IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MEDICUS INSURANCE CO.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:10-cv-00277-LY
	)	
GREENLIGHT REINSURANCE, LTD.,	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF GREENLIGHT'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

Defendant Greenlight Reinsurance, Ltd. ("Greenlight") submits this Memorandum in Support of its Motion to Compel Medicus Insurance Co. ("Medicus") to arbitrate this reinsurance contract dispute pursuant to the Federal Arbitration Act, 9 U.S.C. § 4, and to stay this judicial proceeding pursuant to 9 U.S.C. § 3.

I. INTRODUCTION

Greenlight has filed a Petition pursuant to Section 4 of the Federal Arbitration Act to compel Medicus to comply with the mandatory arbitration provision in a Medical Professional Liability Aggregate Stop Loss Reinsurance Contract (the "Contract"). That Petition is in response to a Complaint that Medicus filed in this Court asking the Court to declare the parties' rights under the Contract. Medicus cannot obtain from this Court the requested declaratory relief regarding the parties' rights and obligations under the Contract because it contractually agreed to have such a dispute determined by an arbitration panel, not a court.

A threshold issue in Medicus' lawsuit is whether the parties are required to proceed with the actuarial appointment procedures in Article 8 of the Contract at this time. Only a properly constituted arbitration panel can decide that issue. Medicus contends that, at this juncture,

Medicus and Greenlight are required to appoint an actuary to make determinations about net present value of Unpaid Ceded Loss and Allocated Loss Adjustment Expenses under Article 8 of the Contract. Greenlight, meanwhile, believes that the provisions of Article 8 are inapplicable at this time for numerous reasons, including Medicus' complete misapplication of the terms and mechanics of the Contract. Furthermore, Greenlight contends that before there can be any activity under Article 8, at a minimum, the arbitration panel needs to give the parties and any actuary selected under Article 8 direction on how the Contract operates. This Court does not have to decide these issues relating to how the Contract operates, the proper commutation payment amount, or even whether the parties are currently required to appoint an actuary under Article 8. Rather, the issue for this Court in this Petition is whether, as a threshold matter, this Court or an arbitration panel should interpret the parties' rights and obligations under the Contract. According to the Federal Arbitration Act ("FAA"), the language of the Contract, and controlling case law, the issues raised in Medicus' Complaint must be resolved by an arbitration panel.

The FAA requires this Court to compel arbitration where a dispute falls within a valid arbitration provision. Article 19 of the Contract provides that, "[a]s a condition precedent to any right of legal action hereunder all disputes and differences arising under or in connection with this Reinsurance shall be referred to arbitration under ARIAS Arbitration Rules." This arbitration provision is enforceable and inarguably encompasses the dispute between the parties over the applicability of Article 8, and the overall operation of the Contract. Medicus is refusing to arbitrate under this valid arbitration provision and the Court should grant Greenlight's Motion to Compel Arbitration under Section 4 of the FAA. Medicus also filed a declaratory judgment action in this Court, which should be stayed under Section 3 of the FAA.

II. FACTUAL BACKGROUND

On January 1, 2009, Greenlight issued to Medicus a Medical Professional Liability Aggregate Stop Loss Reinsurance Contract. (*See* Exhibit A). The purpose of this Contract was for Greenlight to provide Medicus with reinsurance for certain losses that Medicus incurred in excess of the agreed upon attachment levels under policies of direct insurance written by it covering medical malpractice claims. The Contract, as amended, contains a termination provision that allowed Medicus to terminate the Contract by giving notice prior to December 31, 2009, and subsequently paying a break-up fee. (*See* Exhibit A, Article 2 and Exhibit B, Addendum 1.) Medicus exercised its rights under Article 2, and on December 30, 2009, provided Greenlight with notice that it was terminating the Contract. By terminating the Contract, Medicus relieved itself of having to pay certain future premiums to Greenlight, but was required to pay a break-up fee. The amount of the break-up fee varied depending upon whether Medicus elected to commute the reinsurance contract. In a typical reinsurance commutation, the parties agree to release the reinsurer from any future liability under the reinsurance contract in exchange for a payment from the reinsurer to the underlying insured. The commutation payment is often based, in part, on how much loss was transferred to the reinsurer under the reinsurance agreement. The transferred loss is referred to as the "ceded loss." The commutation payment contemplated in the Contract is based, in part, upon the amount of ceded loss.

In the Contract between Medicus and Greenlight, Greenlight was only responsible to indemnify Medicus for losses in excess of attachment points established by a formula in the Contract. Based upon Medicus' reports, Medicus' losses could not reach the attachment points, and therefore none of its possible losses were ceded to Greenlight. Because there were no ceded

losses, there is no commutation payment owing from Greenlight to Medicus. Medicus was agreeing to release Greenlight for all obligations.

Despite this lack of ceded losses, Medicus requested that Greenlight make a commutation payment of $1.1 million to it. Medicus' request for a commutation payment exhibits a complete misapplication of the mechanics of the Contract. When it became apparent that Medicus did not properly interpret how the Contract operates, Greenlight filed a Notice of Arbitration pursuant to the Contract's arbitration provision. In that arbitration, Greenlight will ask the arbitrators to interpret the Contract and declare the parties' rights regarding the applicable attachment points necessary to make any actuarial commutation analysis.

Medicus is refusing to arbitrate. Instead, it claims that the parties must proceed under Article 8 of the Contract at this time. That Article contains procedures for the selection of an actuary to determine the Net Present Value of Unpaid Ceded Loss and Allocated Loss Adjustment Expenses as part of a commutation analysis. Greenlight disagrees that the parties should select an actuary at this time. Rather, before there can be any actuarial analysis of the net present value of the ceded loss, an arbitration panel needs to interpret the Contract and advise the parties on the proper attachment points, among other things.

Therefore, on February 22, 2010, Greenlight demanded arbitration against Medicus pursuant to Article 19 of the Contract. Under Article 19, Medicus was to name its arbitrator on April 23, 2010. Instead of naming its arbitrator, Medicus filed a Complaint in this Court seeking a declaratory judgment of the parties' rights under the Contract and an Order requiring Greenlight to perform its obligations under Article 8. Medicus also attempted to seek a temporary restraining order and preliminary injunction preventing Greenlight from taking any

action or continuing the arbitration it demanded under Article 19.[1] Medicus' request for declaratory relief of the parties' rights under the Contract is not appropriate because the dispute between the parties is controlled by the valid and enforceable binding arbitration provision in the Contract. Even the issue of whether the parties are currently required to select an actuary under Article 8 must be resolved by the arbitration panel. Therefore, as is explained in more detail below, as these disputes between the parties is subject to the arbitration provision in the Contract, Greenlight respectfully requests that this Court enter an Order compelling Medicus to arbitrate its contractual dispute with Greenlight, name an arbitrator, and stay this litigation pending the arbitration panel's resolution of the parties' dispute.

III. ARGUMENT

A. Greenlight's Petition to Compel Arbitration Should Be Granted.

Section 4 of the Federal Arbitration Act ("FAA") states, in part, that,

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. Under Section 4, arbitration may be compelled if there is a valid agreement to arbitrate, a dispute within the scope of the arbitration agreement, and a refusal to arbitrate. *Dealer Computer Services, Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884, 886 (5th Cir. 2009). *See also, Webb v. Investacorp., Inc.*, 89 F.3d 252, 258 (5th Cir. 1996). The Supreme Court has explained that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983). The FAA "is a congressional

[1] Medicus, however, failed to comply with the Court's procedural requirements for seeking a temporary restraining order, as evidenced by the deficiency notice that the Clerk of the Court issued to Medicus on April 23, 2010.

declaration of a liberal federal policy favoring arbitration agreements" and "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id.* To this end, a court may *not* deny a party's request to arbitrate an issue unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Pennzoil Exploration and Production Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998). It is undisputed that there is a valid agreement to arbitrate, this dispute between Medicus and Greenlight over the operation of the Contract falls within the scope of the arbitration agreement, and Medicus is refusing to arbitrate. Therefore, as is explained below, the Court must grant Greenlight's Motion to Compel Arbitration.

1. Greenlight and Medicus have a valid agreement to arbitrate.

Medicus does not dispute that it and Greenlight entered into a written agreement containing an arbitration clause. Indeed, Medicus explicitly acknowledges the propriety of the Contract as it seeks an order from the Court requiring Greenlight to comply with certain alleged obligations under that Contract. It also is undisputed that the same written Contract contains a broad arbitration clause in Article 19. Medicus has not raised, and cannot raise, any challenge to the validity of the Contract and the arbitration clause contained therein. Simply stated, there is a valid agreement to arbitrate between the parties.

2. The contract dispute between the parties falls within the scope of the arbitration provision.

The Court's next inquiry is whether the dispute falls within the scope of the arbitration clause. The arbitration provision in the Contract provides that, "[a]s a condition precedent to any right of legal action hereunder *all disputes* and differences *arising under or in connection with* this Reinsurance shall be referred to arbitration under ARIAS Arbitration Rules." (*See* Exhibit A, Article 19, p. 15 (emphasis added).) The Fifth Circuit, citing the United States Supreme

Court, characterized similar arbitration clauses as "broad arbitration clauses capable of expansive reach." *Pennzoil Exploration and Production Co.*, 139 F.3d at 1067, citing *Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397-98 (1967). These broad provisions are not limited to claims that literally arise under the contract, but rather "embrace all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute." *Penzoil*, 139 F.3d at 1067.

The dispute between the parties arises under or in connection with the reinsurance Contract. Medicus alleges in its own Complaint that "there is a real and genuine dispute before the parties as to their rights, duties and obligations under the Contract." (Complaint, ¶ 6) By its own pleading, Medicus has conceded that the case involves a dispute "arising under or in connection with" the Contract. As the arbitration provision requires that all disputes and differences arising under or in connection with the Reinsurance shall be referred to arbitration, the parties' disagreement as to contractual interpretation and whether the Article 8 actuarial appointment must be made falls squarely within the ambit of the arbitration provision.

3. Medicus refuses to arbitrate this matter.

Finally, Medicus has refused to arbitrate by virtue of its filing of this lawsuit seeking both a declaration that Medicus need not arbitrate the dispute pursuant to Article 19 and a TRO prohibiting Greenlight from continuing the arbitration it demanded. Medicus has manifested in no uncertain terms its refusal to engage in an Article 19 arbitration proceeding. As this case meets all of the requirements of Section 4 of the FAA, this Court should grant Greenlight's Petition to Compel Arbitration and enter an Order compelling Medicus to proceed with the arbitration in accordance with Article 19 of the Contract, and compelling Medicus to appoint an arbitrator within 30 days of the Court's Order.

B. The Court Should Stay the Legal Proceedings in this Court.

In its Complaint, Medicus seeks a declaratory judgment that Greenlight must comply with its obligations under Article 8 of the Contract. As the issue of what article of the Contract provides the appropriate method to resolve the parties' dispute inarguably falls within the Contract's arbitration provision and must be decided by an arbitration panel, the Court also should stay this declaratory judgment action under Section 3 of the FAA. Section 3 provides that

> [i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until the arbitration has been had in accordance with the terms of the agreement . .

9 U.S.C. 3. The Fifth Circuit has recognized that this provision *requires* the Court to stay claims that are covered by an arbitration provision until the arbitration process is complete. *See, Midwest Mechanical Contractors, Inc. v. Commonwealth Construction Co.*, 801 F.2d 748, 751 (5th Cir. 1986). As discussed above, the subject of the declaratory judgment action is undeniably referable to arbitration. It is for the arbitration panel, not the court, to decide how the reinsurance contract operates. Therefore, this proceeding should be stayed as a matter of law under Section 3 of the FAA.

II. CONCLUSION

For all the reasons set forth above, Greenlight respectfully requests that this Court grant its Petition to Compel Arbitration, to stay the litigation and to enter an Order:

1. compelling Medicus to arbitrate the issue of the applicability of Article 8 and all other disputes arising under and in connection with the Contract, including the issue of contractual interpretation that is the subject of its declaratory judgment claim;

2. ordering Medicus to appoint an arbitrator within 30 days of the Court's Order;

3. staying Medicus' declaratory judgment claim until the arbitration is resolved;

4. in the alternative, if the Court denies Greenlight's Motion to Stay, giving it 28 days from the date of the Order denying it, to file a response to the Complaint; and

5. granting any other relief this Court deems just and appropriate.

Respectfully submitted,

GREENLIGHT REINSURANCE, LTD.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th of April, 2010 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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