster v. Home Ins. Co., 592 A.2d 130 (Pa. Commw. 1991), are completely inapplicable here. These cases merely stand for the proposition that a liquidator of an insolvent insurer who brings a breach of contract action against a third party seeking remedies under the insurer's contract with the third party is

bound by the arbitration provision contained in that contract. Neither case involved a stay order. Unlike in these cases, the Rehabilitator is not asserting contract based claims against Miami Cruiseline.

E. A Stay is Necessary for the Rehabilitator to Properly Perform her Statutory Duty

36. Miami Cruiseline's petition to modify the Rehabilitation Order should be denied for another important reason. This Court's enforcement of its stay order would permit the Rehabilitator to perform her statutory duties. One of the principal tasks of the Rehabilitator is to determine the magnitude of Reliance's financial exposure from pending litigation which has a direct and substantial effect on the Rehabilitator's efforts to protect the interests of policyholders and other creditors. Without conducting a thorough analysis of the extent of Reliance's financial exposure, the Rehabilitator will be unable to devise a Plan of Rehabilitation that deals with all policyholders, claimants, creditors and others in a fair and equitable manner, and one which does not involve a "race to the court" or "race to judgment." Alternatively, the Rehabilitator may determine that rehabilitation of Reliance is not feasible and liquidation is required. Given the importance of the Rehabilitator's determination of whether Reliance can be rehabilitated or must be liquidated, a stay is not only appropriate but indeed necessary to permit the Rehabilitator to make this critical determination.

37. The reasons underlying this Court's entry of a stay of all actions against Reliance apply equally to arbitration proceedings against Reliance. In the AAA arbitration, Miami Cruiseline is seeking to recover over \$14 million from Reliance. There is no reason for excepting this proceeding from a stay simply because it is in arbitration.

WHEREFORE, the Rehabilitator requests that this Court deny Miami Cruiseline's Petition to Intervene for Purposes of Seeking and for Clarification or Modification of this Court's May 29, 2001 Rehabilitation Order.

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By:



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M. Diane Koken, Insurance Commissioner
of the Commonwealth of Pennsylvania, as
Rehabilitator of Reliance Insurance
Company.

Dated: July 5, 2001

VERIFICATION

I, William S. Taylor, am the Deputy Insurance Commissioner, Pennsylvania Insurance Department, Office of Liquidations, Rehabilitations and Special Funds, and the Deputy Rehabilitator of Reliance Insurance Company. I hereby verify that the statements made in the foregoing Response in Opposition to Miami Cruiseline Holdings, LLC's Petition to Intervene and for Clarification or Modification of the Rehabilitation Order are true and correct to the best of my knowledge, information and belief.

I understand that the statements in this Response are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

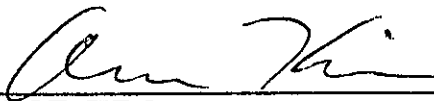
William S. Taylor

Date: July 5, 2001

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the preceding Response of M. Diane Koken in Opposition to Petitions of Miami Cruiseline Holdings LLC to Intervene and for Clarification or Modification of Order of Rehabilitation dated May 29, 2001 was served by first class mail, postage prepaid, on the following individual:

Nicole L. Herman, Esquire
Cohen, Seglias, Pallas & Greenhall, P.C.
P.O. Box 59449
1515 Market Street, 11th Fl.
Philadelphia, PA 19102



ANN E. KIM

Dated: July 5, 2001