

THE COMMONWEALTH COURT OF PENNSYLVANIA

M. DIANE KOKEN,
Insurance Commissioner of the
Commonwealth of Pennsylvania,

Plaintiff,

v.

RELIANCE INSURANCE COMPANY,

Defendant.

ZENITH INSURANCE COMPANY,

Petitioner,

v.

M. DIANE KOKEN,
Insurance Commissioner of the
Commonwealth of Pennsylvania,

Respondent.

Docket No. 269 M.D. 2001

EXHIBITS

Non-Disclosure Agreement

Exhibit A

Objection of Zenith Insurance Company to the Liquidator's Denial of a Direct
Payment Request Under 40 P. S. § 221.34

Exhibit B

Tab A



RECYCLED

NON-DISCLOSURE AGREEMENT

This Non-disclosure Agreement (this "Agreement"), dated as of September 21, 2003, is made between Reliance Insurance Company (In Liquidation) ("RIC"), Skadden, Arps, Slate, Meagher & Flom LLP ("SASM&F") in its own right and as attorneys and agent for the principal Associated General Contractors Self-Insurers Trust Fund ("AGC"). In connection with a certain reinsurance agreement, effective December 31, 1992 and entered into between RIC and Inter-Ocean Reinsurance Company Ltd. with respect to workers compensation business originally ceded to RIC by AGC (the "Reinsurance Agreement"), SASM&F will conduct a review of the unredacted provisions of the Reinsurance Agreement. SASM&F represents to RIC that SASM&F is authorized to sign this Agreement on its own behalf and on behalf of AGC. In the course of performing the review, SASM&F and AGC may receive confidential, non-public, proprietary information relating to RIC's operations and business. RIC, SASM&F and AGC would like to protect the confidentiality of, maintaining RIC's rights in and prevent the unauthorized use and disclosure of such information. Accordingly, RIC, SASM&F and AGC agree as follows:

1. Confidential Information

As used in this Agreement, "Confidential Information" means all non-public information, contained in the Reinsurance Agreement that is designated by RIC as confidential. For the purposes of this Section 1, all of the provisions of the Reinsurance Agreement, whether or not redacted, shall be deemed designated as confidential.

2. Exclusions

Confidential Information does not include any information that (i) was previously known to SASM&F and AGC (ii) is or becomes publicly available without breach of this Agreement, (iii) is received from a third party that did not acquire or disclose such information by a wrongful or tortious act, or in breach of a confidentiality or non-disclosure agreement applicable to the information, or (iv) can be shown by documentation to have been independently developed by SASM&F and AGC without reference to any Confidential Information.

3. Use of Confidential Information

SASM&F and AGC may use Confidential Information only in pursuance of their business relationships with each other and RIC. Except as expressly provided in this Agreement, or as required by applicable law, except as to disclosures to each other contemplated by the terms of this Agreement, neither SASM&F and AGC will disclose Confidential Information to anyone else without RIC's prior written consent. SASM&F and AGC will take all reasonable measures to avoid disclosure, dissemination or unauthorized use of Confidential Information, including at a minimum, those measures they take to protect their own confidential information of a similar nature. SASM&F and AGC will segregate Confidential Information from the confidential materials concerning third parties to prevent commingling or disclosure.

If they deem it necessary, SASM&F and AGC may disclose the Reinsurance Agreement to the Commonwealth Court of Pennsylvania (the "Court") in order to obtain a ruling as to whether AGC (or its successor in interest), is entitled to relief under the guidelines that have been issued in the RIC Liquidation for Enforcement of 40 P.S. § 221.34. If SASM&F and AGC determine that such a disclosure is necessary, they will notify counsel for RIC at least five (5) days in advance of the filing of the petition containing such a disclosure (in addition to the required notice period applicable to such petitions) and will take reasonable steps to have any such submissions to the Court kept confidential by filing Confidential Information under seal or by employing other appropriate means.

4. SASM&F and AGC Personnel

SASM&F and AGC will restrict the possession, knowledge and use of any Confidential Information to those of its directors, officers, employees, agents, representatives and contractors ("Personnel") who have a need to know the specific Confidential Information in connection with the purposes set forth in Section 3. SASM&F and AGC will ensure that its Personnel comply with this Agreement, and will be responsible for any breach of this Agreement by its personnel.

5. Disclosure to Governmental Entities

SASM&F and AGC may disclose Confidential Information as required to comply with binding and valid orders of governmental entities that have jurisdiction over them, provided that SASM&F and AGC (i) use their commercially reasonable best efforts to give RIC prior written notice sufficient to allow RIC to seek a protective order or other appropriate remedy, (ii) discloses only such information as is required by the governmental entity, and (iii) uses commercially reasonable efforts to obtain confidential treatment for any Confidential Information so disclosed.

6. Ownership of Confidential Information

All Confidential Information will remain RIC's exclusive property. RIC's disclosure of Confidential Information pursuant to this Agreement will not constitute an express or implied grant to SASM&F and AGC of any rights to or under RIC's copyright, trade secrets, trademark or other intellectual property rights.

7. Notice of Unauthorized Use

SASM&F and AGC will notify RIC immediately upon discovery of any unauthorized use or disclosure of Confidential Information or any other breach of this Agreement. SASM&F and AGC will cooperate with RIC in every reasonable way to help RIC regain possession of such Confidential Information and prevent its further unauthorized use.

8. Return of Confidential Information

SASM&F and AGC will return or destroy all tangible materials embodying Confidential Information promptly following RIC's written request. At RIC's option, SASM&F and AGC will provide written certification of its compliance with this Section.

9. Injunctive Relief

SASM&F and AGC acknowledges that disclosure or use of Confidential Information in violation of this Agreement could cause irreparable harm to RIC for which monetary damages may be difficult to ascertain or an inadequate remedy. SASM&F and AGC therefore agree that RIC will have the right, in addition to its other rights and remedies, to seek injunctive relief for any violation of this Agreement.

10. Scope; Termination

This Agreement is intended to cover Confidential Information received by SASM&F and AGC both prior and subsequent to the date hereof. This Agreement will automatically terminate upon the completion or termination of the parties' business relationship; provided, however, that SASM&F and AGC' obligation with respect to Confidential Information will survive for five (5) years following such completion or termination.

11. Miscellaneous

11.1 This Agreement will not create a joint venture, partnership or other formal business relationship or entity of any kind, or an obligation to form any such relationship or entity. Each party will act as an independent contractor and not as an agent of the other party for any purpose, and neither will have the authority to bind the other, except as may be specifically set forth in a separate agreement.

11.2 This Agreement constitutes the entire agreement between the parties relating to the matters discussed herein and may be amended or modified only with the mutual written consent of the parties. Each party's obligations hereunder are in addition to, and not exclusive of, any and all of its other obligations and duties to the other party, whether express, implied, in fact or in law. Subject to the limitations set forth in this Agreement, this Agreement will inure to the benefit of and be binding upon the parties and their respective successors and assigns.

11.3 Any failure by RIC to enforce SASM&F and AGC' strict performance of any provision of this Agreement will not constitute a waiver of RIC's right to subsequently enforce such provision or any other provision of this Agreement.

11.4 If a provision of this Agreement is held invalid under any applicable law, such invalidity will not affect any other provision of this Agreement that can be given effect without the invalid provision. Further, all terms and conditions of this Agreement will be deemed enforceable to the fullest extent punishable under applicable law, and, when

necessary, the court is requested to reform any and all terms or conditions to give them such effect.

11.5 This Agreement will be governed by the laws of the Commonwealth of Pennsylvania, without reference to its choice of law rules. Exclusive jurisdiction over and venue of any suit arising out of or relating to this Agreement will be in the Court.

11.6 This Agreement may be executed by facsimile and in counterpart copies.

The parties have executed this Agreement as of the date first written above.

Davidson M. Pattiz
SASM&F in its own
right and as attorney and agent for AGC

By: Davidson M. Pattiz

Its: Counsel

Keith Kaplan
Reliance Insurance Company (In Liquidation)

By: Keith Kaplan

Its: Exec. V.P.

Tab B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. Diane Koken,
Insurance Commissioner of the
Commonwealth of Pennsylvania,

Plaintiff,

v.

Reliance Insurance Company,

Defendant.

No. 269 M.D. 2001

**(1) OBJECTION OF ZENITH INSURANCE COMPANY TO
LIQUIDATOR'S DENIAL OF A DIRECT PAYMENT REQUEST
UNDER 40 P.S. § 221.34; (2) AFFIDAVIT OF JOHN J. TICKNER;
(3) AFFIDAVIT OF DAVIDSON M. PATTIZ**

OBJECTIONS AND POINTS AND AUTHORITIES IN SUPPORT

INTRODUCTION

Zenith Insurance Company and its subsidiaries, affiliates, managed, owned or controlled companies (collectively, "Zenith"), by and through their attorneys, hereby object to the decision rendered by Reliance Insurance Company (in Liquidation) ("Reliance"), denying a request for direct payment of reinsurance proceeds pursuant to 40 P.S. § 221.34 and the guidelines established by Order of this Court on April 26, 2002 (the "Guidelines").

Ever since Reliance was placed into receivership (now liquidation), Zenith – as the successor in interest to The Associated General Commerce Self Insurers Trust Fund ("AGC") – has incurred millions of dollars in losses that, absent Reliance's financial difficulties, would have been covered by an insurance policy issued by Reliance that became effective as of December 31, 1991.¹

Although Reliance did not honor its obligations because of its pending liquidation, Zenith has discovered that Reliance reinsured its liability to AGC with Inter-Ocean Reinsurance Company Ltd. ("Inter-Ocean"), a Bermuda-

¹ As described below, Zenith and AGC merged in 1996. Thereafter, the assets and liabilities of AGC became the assets and liabilities of Zenith. For convenience, and unless otherwise required for the sake of clarity, AGC will be referred to in the post-1996 period as Zenith – the entity into which it merged.

based reinsurer. Zenith also has learned that this Court approved the Guidelines to permit direct payment of reinsurance if certain prerequisites were satisfied.

Zenith has followed both the letter and the spirit of the Guidelines by identifying a reinsurance contract that contains a direct payment provision, consenting to the substitution of Reliance as the entity directly liable on the original insurance obligation and obtaining the consent of the reinsurer, Inter-Ocean, to assume the obligation of making payments in place of Reliance. Accordingly, Reliance should have approved the request for a direct payment under the Guidelines and Zenith's objections should be sustained.

FACTS

AGC Obtains Insurance From Reliance

1. AGC was a self-insurance trust organized under the laws of the State of Florida, with a fund identification number of 59-2445257. By December 31, 1991, AGC recognized that its members' funds on hand were lower than desirable to cover losses incurred from January 1, 1985 through December 31, 1991 (the "Coverage Period"). Affidavit of John J. Tickner ("Tickner Affid.") ¶ 6.

2. Accordingly, AGC purchased an insurance policy from Reliance (the "AGC Policy") that covered up to \$21 million of losses arising during the Coverage Period. More specifically, AGC and Reliance agreed that for a lump sum payment of \$13,925,000, Reliance would insure the *last* \$21 million of losses

based on total estimated losses during the Coverage Period of \$182 million.

Tickner Affid. Ex. A.

3. Zenith merged with AGC effective December 31, 1996, at which point, the AGC Policy became an asset of Zenith's by operation of law and AGC ceased to exist as a separate legal entity. Tickner Affid. ¶ 4.

4. Over time, and prior to Reliance being placed into receivership, Reliance satisfied approximately \$15 million of its \$21 million obligation under the AGC Policy. Tickner Affid. ¶ 8.

5. Even prior to the receivership, however, Zenith faced some resistance from Reliance to paying the amounts owed. Indeed, Zenith was forced to invoke the arbitration provisions of the AGC Policy in order to compel Reliance to resume its payments. Zenith succeeded in those efforts, and Reliance continued to make payments due under the AGC Policy through the third quarter of 2000. Tickner Affid. ¶ 9 and Ex. B.

6. During an arbitration over payments due under the AGC Policy, Zenith learned that Reliance had reinsured its obligations under the AGC Policy with Inter-Ocean. Tickner Affid. ¶ 10. Reliance refused, however, to provide Zenith with a copy of the reinsurance treaty between Reliance and Inter-Ocean.

Id.

Reliance Stops Meeting its Obligations Under the AGC Policy

7. After the third quarter of 2000, Reliance stopped making payments due under the AGC Policy. Tickner Affid. ¶ 9.

8. While in liquidation, representatives of Reliance suggested to Zenith that it make a settlement offer to resolve any remaining differences relating to the AGC Policy. Tickner Affid. ¶ 12 and Ex. C.

9. Zenith welcomed the opportunity to find a negotiated resolution, but asked that Reliance provide a copy of the reinsurance treaty between Reliance and Inter-Ocean so that Zenith would have the necessary and relevant information before proceeding with any discussions. Tickner Affid. Ex. C.

10. Unfortunately, Reliance declined that request for a copy of the Inter-Ocean agreement. Tickner Affid. ¶ 12. Zenith/AGC then filed its proof of claim form, seeking the \$5.7 million Reliance still owes under the AGC Policy. Tickner Affid. Ex. D.

Reliance Produces the Inter-Ocean Treaty

11. Once Zenith/AGC learned that this Court had approved the Guidelines for direct payment of reinsurance proceeds pursuant to 40 P.S. § 221.34, Zenith contacted outside counsel for Reliance at the law firm of Pepper

Hamilton LLP ("Pepper") to request a copy of the contract between Inter-Ocean and Reliance. Affidavit of Davidson M. Pattiz ("Pattiz Affid.") Ex. A.

12. Zenith's counsel explained to the Pepper lawyers that Zenith had reason to believe that it might have a right to direct payment under the Guidelines, but needed a copy of the Inter-Ocean treaty to be sure. Id.

13. Zenith provided the background of the relationship among AGC, Zenith and Reliance and forwarded a copy of the AGC Policy. Id. Unfortunately, Zenith's request (as well as a follow-up inquiry) was met with complete silence. Accordingly, on September 4, 2003, Zenith sent another letter to Pepper, attaching drafts of a petition in intervention to be filed in order to pursue discovery to obtain a copy of the Inter-Ocean policy. Pattiz Affid. Ex. B.

14. At that point, Reliance's in-house counsel interceded to avoid costly and unnecessary litigation that Zenith would have been compelled to file solely to determine whether or not it had any rights under the Guidelines.

15. On or about September 10, 2003, Reliance's Deputy General Counsel, Mark Fisher, and Zenith's counsel, Davidson Pattiz, discussed Zenith's need to review a copy of the Inter-Ocean treaty. Pattiz Affid. ¶ 6. During that conversation, Mr. Fisher agreed to provide a copy of the Inter-Ocean treaty if one could be located and if Zenith would agree to execute a non-disclosure agreement. Id.

16. On September 17, 2003, Mr. Fisher reported that Reliance "ha[d] located the reinsurance agreement" between Reliance and Inter-Ocean relating to the AGC Policy. Pattiz Affid. Ex. C. Thereafter, Zenith and Reliance executed a non-disclosure agreement and Reliance produced the Inter-Ocean treaty.² Pattiz Affid. Ex. D.

Zenith Requests Direct Payment

17. When Zenith received the treaty between Inter-Ocean and Reliance, it noted that the treaty expressly identifies the underlying obligation to AGC as the risk reinsured by Inter-Ocean. Pattiz Affid. Ex. D at Art. I (Inter-Ocean Treaty).³

18. In addition, Zenith noted that the Inter-Ocean treaty contains a cut-through provision that provides for payment in the event of liquidation. Pattiz Affid. Ex. D at Art. XIII (Inter-Ocean Treaty).

² Under the non-disclosure agreement, Zenith is permitted to submit the Inter-Ocean treaty to this Court if necessary to pursue a claim for direct payment under the Guidelines. Pattiz Affid. Ex. D (Non-Disclosure Agreement at ¶ 3). Pursuant to Reliance's request, Zenith has submitted the Inter-Ocean treaty under seal, and has submitted a petition to allow for such filing. Zenith must provide notice to Reliance prior to filing with the Court, and Zenith timely complied with that requirement. Pattiz Affid. at n.1.

³ Because Reliance has requested that the Inter-Ocean treaty be submitted under seal, Zenith has not quoted the relevant cut through language in the text of these papers.

19. Zenith then reviewed the papers submitted to this Court by the Reliance Liquidator in connection with her request for implementation of the Guidelines, and noted that the cut through language in the Inter-Ocean treaty is substantively identical to "Example C" set forth on Page 15 of Reliance's March 21, 2002 Petition to Approve the Guidelines. Pattiz Affid. Ex. E.

20. In that March 21, 2002 Petition, the Liquidator concluded that the language in her Example C, which is mirrored in the Inter-Ocean treaty, would be sufficient to permit a direct payment under the Guidelines if certain consents also were obtained. Id.

21. Encouraged, Zenith set about obtaining the necessary consents required under the Guidelines.

22. Zenith was able to obtain those consents. Tickner Affid. Exs. E and F.

23. With all of the necessary documentation in hand, Zenith submitted its request for direct payment on November 10, 2003. Pattiz Affid. Ex. F.

24. Zenith received the Liquidator's response on January 19, 2004. Pattiz Affid. Ex. G.

25. The Liquidator denied Zenith's request for the following stated reason:

"The reinsurance contract between Reliance and the reinsurer fails to specifically identify any individual named insured to receive the

direct payment, either by name or Reliance policy number. The contract in question is a retrocession, and for coverage purposes only identifies a reinsured."

Pattiz Affid. Ex. G at 1.

26. In light of that denial, Zenith has been compelled to file these objections.

LEGAL ARGUMENT

Zenith's Direct Payment Request Complies With the Guidelines

27. On April 26, 2002, this Court approved the Guidelines For Enforcement of 40 P.S. § 221.34, regarding the direct payment of reinsurance proceeds by reinsurers to insureds.

28. 40 P.S. § 221.34 provides:

"The amount recoverable by the liquidator from reinsurers shall not be reduced as a result of delinquency proceedings, regardless of any provision in the reinsurance contract or other agreement. Payment made directly to an insured or other creditor shall not diminish the reinsurer's obligation to the insurer's estate *except when the reinsurance contract provided for direct coverage of an individual named insured and the payment was made in discharge of that obligation.*

(Emphasis added)

29. Section 221.34 applies to all reinsurance contracts to which Reliance is a party. Pattiz Affid. Ex. H at ¶ 1 (Guidelines).

30. Under the Guidelines, Zenith (as AGC's successor) is entitled to receive direct payment from Inter-Ocean if the following conditions are satisfied:

- "The reinsurance contract must specifically provide for payment to an individual named insured . . . identified with particularity either by name or policy number in the reinsurance contract";
- "The reinsurance contract must provide for a direct coverage obligation by the reinsurer. . . . "; and
- Zenith and Inter-Ocean must execute certain consents substantially in the form of documents approved by the Court in connection with its adoption of the Guidelines.

Pattiz Affid. Ex. H at ¶ 4.

31. Each of these prerequisites has been satisfied.

32. First, the treaty between Inter-Ocean and Reliance states expressly that it provides reinsurance coverage for the obligation initially undertaken by Reliance to AGC.

33. Second, the Inter-Ocean treaty contains a cut through that mirrors an exemplar that the Liquidator agreed would be sufficient to create a right to direct payment.

34. Finally, Zenith and Inter-Ocean have executed the required consents. Tickner Affid. Exs. E and F.

35. It appears that Reliance and Zenith agree on all of these substantive points, but have a single difference of opinion involving mere semantics. In

particular, it appears that Reliance would have approved the direct payment request if AGC had been referred to in the Inter-Ocean treaty as an insured as opposed to a reinsured. But, under the present circumstances, this is a distinction without a difference.

36. Just like every other jurisdiction in the United States, Pennsylvania subscribes to the principle that form should not be exalted over substance. See, e.g., Mullen v. Bd. of Sch. Directors of DuBois Area Sch. Dist., 436 Pa. 211, 216, 259 A.2d 877, 880 (1969) ("To hold that the lack of a formal vote recorded in the minutes, the presence or absence of which is entirely within the control of the Board, renders this contract null and void, would be to exalt form over substance" and declining to do so).

37. This same, common-sense rule also applies to contracts for insurance. See, e.g., Hatfield v. Sovereign Camp, W.O.W., 129 Pa. Super. 570, 582-83, 196 A. 904, 910 (1938) ("Calling a policy of insurance a 'certificate' does not change its character as an insurance contract. 'The law looks to the substance rather than to the form and is not to be cheated by any gloss of words.'") (citation omitted).

38. The AGC Policy involved a lump sum payment by AGC – a collection of self-insured entities – to Reliance in exchange for a promise by Reliance to pay a sum of money for specific losses. According to the preeminent

treatise on insurance, this contract is an insurance policy: "Essentially, insurance is a contract by which one party (the insurer), for a consideration that usually is paid in money, either in a lump sum or at different times during the continuance of the risk, promises to make a certain payment. . . ." Lee R. Russ, 1 Couch on Ins. § 1:6 (3d ed. 2003).

39. Consistent with Pennsylvania law, the Couch treatise recognizes that the fact that a contract of insurance is called something else does not determine its nature:

"The character of insurance is not to be determined by the character of the company writing it, the nomenclature used, or the manner or mode of affording insurance, but by the nature of the contract actually entered into or issued."

Id. at § 1:8.

40. Even if that were not true, calling the AGC Policy one of reinsurance is beside the point because "[t]echnically speaking, reinsurance is insurance."

Id. at § 9:9.

41. In short, Reliance's agreement to pay the losses described in the AGC Policy constitutes insurance and Reliance's contract with Inter-Ocean is one of reinsurance. Thus, Zenith (as AGC's legal successor in interest), has overcome all of the necessary hurdles to obtain a direct payment of the reinsurance proceeds due under the Inter-Ocean treaty, and the Liquidator's decision to the contrary should be rejected.

Approving Zenith's Direct Payment Request Comports With Notions of
Equity and Fairness

42. When the Liquidator submitted the Guidelines for approval, she expressed her intent to provide a "fair and reasonable interpretation of 40 P.S. § 221.34." Pattiz Affid. Ex. E at ¶ 39.⁴

43. As noted above, Zenith has incurred millions of dollars in losses that should have been paid by Reliance. Reliance entered into a contract with Inter-Ocean, whereby it ceded the premium paid to purchase the AGC Policy in exchange for Inter-Ocean agreeing to reinsure the losses incurred under that policy.

44. The "fairness" and equity the Liquidator sought when she petitioned this Court to implement the Guidelines can be achieved most effectively by approving Zenith's direct payment request so that Zenith does not have to continue incurring losses it long ago insured, particularly where a solvent, Bermuda-based insurance company, Inter-Ocean, has the funds needed to compensate for those losses.

⁴ The propriety of evaluating fairness and taking a practical approach to permitting cut through access is well accepted. See, e.g., Koken v. Legion Ins. Co., 831 A.2d 1196, 1234 (Pa. Commw. Ct. 2003) (rejecting general rule precluding direct access to reinsurance proceeds and affording direct access).

CONCLUSION

45. For all of the reasons stated, Zenith (as AGC's successor), requests that the Court sustain these objections to the Liquidator's denial of Zenith's request for direct payment pursuant to the Guidelines.

Respectfully Submitted,
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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Dated: February 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2004, true and correct copies of the Statutory Liquidator's Reply to the Response of Baptist Health South Florida, Inc. and Palm Springs General Hospital to Zenith Insurance Company's Petition to Submit Documents Under Seal; Exhibits; Proposed Order; and Verification were served via U.S. first-class mail upon the following:


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and

All Parties on the attached Master Service List


KASSEM L. LUCAS, Esquire

Master Service List

M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania

v.

Reliance Insurance Company

No. 269 M.D. 2001 (Commonwealth Court of Pennsylvania)

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