

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EMPLOYERS INSURANCE COMPANY OF WAUSAU
and ALLSTATE INSURANCE COMPANY,

Plaintiffs,

v.

MEMORANDUM AND ORDER
05-C-263-S

CENTURY INDEMNITY COMPANY,

Defendant.

Plaintiff Employers Insurance Company of Wausau commenced this civil action seeking a declaration that it is not obligated to participate in a consolidated arbitration of its reinsurance dispute with defendant Century Indemnity Company and to compel defendant to participate in separate arbitration. Plaintiff Allstate Insurance Company sought and was granted leave to intervene and now seeks a similar declaration against defendant. Jurisdiction is based on diversity of citizenship, 28 U.S.C. § 1332. The matter is presently before the Court on defendant's motion to dismiss and cross-motions for summary judgment. The following facts are undisputed.

BACKGROUND

Plaintiff Employers Insurance Company of Wausau is an insurance company organized and existing under the law of Wisconsin with its principal place of business in Wisconsin. Defendant Century Indemnity Company is an insurance company organized and existing under the laws of Pennsylvania with its principal place of business

in Pennsylvania. In 1978, Wausau entered into a reinsurance agreement with defendant (through its predecessor, Insurance Company of North America) captioned the "First Excess General Liability Excess of Loss Reinsurance Agreement." Later that same year, Wausau and defendant entered into a second reinsurance agreement captioned the "Second Excess General Liability Excess of Loss Reinsurance Agreement."

Plaintiff Allstate Insurance Company is an insurance company organized and existing under the law of Illinois with its principal place of business in Illinois. Also in 1978, Allstate entered into a reinsurance agreement with defendant captioned the "First Excess General Liability Excess of Loss Reinsurance Agreement."

On October 15, 2004 defendant demanded that Wausau, Allstate and several other reinsurers pay certain loss presentations from the years 1979 to 1981. The demand letter included a request for a "consolidated arbitration" and instructed the reinsurers that they were to collectively appoint one arbitrator to a three-member arbitrator panel within 60 days of the demand or defendant would name an arbitrator on their behalf.

By letters dated October 20, 2004 Wausau objected to defendant's demand for a single arbitration that would include the other reinsurers. Wausau argued that the First and Second Excess Agreements were separate contracts and that neither contained any language expressing Wausau's agreement to participate in a

consolidated arbitration. Defendant did not respond to these letters. With the 60-day deadline approaching, Wausau wrote two letters to defendant dated December 14, 2004 appointing its arbitrator for two separate arbitrations.

On December 17, 2004 Allstate named its arbitrator. Allstate reserved all rights including the right to object to consolidation of the arbitration proceedings. On March 10, 2005 Allstate sent a letter to defendant arguing that the language of its agreements with defendant did not allow for a consolidated arbitration and advising that Allstate refused to participate in a consolidated arbitration with defendant and the other reinsurers. On March 28, 2005 Allstate sent a letter to defendant advising that Allstate refused to participate in umpire selection for arbitration on a consolidated basis. Allstate advised that it was willing to proceed with umpire selection for a non-consolidated arbitration with defendant. On March 29, 2005 Wausau provided defendant with a draft agreement in which it offered to consolidate with defendant its disputes arising under the First and Second Excess General Liability Excess of Loss Reinsurance Agreements into a single arbitration without any other reinsurers.

On April 19, 2005 defendant sent a letter to Allstate, Wausau and various other reinsurers demanding that they agree within 14 days to proceed with a consolidated arbitration. Wausau and Allstate refused. Defendant and Allstate have not selected an

umpire. Defendant and Wausau have not selected an umpire. There are no arbitration panels in place to consider disputes between Allstate and defendant or between Wausau and defendant.

MEMORANDUM

Presently before the Court are cross-motions for summary judgment and defendant's motion to dismiss. Plaintiffs argue that they are not obligated to participate in defendant's consolidated arbitration but rather that they are entitled to separately arbitrate their disputes with defendant. Defendant argues that the issue of whether it can consolidate its disputes with Wausau, Allstate and other reinsurers into a single arbitration is a question for the arbitrators to decide. Defendant also argues that by failing to include the other putative parties to its proposed consolidated arbitration, plaintiffs have failed to join indispensable parties.

Defendant is correct that the issue of whether it can consolidate its disputes with Wausau, Allstate and other reinsurers into a single arbitration is a question for the arbitrators, not this Court, to decide. In Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452 (2003), the United States Supreme Court reaffirmed the strong federal policy in favor of arbitration and reiterated that Courts should resolve any doubt as to the scope of arbitrable issues in favor of arbitration. At issue in Green Tree was whether an

arbitration agreement permitted class arbitration. The Court found this to be a question of contract interpretation that should be decided by the arbitrator. Although it recognized a limited number of "gateway matters" that judges might resolve before the parties proceed to arbitration (e.g., the validity of the arbitration agreement), it excluded from judicial purview those disputes concerning the "kind of arbitration proceeding the parties agreed to". Green Tree, 539 U.S. at 452. Absent clear and unmistakable evidence of the parties' contrary agreement, the arbitrators, not Courts, resolve these "procedural" disputes. Id. at 453; Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002). As the First Circuit held in Shaw's Supermarkets, Inc. v. United Food and Commercial Workers Union Local 791, 321 F.3d 251, 254 (1st Cir. 2003), the possibility of consolidation is a procedural issue for the arbitrators to decide.

Contrary to defendant's suggestion, however, this determination does not resolve the matter in its favor and merit dismissal of the present action. The parties remain at an impasse of defendant's creation. Defendant has notified Wausau, Allstate and the third-party reinsurers that it intends to commence a consolidated arbitration. It has asked them to collectively nominate one member of a three-person consolidated panel. They have refused to consent to defendant's consolidated arbitration. Each reinsurer insists on selecting its own arbitrator. Defendant insists on consolidation.

Consequently, no arbitrators have been selected. There is no one to whom the Court can refer the consolidation dispute for arbitration. It would be nonsensical to package the parties' dispute and send it off addressed to "arbitrator" when, in fact, there is no arbitrator to receive it. Pursuant to § 4 of the Federal Arbitration Act, this Court has the power to compel the parties to proceed to arbitration in accordance with the terms of their agreements. 9 U.S.C. § 4.

The arbitration clauses in Wausau's agreements with defendant are identical to each other and to the arbitration clause in Allstate's agreement with defendant. They read in relevant part as follows:

Arbitration

As a condition precedent to any right of action hereunder, any dispute arising out of this Agreement shall be submitted to the decision of a board of arbitration composed of two arbitrators and an umpire, meeting in New York, New York, unless otherwise agreed.

The members of the board of arbitration shall be active or retired disinterested officials of insurance or reinsurance companies or Underwriters at Lloyd's, London, not under the control of either party to this Agreement. Each party shall appoint its arbitrator and the two arbitrators shall chose an umpire before instituting the hearing. If the respondent fails to appoint its arbitrator within 60 days after being requested to do so by the claimant, the latter shall also appoint the second arbitrator. If the two arbitrators fail to agree upon the appointment of an umpire within 60 days after their nominations, each of them shall name three of whom the other shall decline two, and the decision shall be made by drawing lots.

As a preliminary matter, defendant argues that Allstate, Wausau and the third-party reinsurers are, in effect, co-signatories to a

single reinsurance contract. From this proposition, defendant suggests that the arbitration clause's use of the term "party" comprises all reinsurers with which defendant wishes to arbitrate. Accordingly, defendant argues that it is entitled to demand that the reinsurers collectively appoint a single arbitrator to a three-member panel for the purpose of resolving all pending disputes in one consolidated arbitration. From this proposition, defendant also argues that the missing third-party reinsurers are indispensable parties to the present action.

A cursory review of Allstate's and Wausau's agreements with defendant reveals its position to be without merit. Each agreement uses the defined terms "Company" (i.e., defendant) and "Reinsurer" to represent the parties. Each agreement defines "Reinsurer" as "the Reinsurer specifically identified on the signature page of this Agreement." Turning to the signature page of each agreement, Allstate's agreement is signed by a representative of defendant and several representatives of "Allstate Insurance Company, Northbrook, Illinois" and Wausau's two agreements are signed by a representative of defendant and a representative of "Employers Mutual Liability Insurance Company of Wisconsin, Wausau Wisconsin." Allstate is not identified in, nor is it a party to, either of Wausau's agreements. Wausau is not identified in, nor is it a party to, Allstate's agreement. These are separate agreements.

Nor are the other reinsurers parties to any of these agreements. Because the Court's consideration is limited to the rights and duties arising from these three agreements, the third-party reinsurers are not indispensable parties to the present action.

Having reserved the issue of consolidation for the arbitrators' later consideration, each agreement provides an unambiguous procedure for the creation of its own arbitration panel to resolve this and any other disputes that might later arise. Wausau and defendant have agreed to arbitrate "any dispute arising out of" their agreements. Their arbitrators may consider the issue of consolidation once they have been seated. In the meantime, however, Wausau shall appoint its arbitrator, defendant shall appoint its arbitrator and the two arbitrators shall choose an umpire in accordance with the terms of Wausau and defendant's agreements. Similarly, Allstate and defendant have agreed to arbitrate "any dispute arising out of" their agreement. Their arbitrators may consider the issue of consolidation once they have been seated. In the meantime, however, Allstate shall appoint its arbitrator, defendant shall appoint its arbitrator and the two arbitrators shall choose an umpire in accordance with the terms of Allstate and defendant's agreement.

ORDER

IT IS ORDERED that defendant Century Indemnity Company's motions to dismiss and for summary judgment are DENIED.

IT IS FURTHER ORDERED that plaintiffs Employers Insurance Company of Wausau and Allstate Insurance Company's motion for summary judgment is GRANTED insofar as it seeks to compel defendant to proceed to arbitration in accordance with the terms of the parties' agreements. Plaintiffs' motion is in all other respects DENIED.

IT IS FURTHER ORDERED that defendant proceed to arbitration with plaintiff Allstate Insurance Company forthwith. Allstate shall appoint its arbitrator. Defendant shall appoint its arbitrator. Thereafter the two arbitrators shall choose an umpire in accordance with the terms of their agreement.

IT IS FURTHER ORDERED that defendant proceed to arbitration with plaintiff Employers Insurance Company of Wausau in accordance with the terms of their agreements. Wausau shall appoint its arbitrator. Defendant shall appoint its arbitrator. Thereafter the two arbitrators shall choose an umpire in accordance with the terms of their agreements.

Let judgment be entered accordingly.

Entered this 19th day of July, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge