...United States District Court, Northern District of Illinois, Eastern Division, 28 October 1993, No. 93 C 4439

GERLING-KONZERN GLOBALE RUECKVERSICHERUNGS-AG, et al., Plaintiffs, v. STEPHEN F. SELCKE, etc., Defendant.

GERLING-KONZERN GLOBALE RUECKVERSICHERUNGS-AG v. SELCKE

1993 U.S. Dist. LEXIS 15316

Decided

October 29, 1993, Docketed

JUDGES: [*1] Kocoras

OPINIONBY: CHARLES P. KOCORAS

OPINION: MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on a motion to dismiss brought by the defendant. For the reasons that follow, we grant the defendant's motion.

BACKGROUND

The defendant, Stephen F. Selcke ("Selcke"), is the Director of Insurance of the State of Illinois. He is acting as the Liquidator of Inter-American Insurance Company, an Illinois corporation that became insolvent and was placed in receivership on December 23, 1991. The claims of policyholders greatly exceed Inter-American's tangible assets. The most valuable asset in Inter-American's estate is a group of "surplus relief" reinsurance treaties issued by seven reinsurers, including the plaintiffs in this case, Gerling-Konzen Globale Rueckversicherungs-AG and Gerling Global Life Insurance Company

(collectively, "Gerling").

The liquidation of Inter-American is proceeding in the Circuit Court of Cook County. Upon declaring Inter-American insolvent, the Circuit Court enjoined all persons from commencing or pursuing any claims against Inter-American unless those actions were brought in the Circuit Court. Gerling and the other reinsurers have filed [*2] pleadings in the Circuit Court regarding their rights and obligations under the surplus relief reinsurance treaties. Gerling seeks about $ 10 million from the estate, which it claims is due under the reinsurance treaties.

All of the reinsurance treaties contain arbitration clauses. Three of the reinsurers have moved that the Circuit Court order arbitration of their disputes over their obligations under the reinsurance treaties. Gerling brought this suit in federal court seeking an order compelling arbitration under the Federal Arbitration Act, 9 U.S.C. || 1-16, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), 3 U.S.T. 2517,

T.I.A.S. No. 6997, reprinted at 9 U.S.C.A. | 201. In its federal complaint, Gerling alleges that it has requested Selcke to submit all disputes to arbitration and that Selcke has refused this request. Complaint, para. 14. However, Selcke states that Gerling has not yet demanded arbitration of any disputes. Memorandum in Support of Motion to Dismiss, at 5.

Selcke brought the present Motion to Dismiss on grounds that this Court should abstain [*3] from exercising jurisdiction over Gerling's claims because of the potential disruption of the Circuit Court liquidation proceedings. Alternatively, Selcke urges that we should dismiss this suit because we lack subject matter jurisdiction. Finally, Selcke indicates that lack of ripeness is a further ground for dismissal.

LEGAL FRAMEWORK

[1] A brief discussion of federal statutes will provide a framework for the analysis to follow. First, in support of his motion to dismiss on abstention grounds, Selcke points to the federal policy embodied in the McCarran-Ferguson Act. Through that Act, Congress vested primary authority in the states to regulate the business of insurance. See 15 U.S.C. | 1011 et seq. The Act provides in pertinent part that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. | 1012(b). State statutes regulating the liquidation of insurance companies are laws regulating the business of insurance, to the extent [*4] that their purpose is to protect policyholders by securing payment of their claims. U.S. Dep't of Treasury v. Fabe, 124 L. Ed. 2d 449, 113 S. Ct. 2202, 2210 (1993). The relevant provisions of the Illinois Insurance Code were enacted, at least in part, for the purpose of preserving the rights and interests of the

policyholders. See, e.g., 215 ILCS 5/193(4). Thus, the Illinois rehabilitation and liquidation statute is one that regulates the business of insurance. Selcke thus argues that the Federal Arbitration Act and the enabling legislation for the Convention should not be construed to impair Illinois law regarding liquidation of insolvent insurers.

In opposing the motion to dismiss, Gerling points to the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Gerling submits that the Convention requires courts in the United States to compel arbitration in circumstances present here, and that this Court should enter an order compelling arbitration rather than abstaining.

DISCUSSION

1. Abstention

Selcke asserts that abstention would be appropriate here under the Burford, Younger, and Colorado River abstention [*5] doctrines. Turning first to Burford abstention, Selcke cites Corcoran v. Ardra Insurance Co., 842 F.2d 31 (2d Cir. 1988) for the proposition that Burford abstention is appropriate in insurer insolvency cases. In Ardra, the New York Superintendent of Insurance brought suit in the state court to recover proceeds allegedly due to an insolvent insurer under three reinsurance agreements. Ardra, 842 F.2d at 32. A reinsurer removed the case to federal court. Id. The district court remanded on abstention grounds, citing Burford and Colorado River, because the applicability of the Convention depended upon the powers granted to the Superintendent of

Insurance by state law. Id. at 34. The reinsurer appealed, contending that abstention was inappropriate because the reinsurance agreements contained arbitration clauses and under the Convention, the district court was required to order arbitration. Id. at 32. The Second Circuit found that a district court has the power to dismiss an insurer insolvency case on abstention grounds and extended that reasoning [*6] to uphold the district court's remand of the case. Id. at 36. The Second Circuit stated that abstention in that case "fit particularly well within the Burford goal of avoiding interference with specialized state regulatory schemes." Id. at 37.

The Seventh Circuit addressed Burford abstention in the insolvent insurer context in General Railway Signal Co. v. Corcoran, 921 F.2d 700 (7th Cir. 1991). Although not ruling on the abstention issue, the Seventh Circuit quoted dicta from one of its previous opinions stating that "abstention from the exercise of federal court jurisdiction . . . over claims arising out of such state liquidation proceedings is particularly appropriate." Id. at 708, citing In re Cash Currency Exchange, Inc., 762 F.2d 542 (7th Cir. 1985), cert. denied 474 U.S. 904, 88 L. Ed. 2d 232, 106 S. Ct. 233 (1985). The Seventh Circuit cited with approval cases from three Circuit Courts of Appeal

holding that Burford abstention is required when creditors of an insolvent insurance company try to litigate their claims [*7] in federal court. Id. at 708.

The Seventh Circuit affirmed the district court's decision to abstain in Hartford Casualty Insurance Co. v. Borg-Warner Corp., 913 F.2d 419 (7th Cir. 1990). It stated that the following non-exclusive list of factors should be considered in a Burford analysis:

(1) whether the suit is based on a cause of action which is exclusively federal; (2) whether difficult or unusual state laws are at issue; (3) whether the suit requires the court to determine issues that are directly relevant to state policy in the regulation of the insurance industry; and (4) whether state procedures indicate a desire to create special state forums to regulate and adjudicate the issues presented.

Hartford Casualty, 913 F.2d at 425 (citations omitted). Not all of these factors must be present to warrant abstention. Mondrus v. Mutual Ben. Life Ins. Co., 775 F. Supp. 1155, 1158 (N.D. Ill. 1991). Here, although Gerling's complaint lists federal statutes, those statutes do not control the substantive aspects of the case. This is an insurance insolvency case. The substantive law [*8] involved is state insurance and contract law. Although Gerling represents otherwise, we believe that were we to retain this case, we would have to decide which issues are arbitrable, a question of contract interpretation. Further, the state court is currently entertaining that issue and deciding an executory contract issue, which may make arbitration unnecessary.

The regulation of the insurance industry is an area of substantial public concern in Illinois. The McCarran-Ferguson Act authorizes the states to maintain the preeminent role in regulating the business of insurance and Illinois, like most states, has adopted a complex regulatory scheme to govern the liquidation of insolvent insurers. The exercise of federal jurisdiction in this case would disrupt the administration of Illinois' regulatory scheme.

We find that the facts of this case support abstention. If we were to retain jurisdiction and enter an order compelling arbitration as requested by Gerling, we would be disrupting the state court's orderly administration of the

liquidation proceeding. There are seven reinsurance companies. Some of those companies have brought motions to compel arbitration in the state court, but [*9] Gerling is the only one to seek such relief from the federal courts. Now pending in the state court is the issue of whether the reinsurance contracts are executory. See Alabama Reassurance Company's Objections to Liquidator's Motion for Approval of Procedure for Notice, at 4. (No. 91 CH 10189, Sept. 7, 1993). n1 The resolution of that issue may render the arbitration issues moot. Id. The state court has continued the motions of other reinsurers to compel arbitration, awaiting resolution of the executory contracts issue. Id. The reinsurers stated, "This course made sense." Id. There is no logical reason for us to compel arbitration between the

Liquidator and one of the reinsurers in advance of the state court deciding the executory contracts issue, which could render arbitration unnecessary. We believe that such a course of action would offend comity. Moreover, ordering arbitration with one reinsurer fractionates the case and is likely to increase costs for the Liquidator, which is not in the best interests of the policyholders (or of the reinsurers if they prevail in their claims against the estate).

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n1 Alabama Reassurance Company's attorneys were authorized to submit these Objections on behalf of Gerling.

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Numerous cases support our decision to abstain in this circumstance. See, e.g., Hartford Casualty Ins. Co. v. Borg-Warner Corp., 913 F.2d 419 (7th Cir. 1990); Lac D'Amiante Du Quebec v. American Home Assurance Co., 864 F.2d 1033 (3rd Cir. 1988) (vacating the district court's judgment because of its refusal to abstain); Grimes v. Crown Life Ins. Co., 857 F.2d 699 (10th Cir. 1988), cert. denied, 489 U.S. 1096, 103 L. Ed. 2d 934, 109 S. Ct. 1568 (1989); Corcoran v. Ardra Ins. Co., 842 F.2d 31 (2d Cir. 1988); Law Enforcement Ins. Co. v. Corcoran, 807 F.2d 38 (2d Cir. 1986), cert. denied, 481 U.S. 1017, 95 L. Ed. 2d 503, 107 S. Ct. 1896 (1987); Mondrus v. Mutual Ben. Life Ins. Co., 775 F. Supp. 1155, 1157 (N.D. Ill. 1991). Nonetheless, we are cognizant that the District Court for the District of Arizona resolved the Burford abstention issue differently in U.S. Financial Corp. v. Warfield, No. 93-809 (Aug. 16, 1993). The court there identified a number of factors that favored abstention, but concluded that [*11] abstention was not appropriate under the facts of that case. Id. at 28. The court noted that the question was "a very close one." Id. at 30. The key factor that the court identified as favoring retention of the case was that the federal court would not have to review decisions made by the receiver or the liquidation court. Id. at 28. Here, while we are not called on to review the state court's decisions, Gerling asks us to make a preemptive strike on the state court's decision on the executory contracts issue. We are not willing to do that.

Our reading of the other cases cited by Gerling does not change our decision. In Bennett v. Liberty National Fire Insurance Co., 968 F.2d 969 (9th Cir. 1992), the Ninth Circuit ordered the liquidator of an insolvent insurance company to arbitrate claims with the reinsurer, pursuant to the Federal Arbitration Act and the contract of reinsurance. Two of the reasons advanced by the court were that the liquidator did not show that enforcing the arbitration clause would disrupt the orderly liquidation of the insurer and that under Idaho ex rel. Soward v.

United States, 858 F.2d 445 (9th Cir. 1988), [*12] cert. denied, 490 U.S. 1065 (1989), the state interest in exclusive jurisdiction is materially reduced once an insurer becomes insolvent. Id. at 972. As to the first reason, we discussed above that ordering piecemeal arbitration in advance of the state court's decision on the executory contracts issue would disrupt the orderly liquidation of Inter-American. As to the second reason, Soward was disapproved of by the Supreme Court in Fabe v. United States Department of Treasury, 124 L. Ed. 2d 449, 113 S. Ct. 2202, 2210 (1993).

Gerling also cites Fragoso v. Lopez, 991 F.2d 878 (1st Cir. 1993). However, the First Circuit described that case as "idiocratic." Fragoso, 991 F.2d at 885. Fragoso is distinguishable from the case at bar because in Fragoso, the trial was complete and all that remained were "solely legal questions suitable for federal appellate resolution." Id. The First Circuit stated that because of the procedural status of the case, it was a "very weak candidate for abstention." Id. Further, the court noted that the federal court's exercise of appellate [*13] jurisdiction over it "could not possibly impair uniformity in the interpretation of CIS's insurance policies, nor could [it] obstruct the adjudication of claims against CIS in the liquidator's forum." Id. This, the court stated, was a "singularly important difference" distinguishing the case from Gonzalez v. Media Elements, Inc., 946 F.2d 157 (1st Cir. 1991), where the First Circuit abstained in an insurer insolvency case. As we have noted above, our exercise of jurisdiction could impair uniformity of interpretation of the reinsurance policies and would obstruct the state court's ongoing adjudication of claims. Thus, Fragoso does not persuade us to abstain.

Finally, Gerling urges that the Convention requires us to compel arbitration. However, we view the issue of abstention as wholly separate from the Convention. Gerling can raise the issue of the applicability of the Convention and its requirements in the state court.

Article II of the Convention states that "the court of a Contracting State, when seized of an action [involving an arbitration agreement] shall, at the request of one of the parties, refer the parties to arbitration." See Convention, [*14] Art. II, para. 3, 3 U.S.T. 2517, T.I.A.S. No. 6997, reprinted at 9 U.S.C.A. | 201. The purpose of Selcke's motion was essentially to test our jurisdiction and the advisability of our exercising jurisdiction. If we do not have jurisdiction or we do not exercise jurisdiction, we are not "seized" of the case. We have determined that it is not advisable for us to exercise jurisdiction here. By abstaining, we are relinquishing jurisdiction. Because we are not "seized" of this case, we will not refer the parties to arbitration. The state court is an adequate forum for Gerling to raise the Convention issue in and the state court can refer the parties to arbitration.

Based on our above decisions, it is not necessary for us to reach the issues of Younger and Colorado River abstention or ripeness.

CONCLUSION

For the reasons stated above, we abstain from exercising jurisdiction over this case. Accordingly, we grant Selcke's motion to dismiss.

Charles P. Kocoras

United States District Judge

Dated: October 28, 1993