

SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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August 27, 2008

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RE: The Charter Oak Fire Insurance Company and Travelers Property
Casualty Company of America v. McClafferty Printing Co., Inc., et al.
v. Poland & Sullivan Insurance Inc.
C.A. No. 05C-08-040 WCC

Upon Plaintiff's Motion to Compel Arbitration and Stay Proceedings
Denied in Part - Granted in Part

Submitted: August 13, 2008
Decided: August 27, 2008

Dear Counsel:

This is the remaining case in a litigation that resulted from an accident involving an automobile insured by Travelers Property Casualty Company of America ("Travelers") for McClafferty Printing ("McClafferty"). The insurance

was purchased through Travelers local agent, Poland and Sullivan Insurance Inc. (“Poland and Sullivan”). The primary tortfeasors litigation involving the injured parties has been settled by Travelers. As part of the global settlement Travelers paid \$1,725,000.00, and McClafferty contributed \$175,000.00 to settle the claim. As part of the settlement, McClafferty also assigned to Travelers the rights they had to the litigation McClafferty had filed against Poland and Sullivan. This litigation was a third party claim alleging that the agency was negligent in the procurement of McClafferty’s insurance coverage and that Poland and Sullivan is liable to the McClafferty defendants for any resulting loss if the Plaintiff’s insurance coverage denial was affirmed.

The dispute now before the Court is whether the arbitration requirement in the agency contract executed between Travelers and Poland and Sullivan would require the McClafferty assigned claim to be arbitrated. Travelers is requesting the Court to allow the arbitrator to first decide whether the McClafferty claims would be included within the arbitration provisions of the contract and if so, decide the dispute. Poland and Sullivan request the Court to find the arbitration provision does not apply to the assigned dispute between McClafferty and Poland and Sullivan as McClafferty is a non-signatory to the agency agreement and to keep the litigation in this Court which is set for trial on September 15th.

The arbitration provision which is at dispute here is contained in an agency contract which was effective on January 1, 1997 between Travelers and Poland and Sullivan. The arbitration provision states the following:

If any dispute or disagreement arises in connection with any interpretation of this contract, its performance or non-performance, or any figures or calculations used, both parties will make every effort to meet and settle the dispute in good faith informally. If both parties cannot agree to a settlement of the dispute or disagreement, and if the dispute or disagreement does not involve our termination of this contract or withdrawal of authority of any type(s) of business, the matter in controversy will, upon written request of either party, be settled by arbitration. Arbitration will be conducted following the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction.

The Court believes that it is important to put this provision into some contractual context. The agency agreement provides authority for Poland and Sullivan to act as Travelers agent to sell their insurance. The agreement sets forth the conditions of the agency relationship and references generally the commission and billing practices that are authorized. In simple terms, this is the document that controls the legal relationship between Travelers Insurance Company and Poland and Sullivan. It does not reference Poland and Sullivan's conduct with its clients or control disputes that may arise between Poland and Sullivan and its customers.

Fundamental to resolving this dispute is the Court's belief that as assignee, Travelers only has obtained the rights and privileges that McClafferty could exercise and an assignment will not expand those rights. In essence, an assignee steps into the shoes of the assignor and here only if Travelers could establish the McClafferty had a right to force arbitration would such action be required. The Court finds they cannot and their attempts to stretch the language of the agency agreement to encompass the McClafferty suit against Poland and Sullivan is not convincing. The arbitration provision clearly only relates to disputes that arise between Travelers and Poland and Sullivan and normally would have no force or effect upon non-signatory third party complaints. The Court acknowledges that under certain limited circumstances a non-signatory can compel a signatory to a contract to arbitrate, however, as explained below, neither of the two circumstances required in the *Wilcox* case would apply here.¹

The first possible circumstance that would allow arbitration would be when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the non-signatory. This provision does not apply here as it is a non-signatory who is asserting the claim and in addition the claims do not rely or depend upon the agency agreement to survive.²

The other possible circumstance is when the signatory to the contract containing an arbitration clause raises allegations of substantial interdependence

¹ See *Wilcox & Fetzer, Ltd. v. Corbett & Wilcox* 2006 WL 2473665 (Del. Ch. Aug. 22, 2006).

² The McClafferty's third-party complaint claims that Poland & Sullivan failed to properly (i) advise how to insure the 2004 BMW M3, (ii) investigate the insurance coverage for the 2004 BMW M3, and (iii) procure the insurance coverage for the 2004 BMW M3 as requested by Shawn McClafferty. See Third Party Def. Opening Br. at 7.

and concerted misconduct by both the non-signatory and one or more of the signatories of the contract. However, the assigned claim here is not one where Travelers is alleging concerted misconduct by McClafferty and Poland and Sullivan or where Poland and Sullivan is alleging such conduct between Travelers and McClafferty. While it would be difficult to argue that the assigned claims here are not related to the overall claims made in the various litigations that arose out of this accident, they are not dependent upon the contract that contains the arbitration clause.

When one breaks down Travelers' argument to its simplest terms, it is that when they became the "assigned" plaintiff, the dispute became one between Travelers and Poland and Sullivan and thus the agency arbitration provisions were sufficiently broad to encompass the claim. The Court disagrees as the McClafferty dispute is not related to the performance of the agency agreement and is a claim that the parties did not contemplate would be required to be arbitrated. If Travelers, who wrote the agreement, wanted to include assigned claims it could easily have included them in the arbitration language. They chose not to do so, and the Court cannot expand the clause to include what clearly was not contemplated by the clear and unambiguous terms of the contract. As such, the Court finds the McClafferty litigation remains a valid action in this Court and is not subject to the arbitration provision of the agency agreement.

Having made this ruling, the Court however also finds that some common sense and practical realities need to be imposed here. Travelers' claims against Poland and Sullivan independent of the McClafferty litigation has been submitted to arbitration under the agency agreement. In other words, Travelers claims that it is entitled to recover \$1,725,000.00 it was required to pay to settle the overall litigation as a result of the conduct of Poland and Sullivan. The parties agree, as does the Court, that under the agency agreement this dispute must proceed to arbitration. It is also clear to the Court that what occurs during that arbitration will in large respect determine whether there is any interest by Travelers to continue to pursue this assigned claim, particularly since counsel has represented that any monies that are recovered under the assignment are required to be returned to McClafferty.³ While the Court is sure both parties have some litigation strategy that they believe will work in their favor by either forcing or delaying this litigation before arbitration, the Court can conceive of no benefit to either the parties or the

³ The Court accepts this representation although the repayment language is not clear by its review of the assignment document.

Court of forcing this relatively insignificant monetary dispute, when compared to the overall claim, to trial before arbitration. Therefore, while the McClafferty assigned claim against Poland and Sullivan will remain before this Court, this action is stayed until the arbitrator has ruled on the dispute between Travelers and Poland and Sullivan.⁴

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

WCCjr:twp

cc: Christy Magid, Case Manager

⁴ The arguments made by the defendant regarding the Plaintiff's failure to designate an expert is simply not sufficient to override what is clearly the appropriate manner to proceed in this litigation. In addition, even if McClafferty failed to retain an expert, it is unlikely that the Court would prevent Travelers from obtaining such an expert now that they have been assigned the claim.