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J. ROBERT WOOLEY	§	DOCKET NO.: 499, 737-~~BC~~ DIV. D
	§	
v.	§	19TH JUDICIAL DISTRICT COURT
	§	
THOMAS S. LUCKSINGER, ET AL.	§	PARISH OF EAST BATON ROUGE
	§	
	§	STATE OF LOUISIANA

COST OK Amt. 28385
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BY DY. CLERK OF COURT

RESPONSE OF EXECUTIVE RISK INDEMNITY INC., EXECUTIVE RISK SPECIALTY INSURANCE COMPANY AND EXECUTIVE RISK MANAGEMENT ASSOCIATES TO THE MOTION TO ENJOIN AND/OR STAY ACTION BY GREENWICH INSURANCE COMPANY TO REFORM THE CONTRACT OF INSURANCE ISSUED FOR THE BENEFIT OF AMCARE HEALTH PLANS OF LOUISIANA INC.

COME NOW Executive Risk Indemnity Inc., Executive Risk Specialty Insurance Company and Executive Risk Management Associates (collectively "Executive Risk"), through their undersigned counsel, who file this Response to the Motion to Enjoin and/or Stay Action by Greenwich Insurance Company to Reform the Contract of Insurance Issued for the Benefit of AmCare Health Plans of Louisiana Inc. ("AmCare-Louisiana"), which was filed by the Receiver for AmCare-Louisiana ("Receiver").[1]

I. INTRODUCTION

Executive Risk files this response to apprise the Court of circumstances potentially relevant to its analysis of this motion. The Receiver's Motion seeks to stay and/or to enjoin separate lawsuits filed by Greenwich Insurance Company ("Greenwich") in the Harris County District Court, 269th Judicial District of Texas, and the United States District Court for the Southern District of Texas. Greenwich filed the lawsuits in Texas seeking to reform a Management Liability and Company Reimbursement Insurance Policy Greenwich issued to AmCareCo, Inc. ("AmCareCo"), the Texas-based parent of AmCare-Louisiana.

The Receiver asserts a number of arguments about reformation, the timing of Greenwich's lawsuit and whether notice of the lawsuit should have been provided to the Court that do not apply to Executive Risk. Executive Risk has not sought reformation, has not filed a declaratory judgment action, has not sought to have an adjudication of policy rights in the absence of the Receiver, has not failed to apprise the Court of any lawsuit, and so will not address those issues in this Response.

[1] On other occasions, the parties have used the shorthand "AmCare" to refer to "AmCare-Louisiana." However, in this instance, the distinction between this entity and its Texas parent, AmCareCo. Inc., is important. Accordingly Executive Risk will use the term "AmCare-Louisiana" to avoid confusion.

However, Executive Risk did issue two insurance policies to the same Texas parent, AmCareCo – a Diversified Health Care Organization Directors and Officers Liability Policy and a Managed Care Organization Policy. Executive Risk anticipates there will be coverage disputes under these Policies and desires to resolve any such disputes efficiently and fairly for all parties concerned. To achieve that result, Executive Risk expects, before the date of hearing on this motion, to seek leave of the Court to sue the Receiver along with others to obtain a declaration concerning the scope of its coverage.

Given the Receiver's filing, Executive Risk wishes to apprise the Receiver and the Court of these plans so that the parties and the Court can consider how best to handle the entire insurance situation at one time. Executive Risk would also like to address what it believes is a mistaken procedural argument that the Receiver apparently would seek to apply to any insurer.

In its Motion, the Receiver asserts that:

(1) "[a]ll of the Receivers for AmCare[-Louisiana], AmCare-Texas, AmCare Management and AmCare-O[klahoma] have asserted claims against Greenwich under the Policy." Receiver's Memorandum in Support ("Mem.") at 5;[2]

(2) fundamental principles of justice and efficiency require that the rights under the insurance that the Receiver believes potentially might apply to its action can only be adjudicated in a proceeding in which all parties are present, id. 10-11, and prevent an insurer (like Greenwich) from seeking to adjudicate policy obligations "without affording the Receivers [in all three states] notice and opportunity to be heard" in the proceeding, id. at 5; but,

(3) because in Louisiana (just as in Texas and Oklahoma) there are receivership proceedings, "[i]f Greenwich seeks to obtain a judgment binding on the Receiver in this litigation, that action should be brought before *this* Court with all required parties afforded an opportunity to be heard here." See Mem. at 10 (emphasis added); see also Mem. at 11-13. Id. at 10.

These positions conflict. If receivers from three different states all have an interest in the adjudication, and it is essential or even desirable to join all interested parties in one place, each receiver cannot possibility insist on having the case take place only in his/her own forum. And if, insurance is to be adjudicated in Louisiana, it is impossible to bring all interested parties to

[2] The Texas proceeding is in the 200th Judicial District Court of Travis County, Texas, Cause No.: GV-204523. The Oklahoma proceeding is before the Oklahoma County District Court, Case No.: CJ 2003-5311.

this forum. The policies were not issued in Louisiana. They were issued in Texas to a Texas parent company. Two of the defendants the Receiver named to this action, Michael K. Jhin and William F. Galtney, have already urged that they do not have sufficient contacts with Louisiana to be sued here. Even if their position were found to be incorrect, there is no reason to believe that *every* other insured (including those who lived and worked in Texas or Oklahoma) would be found to have contacts with Louisiana sufficient to establish personal jurisdiction. And there is no apparent basis for jurisdiction in Louisiana to sue the receivers of Oklahoma or Texas corporations about the interpretation of policies issued in Texas. The only state where a suit could be maintained against all interested parties is Texas – where the policies were issued.

By seeking to enjoin litigation in Texas or to predetermine its effect, the Receiver is not serving any desire to have insurance litigated in one forum; rather, it is seeking to defeat it. The Receiver asks the Court to prevent insurers and others with an interest in the relevant policies from obtaining adjudication in the only forum that appears to have jurisdiction over these parties. This result is as contrary to law as it is to logic.

II. ARGUMENT

A. Personal Jurisdiction

Louisiana's long arm statute authorizes Louisiana courts to exercise personal jurisdiction over nonresidents for the following activities:

> (1) Transacting any business in this State;
>
> (2) Contracting to supply services or things in this State;
>
> (3) Causing injury or damage by an offense or quasi offense committed through an act or omission in this State;
>
> (4) Causing injury or damage in this State by an offense or quasi offense committed through an act or omission outside this State if the actor regularly does or solicits business, or engages in any other persistent course of conduct, or derives revenue from goods used or consumed or services rendered in this State;
>
> (5) Having an interest in, using or possessing a real right on immovable property in this State;
>
> (6) Non-support of a child, parent, or spouse or a former spouse domiciled in this State to whom an obligation of support is owed and with whom the nonresident formerly resided in this State;
>
> (7) Parentage and support of a child who was conceived by the nonresident while he resided in or was in this State;
>
> (8) Manufacturing of any product or component thereof which caused damage or injury in this State, if at the time of placing the product into the stream of commerce, the manufacturer could have foreseen, realized, expected, or

> anticipated that the product may eventually be found in this State by reason of its nature and the manufacturer's marketing practices.

LA. REV. STAT. ANN. § 13:3201. In addition, a Louisiana court may exercise personal jurisdiction over a nonresident on any basis consistent with the United States Constitution and the constitution of this State. Id.

The United States Constitution requires that a nonresident defendant have minimum contacts with the forum state such that maintenance of the lawsuit in that jurisdiction does not offend traditional notions of fair play and substantial justice. International Shoe Co. v. Washington, 326 U.S. 310 (1945); deReyes v. Marine Mgmt. & Consulting, Ltd., 586 So.2d 103 (La. 1991). A defendant's minimum contacts must be based on actions where the defendant purposefully availed himself to the benefits and protections of the laws of the state. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

The Receiver argues at length in its Motion that all proceedings that concern AmCare and the Receiver must be brought in a single action before the Court. Otherwise, according to the Receiver, the proceeding will violate "traditional notions of fair play, and judicial economy." Mem. at 12.

The Receiver, however, does not explain how this Court could exercise personal jurisdiction over all interested parties. For example, when addressing insurance coverage matters, there are receivers and directors and officers for AmCare companies in Texas and Oklahoma. Mem. at 5. The Receiver here suggests that each of these parties has no less of an interest in the outcome of insurance coverage litigation concerning AmCare companies than the Receiver in this action, id., but offers no explanation as to how or why all these other parties would be subject to this Court's jurisdiction. Indeed, each of the receivers could presumably make the same argument the Receiver makes here – insisting that the receivership proceeding in Texas or Oklahoma necessitates that any coverage dispute be resolved there. However, it is "a fallacy that [a] liquidation statute, on its face, gives jurisdiction without contacts." Wright v. Sullivan Payne Co., 839 S.W.2d 250 (Ky. 1992). "The state does not acquire jurisdiction by being the center of gravity of the controversy or the most convenient location for litigation." Id. at 255.

When following the Receiver's logic that all interested parties should be joined in a single action, Texas is the jurisdiction most likely to have personal jurisdiction over each of the parties that claims to be interested in the outcome of insurance coverage litigation. Executive

Risk issued its policies to AmCareCo, which has its principal place of business in Houston, Texas and is not even *licensed* to conduct business in the State of Louisiana. In Texas, unlike Louisiana (or Oklahoma), personal jurisdiction can exist by virtue of the connection to the policy under which the rights are being adjudicated, without requiring proof of broad general contacts with the state. See TEX. CIV. PRAC. & REM. CODE ANN. § 17.042.

B. Joinder

Although the Receiver declares that all interested parties should be joined in this Court, that does not seem possible. A person shall be joined as a party in a Louisiana action when either:

> (1) In his absence complete relief cannot be accorded among those already parties.
>
> (2) He claims an interest relating to the subject matter of the action and is so situated that the adjudication of the action in his absence may either:
>
> > (a) As a practical matter, impair or impede his ability to protect that interest.
> >
> > (b) Leave any of the persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations.

LA. CODE CIV. PROC. ANN. art. 641. Joinder of interested parties in an action is mandatory. See, e.g., Stephenson v. Nations Credit Fin. Services Corp., 98-1698 (La. App. 1 Cir. 9/24/99), 754 So.2d 1011, 1018; Succession of Poulus, 95-1469 (La. App. 1 Cir. 2/23/96), 668 So.2d 747, 748. The notion that all parties with an interest in the litigation must be joined in the action is further supported by Louisiana's declaratory judgment rule. According to LA. CODE CIV. PROC. ANN. art. 1880, "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

When joinder is not feasible, a court must determine whether the action should proceed among the parties before it or whether the case should be dismissed. LA. CODE CIV. PROC. art. 642. Factors a court should consider when making such a determination include:

> (1) The extent a judgment rendered in the person's absence might be prejudicial to him or those already present.
>
> (2) The extent to which the prejudice can be lessened or avoided by protective provisions in the judgment, by the shaping of relief, or by other measures.
>
> (3) Whether a judgment rendered in the person's absence will be adequate.
>
> (4) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

There is no reason to believe that all parties can be joined in this case. Messrs. Jhin and Galtney have already filed Declaratory Exceptions of Lack of Personal Jurisdiction. It is extremely likely that others who work in Oklahoma or Texas will not have minimum contacts with Louisiana. And the Receiver has not even proposed an argument whereby there would be jurisdiction over every Texas and Oklahoma director, officer or receiver here. One way of solving the problem of joining all the parties to one action is to grant the insurers leave to name the Receiver along with the other interested parties in Texas. Another is to grant the Receiver the power to intervene in such an action to protect his interests. But granting the Receiver's motion guarantees that all parties claiming an interest will *not* be joined in one action.

C. It is Improper To Enjoin a Proceeding Filed in Another State That is the Only Forum Where All the Interested Parties Can Be Named.

Even if the Receiver had the right to insist that the adjudication be divided among different forums, he does not have the right to have this Court enjoin litigation in the only forum that could adjudicate it *as to other parties*. Nothing in the Court's Liquidation Order as it is drafted or as it could fairly be revised justifies preventing insurers and others from resolving their differences.

The Receiver cites no authority to support the proposition that this Court is empowered to enjoin parties who are not part of the liquidation proceeding from resolving their differences in a court of another state. In fact, an order by one state court to enjoin litigation in another is an extraordinary remedy. The normal rule is that "[w]hen the same cause of action, involving the same parties, is before the courts of different states, the actions may proceed independently of each other," St. Paul Surplus Lines Ins. Co. v. Mentor Corp., 503 N.W.2d 511 (Minn. Ct. App. 1993) (citations omitted), and it is up to each court to decide how to try its own case. In Cook v. Delmarva Power & Light Co., 505 A.2d 447 (Del. Super. Ct. 1985), the court held that it lacked authority to prevent a party from using litigation in another state to resolve a dispute with parties who are not subject to the court's jurisdiction. The court found that "the New York Supreme Court enjoining all persons who have claims against a party insured by [the company in liquidation], whether subject to its jurisdiction or not, is beyond the jurisdiction of the New York Court and would not preclude this Court from adjudicating a legal claim against [the insured]." Id. at 449. See also Wright, 839 S.W.2d at 252-56 (affirming reversal of contempt order by

finding that court did not have personal jurisdiction over company in possession of assets potentially belonging to company in liquidation and, therefore, court's order enjoining litigation against liquidated company could prohibit litigation in other jurisdictions).

Even if this Court had the authority Cook found to be lacking, the Receiver has presented no fair argument for enjoining other litigation. The Receiver can entirely protect its interest by intervening in Texas. Rather than doing that, the Receiver asks this Court to take the extraordinary step of preventing others from protecting *their* interests. The relief the Receiver requests is unwarranted.

For all foregoing reasons, the Receiver's Motion should be denied.

Respectfully submitted,

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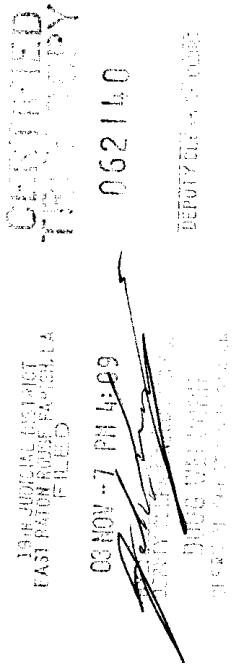

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition By Executive Risk Indemnity, Inc., Executive Risk Specialty Insurance Company And Executive Risk Management Associates To The Motion To Enjoin and/or Stay Action By Greenwich Insurance Company To Reform The Contract Of Insurance Issued For The Benefit Of AmCare Health Plans Of Louisiana Inc. , was served via facsimile and by ordinary United States mail addressed to the following on this 7th day of November, 2003:

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