UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

SEATON INSURANCE COMPANY (f/k/a UNIGARD MUTUAL INSURANCE COMPANY) and STONEWALL INSURANCE COMPANY, Plaintiffs, v. CLEARWATER INSURANCE COMPANY (f/k/a SKANDIA AMERICA REINSURANCE CORPORATION), Defendant.	Civil Action No.: 09-00516-LDA

PLAINTIFF SEATON INSURANCE COMPANY'S
MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO SEVER OR FOR SEPARATE TRIAL

Plaintiff Seaton Insurance Company, formerly known as Unigard Mutual Insurance Company ("Seaton"), submits this Memorandum of Law in support of its Motion to Sever or for Separate Trial. For the reasons set forth below, the Court should enter an order pursuant to Fed.R.Civ.P. 21 severing Seaton's claims against Defendant Clearwater Insurance Company, formerly known as Skandia America Reinsurance Corporation ("Clearwater"), from the claims asserted against Clearwater by Plaintiff Stonewall Insurance Company ("Stonewall"). Seaton's claims would be assigned a separate docket number and proceed independently from the claims between Stonewall and Clearwater. In the alternative, the Court should enter an order pursuant to Fed.R.Civ.P. 42(b) for a separate trial of Seaton's claims against Clearwater. Seaton further requests that the Court set an expedited schedule for the trial of its claims against Clearwater to be held in February 2012. Granting Seaton's motion to sever or for a separate trial will simplify this matter going forward and facilitate its expeditious resolution.

BACKGROUND

This action was commenced by Seaton and Stonewall on October 26, 2009. In their Complaint, Seaton and Stonewall allege straightforward claims for breach of contract based upon the failure by Clearwater (as the successor to Skandia) to make payments to Seaton and Stonewall for numerous claims submitted by them to Clearwater under certain facultative reinsurance certificates. The claims asserted by Seaton and Stonewall were joined together in this action when it was originally filed in the interest of convenience and because, at the time, Seaton and Stonewall were under common ownership and management. However, Seaton and Stonewall have at all times remained separate companies, issuing distinct forms of policies and entering into contracts independently from one another. Indeed, there was no corporate or other relationship between Seaton and Stonewall when the facultative reinsurance contracts that are the subject of this case were issued by Clearwater in the 1970s. It is only as a result of certain corporate transactions that Seaton and Stonewall came to be under common control decades later. Moreover, since the time that the Complaint was filed in 2009, Seaton and Stonewall have returned to being separately owned and managed. Thus, any convenience or economy that may have been achieved by having these claims proceed in a combined action no longer exists.

Seaton's claims arise from four facultative reinsurance certificates issued by Clearwater to Seaton. As set forth in these reinsurance certificates, Clearwater agreed to reinsure a stated percentage of any losses paid by Seaton under certain excess and umbrella liability policies that Seaton issued to Champion International Corporation ("Champion"); Studebaker-Worthington, Inc. ("Studebaker"); Union Carbide Corporation ("Union Carbide"); and Westinghouse Electric Company ("Westinghouse"). Champion, Studebaker, Union Carbide and Westinghouse have each been sued by thousands of individuals who claim to have suffered bodily injury as the result

of exposure to asbestos or asbestos-containing products. Seaton has participated in funding the defense, settlement or other resolution of these claims under its policies.

Seaton has paid out millions of dollars on these claims and billed Clearwater for its proportional share of these losses under the terms of the facultative reinsurance contracts. Clearwater currently owes Seaton more than $1.2 million on these claims. In early January 2012, Seaton will be making a very substantial additional payment on the Westinghouse claim and Clearwater's share of that payment will be approximately $320,000. In breach of its obligations under the subject facultative reinsurance contracts, Clearwater has failed to make payment to Seaton for these losses. See *Lexington Ins. Co. v. Clearwater Ins. Co.*, No. 09-0234, 2011 WL 3715546 (Mass. Super. Ct. July 27, 2011)(granting summary judgment for ceding insurer based upon the "follow the settlements" doctrine and rejecting Clearwater's attempt to avoid payment by second-guessing the ceding company's allocation method).

Seaton's claims are completely independent of Stonewall's claims against Clearwater. The facultative reinsurance contracts issued by Clearwater on which suit has been brought reinsure entirely different underlying policies as respects Seaton and Stonewall. Further, Seaton and Stonewall issued separate umbrella and excess liability policies, with different terms and conditions, to these various policyholders. The only policyholder that Seaton and Stonewall have in common for purposes of this litigation is Studebaker. However, the excess policies issued by Seaton and Stonewall to Studebaker have different coverage terms, limits of liability, years of coverage and attachment points. The claimed damages relating to the Studebaker accounts are different for Seaton and Stonewall, with different amounts of indemnity payments having been made by Seaton and Stonewall. None of the other accounts at issue in this litigation are common to Seaton and Stonewall. In short, the facts of the claims between Seaton and

Clearwater are distinct from the claims involving Stonewall. Separating the two sets of claims into different actions or for trial is logical, will avoid the potential for juror confusion, and will permit the case to be concluded more rapidly.

ARGUMENT

I. THE COURT SHOULD SEVER SEATON'S AND STONEWALL'S CLAIMS

Rule 21 of the Federal Rules of Civil Procedure authorizes the Court to divide a case containing multiple claims into separate actions. *Corvello v. New England Gas Co., Inc.*, 247 F.R.D. 282, 285 (D.R.I. 2008). Where one set of claims is discrete and separate from another set of claims an order severing the claims is appropriate. *Id.* There are several factors that the Court considers in deciding whether claims should be severed:

> (1) whether the claims arise out of the same transaction or occurrence; (2) whether the claims present some common questions of law or fact; (3) whether settlement of the claims or judicial economy would be facilitated; (4) whether prejudice would be avoided if severance were granted; and (5) whether different witnesses and documentary proof are required for the separate claims.

In re High Fructose Corn Syrup Antitrust Litigation, 293 F. Supp. 2d 854, 862 (C.D. Ill. 2003).

Based upon these factors, Seaton's claims should be severed from the claims involving Stonewall. Seaton's claims arise from a different set of transactions than Stonewall's claims. The facultative reinsurance contracts at issue reinsure Seaton alone for losses under the policies that were issued by Seaton to Champion, Studebaker, Union Carbide and Westinghouse. There are no common facts as respects the Seaton and Stonewall claims as they involve different settlements of the underlying asbestos claims; different billings of a portion of those settlements and related expenses to Clearwater; different histories as respects Clearwater's response to the claims; and entirely different documents and exhibits. Although the claims may involve some

common questions of law, such as the interpretation of the subject reinsurance certificates or the elements of a breach of contract claim, there should be no dispute between the parties as to the simple legal principles that control this case. Accordingly, there is no particular economy that would be achieved by having the claims continued to be joined in a single action.

Indeed, severing the cases would promote judicial economy since there would be fewer facts and issues to present in each of the two cases, thereby streamlining trial. Severing Seaton's claims would simplify matters for the jury as fewer contracts would be in dispute in each case. Equally, separating the claims would avoid the possibility that the jury could become confused as to whether it is Seaton or Stonewall that is a party to a particular facultative reinsurance contract. Severing the claims would avoid any potential for the jury to speculate as to why these two unrelated companies were both in the case, thereby avoiding any potential for prejudice to either Seaton or Stonewall. Separating the Seaton claims from the Stonewall claims would focus the issues in dispute as to each party and prevent Clearwater from playing one plaintiff off the other or otherwise attempting to confuse the issues. There is not likely to be any overlap of witnesses or evidence. Accordingly, it would be appropriate to sever Seaton's claims from the claims brought by Stonewall and allow Seaton's claims to proceed immediately to trial in February 2012.

II. IN THE ALTERNATIVE, SEATON'S CLAIMS SHOULD BE TRIED SEPARATELY

Should the Court decline to sever Seaton's claims from the remainder of the action, Seaton requests a separate trial. Rule 42(b) of the Federal Rules of Civil Procedure provides:

> For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, cross-claims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

Proceeding with separate trials allows the Court to hear and decide one or more of the issues or claims without trying all of the controverted issues or claims at the same time. *Corvello*, 247 F.R.D. at 285.

Similar factors are generally considered on a motion for a separate trial as on a motion to sever. *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 559 (1st Cir. 2003). The overarching consideration is whether a separate trial of certain claims or issues would facilitate the fair and efficient adjudication of the case. *Corvello*, 247 F.R.D. at 286; *Itel Capital Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253, 1260 (11th Cir. 1983). The relevant factors include:

> (1) whether separate trials will help to simplify the issues and avoid confusion; (2) whether separate trials will expedite or delay the proceedings; (3) whether separate trials would unfairly prejudice any of the parties; (4) whether separate trials will result in more efficient utilization of judicial resources and the resources of the parties; (5) whether separate trials will result in duplication of evidence; (6) whether separate trials will create a risk of inconsistent verdicts; and (7) whether separate trials would deprive a party of any right that it may have to a jury trial.

Corvello, 247 F.R.D. at 286 (finding that separate trials were appropriate and warranted).

As set forth above, the separate and distinct facts relating to the claims between Seaton and Clearwater (on the one hand) as compared to the claims between Stonewall and Clearwater (on the other hand) militate strongly in favor of separate trials. A separate trial of Seaton's claims would simplify the issues and avoid confusion because only four of the facultative reinsurance contracts would be at issue. The jury could focus only on the payments made by Seaton on behalf of Champion, Studebaker, Union Carbide and Westinghouse and Clearwater's failure to pay its proportional share of those losses as required by the terms of the facultative reinsurance contracts. Separate trials would not delay the proceedings as Seaton requests an expedited trial to resolve its dispute with Clearwater and a trial limited to these four claims would not require more than two or three days. There would be no prejudice to any party by

having separate trials and no party would be deprived of any right to a trial by jury. Although two trials may be necessary instead of one, each individual trial would be shorter than a combined trial. In addition, there would be no duplication of evidence if separate trials were ordered because Seaton's and Stonewall's claims are based on separate and unrelated contracts. There is no risk of inconsistent verdicts because the claims under the facultative reinsurance contracts issued to Seaton must stand on their own whether the claims are tried separately or together with the claims involving Stonewall. In short, separate trials will advance the expeditious resolution of this dispute—not delay it—and an order for a separate trial of Seaton's claims is appropriate.

III. AN EXPEDITED TRIAL SCHEDULE SHOULD BE ESTABLISHED FOR SEATON'S CLAIMS

Seaton can be prepared to try this case as quickly as the Court can schedule a trial date. There have already been substantial delays in this case due to Clearwater's tactics and procedural maneuvers. This would be a simple case to try. Seaton does not expect a trial of its claims to require more than 2-3 days (if full trial days) or 3-5 days (if the Court tries the case on an abbreviated schedule). Seaton therefore requests that the matter be set down for trial in February 2012 or as soon thereafter as the Court's schedule will permit. Advancing this case on the Court's trial calendar is the surest way to promote its prompt disposition.

Clearwater's initial attempt at delaying this case was to challenge the Court's jurisdiction. On December 14, 2009, Clearwater filed a Motion to Dismiss or Stay this action in favor of the far less comprehensive declaratory judgment action that had been commenced by Clearwater in Connecticut Superior Court involving only the Studebaker balances. [PACER No. 9]. Clearwater pressed its challenge even after the Connecticut court stayed that action, ruling that Rhode Island was a proper forum for the dispute. After briefing and argument, Magistrate Judge

Almond issued a Report and Recommendation on February 4, 2010 recommending that Clearwater's motion be denied on the grounds that Rhode Island is a proper forum for this case and that the action commenced by Seaton and Stonewall is more comprehensive than the Connecticut action filed by Clearwater. [PACER No. 18]. Clearwater filed an Objection to the Report and Recommendation [PACER Nos. 19 and 20]. The Court (Smith, J.) heard argument on Clearwater's Objection on March 31, 2010. The Court issued an Opinion and Order adopting the Magistrate's Report and Recommendation and denying Clearwater's Motion to Dismiss or Stay on September 2, 2010 [PACER No. 27]. Clearwater then filed its Answer on September 27, 2010. [PACER No. 29]. A Scheduling Conference was held on January 13, 2011.

Clearwater then failed to respond adequately to properly served discovery requests. For example, Seaton served its First Set of Interrogatories and First Request for Production of Documents to Clearwater on February 28, 2011. Seaton served tailored discovery requests designed to elicit information that would frame the issues in this case. In particular, Seaton's discovery requests were aimed at obtaining information as to the ***specific reasons*** why the outstanding balances on the reinsurance claims have not been paid under the subject contracts. Similarly, Seaton sought to flesh out any specific facts relied upon by Clearwater to support its various defenses to payment. However, Clearwater refused to provide this fundamental information concerning its basis (if any) for failing to pay the amounts owed under the facultative reinsurance contracts and any facts that it claims support its various affirmative defenses. Seaton and Stonewall attempted to confer with Clearwater about the deficiencies in the discovery responses, but Clearwater never agreed to supplement its responses.

Discovery relating to Seaton's claims can be completed in short order. Although Seaton is dissatisfied with the adequacy of Clearwater's written discovery responses, Seaton believes

that it can obtain the missing information, including the purported basis for Clearwater's "no pay" position, through a deposition pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. To that end, Seaton served a Notice of Deposition to Clearwater on June 21, 2011 for a deposition to be held in July. Clearwater was unable to produce a witness for the date identified in the Notice of Deposition and agreed to offer alternative dates. Clearwater did not propose alternative dates and now contends that any deposition of Clearwater should be postponed until the parties' production of documents is completed. However, Seaton completed its production of responsive documents in early October 2011 and there is no reason why a deposition of Clearwater concerning Seaton's claims cannot be completed forthwith. Seaton again requested that Clearwater make a corporate witness available to testify on December 12, 13, or 14, but Clearwater failed to respond to this request. Accordingly, Seaton has re-noticed the Rule 30(b)(6) deposition of Clearwater with respect to Seaton's claims for January 17, 2012. If Clearwater fails to appear, Seaton will seek all appropriate relief from the Court.

Following the completion of this deposition, Seaton can be prepared to try the case promptly. This is a simple breach of contract case that does not require expert testimony. Further, while Seaton believes that it is entitled to judgment in its favor as a matter of law, Seaton submits that a short trial would be the most expeditious way to resolve the case. Seaton therefore requests that a trial be set on Seaton's claims for February 2012 or as soon thereafter as the Court's schedule will allow.

CONCLUSION

For the reasons stated, Seaton requests that the Court order that Seaton's claims against Clearwater be severed from the action or, in the alternative, that Seaton's claims be tried separately. Seaton further requests that an expedited trial schedule be established to resolve its

claims in February 2012 or as soon thereafter as the Court's schedule will allow, together with such other relief as the Court deems just and proper.

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By its attorneys,

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Dated: December 30, 2011

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on December 30, 2011.

/s/ John T. Harding

John T. Harding