

NO. D-1-GV-08-000945

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	
	§	
MEMORIAL SERVICE LIFE	§	TRAVIS COUNTY, TEXAS
INSURANCE COMPANY, LINCOLN	§	
MEMORIAL LIFE INSURANCE	§	
COMPANY, AND NATIONAL	§	
PREARRANGED SERVICES, INC.	§	250 th JUDICIAL DISTRICT

**NOLHGA'S OBJECTION TO
NORTHSTAR'S MOTION TO LIFT STAY**

TO THE HONORABLE JUDGE OF THIS COURT:

The National Organization of Life and Health Insurance Guaranty Associations ("NOLHGA") on behalf of the guaranty associations affected by this insolvency, including the Texas Life, Accident, Health, and Hospital Service Insurance Guaranty Association, respectfully files this "NOLHGA'S Objection to Northstar's Motion to Lift Stay." The Motion is set for oral hearing before Tom Collins, Receivership Special Master on January 22 and 23, 2009.

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The National Organization of Life and Health Insurance Guaranty Associations (“NOLHGA”) opposes Northstar’s motion because, as discussed by the Special Deputy Receiver (“SDR”) in her Response to Northstar’s Motion and by NOLHGA below, Northstar seeks an improper remedy in an improper forum. Under Texas law all other proceedings affecting the estate of Lincoln Memorial Life Insurance Co. (“Lincoln”), with exceptions inapplicable here, are automatically stayed for the duration of this insolvency proceeding. *See* Tex. Code § 443.008(c). In addition, on September 22, 2008, this Court entered an order noting the automatic stay and reaffirming that, in accordance with Tex. Code § 443.008(f), the “stay of actions against [Lincoln] is in effect for the duration of this proceeding, and the stay of actions against [Lincoln’s] property is in effect for as long as the property belongs to the receivership estate.” Northstar Reinsurance Ireland Limited (“Northstar”), a Lincoln reinsurer that had previously initiated arbitration proceedings to determine its rights against Lincoln, has moved to lift the stay to allow its arbitration to proceed in part. NOLHGA objects to lifting the stay for the reasons set for below.

NOLHGA’s Interest in the Proceedings

1. NOLHGA is a voluntary association of the life and health insurance guaranty associations of all 50 states plus the District of Columbia and Puerto Rico. It coordinates the efforts of state guaranty associations to provide protection to policyholders when a life or health insurance company insolvency affects people in multiple states. NOLHGA has standing in this matter pursuant to Tex. Ins. Code §§ 463.106(a), 463.109. It is anticipated that NOLHGA’s members will pay hundreds of millions of dollars in connection with this insolvency and that NOLHGA will be, by far, the largest creditor of Lincoln.

Argument

2. Northstar entered a Reinsurance Agreement (the “treaty”) with Lincoln. Northstar has provided approximately \$38 million, through a Letter of Credit and trust, to secure its reinsurance obligations to Lincoln. Texas law required Northstar, which is not licensed in Texas, to pledge such assets as a condition for Lincoln to receive financial credit for the reinsurance transaction, and required that the assets be for the sole benefit and under the sole control of the ceding insurer, Lincoln. *See* Tex. Ins. Code § 492.104-105 (requirements for assets held as security); Tex. Admin. Code § 7.607-610 (detailed regulations).

3. In its Motion to Lift Stay (“Motion”), Northstar claims that it terminated the treaty, that it owes no further obligation to Lincoln, and that it is entitled to the return of its pledged assets (the “disputed property”). It asks the Court to lift both the automatic stay and the Court’s own injunction, to allow an arbitrator to decide (1) that Northstar terminated its reinsurance treaty with Lincoln, (2) that it owes no further obligation to Lincoln, and (3) that it is entitled to immediate possession of the disputed property.¹ Northstar presents these questions as virtually ministerial, asserting that the arbitrator will conclude that the treaty is terminated and that Northstar is entitled to the assets.

4. Northstar’s request is improper for two fundamental reasons. First, Northstar’s assertions are substantively incorrect for a variety of reasons. For example, as discussed in the SDR’s brief, Northstar’s alleged termination was not effective. Those arguments will not be restated herein. Moreover, if the Reinsurance Treaty has been terminated, Northstar still owes

¹ In its Reply Brief in Support of Motion to Lift Stay (“Reply”), responding to the SDR, Northstar reiterates that “any dispute concerning the termination of the Agreement should be resolved by arbitration,” but argues in the alternative that “the Court should conduct an evidentiary hearing on whether the Agreement [sic] is property of the estate.” Reply at ¶ 4.

Lincoln at least three kinds of obligations: (1) the treaty does not allow Northstar to terminate with regard to paid-up policies, and a substantial number of the reinsured policies (approximately \$62 million worth) were single-pay policies on which Northstar still owes reinsurance obligations; (2) the treaty requires Terminal Accounting, under which Northstar owes Lincoln approximately \$26 million, and (3) Northstar must provide sufficient benefits to avoid a forfeiture. Northstar's performance of both obligations is secured by the pledged assets. Lincoln paid all the premiums due on many of the policies, and to deprive its estate of all the benefits of the reinsurance treaty, as Northstar seeks to do, would be an impermissible forfeiture.

5. Second, Northstar's request to lift the stay to allow arbitration to proceed is procedurally incorrect. Under Texas law, this Court has "exclusive jurisdiction" over all matters relating to Lincoln's receivership, and there is no basis to surrender that jurisdiction to an arbitrator. How much, if any, of the \$38 million Northstar is entitled to take from Lincoln's estate is a question subject to the exclusive jurisdiction of the Court, and the arbitration clause is no longer enforceable.

6. The Court should deny Northstar's Motion to Lift Stay. Northstar's proposal to put the issues before an arbitrator would improperly and unfairly deprive Lincoln's estate and Lincoln's other creditors of the protections afforded by this Court. Northstar's proper remedy is to pursue its claims in this Court, under an appropriate timetable and procedures set by the Court to resolve all of the issues surrounding its claim.

I. Northstar is Not Entitled to the Property.

7. The substantive issue raised by Northstar's Motion is whether Lincoln's estate has an interest in the disputed property. Northstar admits that "Lincoln is permitted to draw upon" the assets Northstar pledged as security "for payment of amounts due Lincoln under the [reinsurance] Agreement." Motion at ¶ 3.

8. Northstar argues that it terminated the reinsurance treaty, and that once it did so, there were no further “amounts due Lincoln under the Agreement.” It concludes that since Lincoln’s estate assertedly has no interest in the property, the property should be released to Northstar. Northstar’s picture is simple but false. In fact, there are “amounts due Lincoln under the [reinsurance] Agreement,” for three reasons.

9. First, under the treaty’s provisions, Northstar is not entitled to terminate its reinsurance agreement as to any paid-up policies. A substantial portion of the reinsured policies were single-pay policies, on which Northstar owes continuing obligations secured by the disputed property.

10. Second, the treaty, as amended by the parties, provided that Lincoln would be entitled to “Terminal Accounting” in connection with any attempted termination if Lincoln was, at the time, “insolvent,” as defined in the treaty. Northstar does not address these terms of the treaty or whether they apply, but they do apply. The disputed property cannot be released to Northstar because it still secures the performance of the Terminal Accounting Northstar owes the Lincoln estate.

11. Third, Northstar seeks an improper and impermissible forfeiture by denying Lincoln any benefit in return for all of the consideration paid.

12. Northstar includes the treaty and its amendments as Ex. A to the Motion. However, Northstar chooses neither to call the Court’s attention to the relevant portions nor explain what changes the amendments made. To understand why Northstar still owes Lincoln contractual obligations secured by the disputed property, it is important to look at the applicable treaty provisions, as amended.

A. The Termination and Terminal Accounting Provisions.

13. The treaty between Lincoln (“Ceding Company”) and Northstar (“Reinsurer”)

was executed in April 2006, effective January 1, 2006. It was amended three times, by Amendment One (executed July 2006, effective January 1, 2006), Amendment Two (executed August 2006, effective January 1, 2006), and Amendment Three (executed September-October 2007, effective September 1, 2007). *See* Motion, Ex. A.

14. Northstar argues that when Lincoln failed to pay the amount due for the January 31, 2008 accounting period within 60 days thereafter, Northstar further argues it was entitled to (and did) terminate on 30 days notice. As originally entered, the treaty provided that Northstar could terminate the treaty under such circumstances, but the third amendment to the treaty added two pertinent restrictions: If Lincoln was then “insolvent” (as defined in the amendment), (1) Northstar could terminate only “policies then in premium paying status,” and (2) to the extent Northstar was allowed to terminate, Terminal Accounting provisions would apply.

15. The relevant parts of Article VII (“Duration and Recapture”) and Article VIII (“Terminal Accounting”) provide as follows (with provisions added by Amendment Three shown in italics):

ARTICLE VII

DURATION AND RECAPTURE

....

3. Termination for Nonpayment of Amounts Due by the Ceding Company. If the Ceding Company fails to pay the Reinsurance Premiums or any other amounts due to the Reinsurer pursuant to this Agreement, within sixty (60) days after the end of any Accounting Period, the Reinsurer may terminate this Agreement subject to thirty (30) days prior written notice to the Ceding Company.

....

5. Termination for Nonpayment of Amounts Due by the Reinsurer. If the Reinsurer fails to pay the Benefit Payments or any other amounts due to the Ceding Company pursuant to this

Agreement, within sixty (60) days after the end of any Accounting Period, the Ceding Company may terminate this Agreement subject to thirty (30) days prior written notice to the Reinsurer.

Termination under this Paragraph 5 will be subject to the payment of a Terminal Accounting and Settlement, as described in Article VIII, Paragraph 3.²

7.³ Termination for Nonpayment of Amounts Due by the Ceding Company While the Ceding Company is Insolvent. *If the Ceding Company fails to pay the Reinsurance Premiums or any other amounts due to the Reinsurer pursuant to this Agreement, within sixty (60) days after the end of any Accounting Period while the Ceding Company is insolvent, the Reinsurer may terminate all policies then in premium paying status, subject to thirty (30) days prior written notice to the Ceding Company. Insolvent, for purposes of this paragraph, is defined to be: (a) the filing of a voluntary or involuntary petition for liquidation by or on behalf of the Ceding Company, (b) any assignment for the benefit of creditors, or (c) the appointment of a conservator, liquidator, receiver, or statutory successor to conserve or administer the Ceding Company's properties or assets.*

Termination under this Paragraph 7 will be subject to the payment of a Terminal Accounting and Settlement, as described in Article VIII, Paragraph 3.

ARTICLE VIII

TERMINAL ACCOUNTING AND SETTLEMENT

1. Terminal Accounting. In the event that . . . this Agreement is terminated in accordance with Article VII, Paragraph 5, or certain policies are terminated in accordance with Article VII, Paragraph 7, a Terminal Accounting and Settlement will take place for all policies that are . . . terminated.

2. Date. The terminal accounting date will be the earliest of . . . (2) the effective date of termination pursuant to any notice of

² Before it was amended, the treaty provided that Terminal Accounting applied only to termination after the Reinsurer's nonpayment (¶ 5), not to termination after the Ceding Company's nonpayment (¶ 3).

³ There is no ¶ 6.

termination given under this Agreement, or (3) any other date mutually agreed to in writing.

16. Northstar claims it terminated the treaty on April 2, 2008 (which the SDR's response to the Motion disputes). But if Lincoln was then "insolvent," as defined in the treaty, then Northstar could terminate only "policies then in premium paying status," and only subject to its payment of Terminal Accounting for those policies. Lincoln was then "insolvent" under the treaty's definition, and as a result (1) Northstar could not terminate paid-up policies, and (2) as to those policies that could be terminated, terminal accounting applies.

17. For both reasons, Northstar still owes the Lincoln estate obligations, and the estate has an interest in the letter of credit and trust funds that Northstar pledged as security for its performance.

B. The Property Secures Northstar's Performance for Non-Terminated Policies.

18. Under the definitions provided in the treaty, Lincoln clearly was "insolvent" when Northstar attempted to terminate on April 2, 2008.

19. Art. VII, ¶ 7 of the treaty defines "insolvency" as including "the appointment of a conservator, liquidator, receiver, or statutory successor to conserve or administer [its] properties or assets." On October 24, 2007, the Texas Commissioner of Insurance had issued a Confidential Order Creating State of Supervision and Appointing Supervisor (the "Confidential Order") (Ex. A). The Confidential Order placed Lincoln under the supervision of the Commissioner in order "to conserve or rehabilitate [Lincoln] and to protect [Lincoln's] assets pending a determination of whether [Lincoln] can successfully be rehabilitated." Ex. A at 1-2. This order precisely meets the definition of "insolvency" that Northstar had agreed to in Amendment Three to its reinsurance treaty.

20. Under the terms of the amended treaty, since Lincoln was "insolvent," Northstar's

right to terminate was limited to “policies then in premium paying status.” Art. VII, ¶ 7. But many of the policies that Northstar reinsured — approximately \$62 million worth — were single-pay policies, not policies in premium paying status.

21. Northstar could not terminate its obligations regarding the single-pay policies. It owes the Lincoln estate continued performance of those obligations, and its performance is secured by the disputed property, as required by Texas law.

C. The Property Secures Northstar’s Performance for Terminal Accounting.

22. The second reason why the Lincoln estate still has an interest in the disputed property, even if Northstar exercised its termination rights, is that the assets secure Northstar’s terminal accounting obligation.

23. Article VIII of the treaty, as amended by Amendment Three, provides a formula to calculate a Terminal Accounting amount, which may run either from the Ceding Company to the Reinsurer or from the Reinsurer to the Ceding Company.

24. The formula is as follows (with provisions added by Amendment Three shown in italics):

3. Settlement. The Terminal Accounting and Settlement will consist of:

(a) the monthly settlement as provided in Article VI, Paragraph 3, computed as of the terminal accounting date;⁴

⁴ Article VI, Paragraph 3 provides:

Monthly Settlements

A. As described in Paragraph 4 below, with respect to each Accounting Period, the Ceding Company will pay the Reinsurer the Reinsurance Premiums determined in accordance with Article II.

B. Simultaneously, the Reinsurer will pay the Ceding Company the sum of

(continued . . .)

(b) payment by the Reinsurer to the Ceding Company of a Terminal Reserve Adjustment equal to . . . :

....

(ii) the Statutory Reserve on the insurance policies reinsured hereunder as of the terminal accounting date; and

(c) payment by the Ceding Company to the Reinsurer of any Terminal Accounting Adjustment, determined in accordance with Paragraph 4 below, as of the terminal accounting date.

....

If the calculation of the Terminal Accounting and Settlement produces an amount owing to the Ceding Company, such amount will be paid by the Reinsurer to the Ceding Company. If the calculation of the Terminal Accounting and Settlement produces an amount owing to the Reinsurer, such amount will be paid by the Ceding Company to the Reinsurer.

4. Terminal Accounting Adjustment. . . .

....

In the event that certain premium paying policies are terminated in accordance with Article VII, Paragraph 7, the Ceding Company will pay the Reinsurer a Terminal Accounting Adjustment for the terminated policies equal to the sum of the quantity of (i) times (ii) with respect to each insurance policy terminated hereunder, where:

(i) equals the Commission Allowance that was paid in the current or prior Accounting Periods for such policies pursuant to Article III; and

(ii) equals the Premium Paying Adjustment Factor, as described below.

(i) the Commission and Expense Allowance determined in accordance with Article III, Paragraphs 1, 2, and 3, adjusted for the Commission Chargeback in accordance with Article III, Paragraphs 4 and 5, plus

(ii) the Benefit Payments, as described in Article IV.

The Premium Paying Adjustment Factor applicable to a particular policy that is subject to termination will be determined from the following series of tables [followed by 5 tables of Premium Paying Adjustment Factors, for 12 Month, 18 Month, 3 Year, 5 Year, and 10 Year Pay Plans].

25. Under this formula, a substantial payment (approximately \$26 million) is due to the Lincoln estate from Northstar. Contrary to Northstar's naked assertions that it owes nothing to the estate and that its pledge of assets has no further function, the disputed property secures a substantial obligation to the estate.

26. In these circumstances, releasing the assets to Northstar would deprive the estate of substantial rights and grant Northstar an unjustified preference over other creditors. Lifting the stay would interfere with the orderly administration of the estate.

D. Northstar Seeks a Forfeiture Not Allowed in Equity.

27. Northstar seeks to deprive the estate of all of the benefits of the Reinsurance Agreement, despite the payment of all premiums due on many of the policies. Even if the forfeiture occurred as argued by Northstar, this would be a forfeiture not permitted by law. *E.g. Baily v. Sovereign Camp W.O.W.*, 288 S.W. 115 (Tex. 1926). Northstar certainly may not simply cancel its obligations on fully paid policies.

II. The Proper Forum is this Court, Not Arbitration.

28. The procedural issue presented by the current Motion is whether this Court or an arbitration panel should decide whether Northstar terminated the treaty, whether it has any residual obligations to Lincoln's estate, and whether or to what extent it is entitled to the disputed property. These are issues for the Court, not an arbitrator.

A. The Court Has Exclusive Jurisdiction.

29. This Court has exclusive jurisdiction over this matter, and there is no reason for it to cede its jurisdiction to an arbitration panel. The Texas Insurance Code expressly provides that

“[t]he receivership court, as of the commencement of a delinquency proceeding . . . , has **exclusive jurisdiction** of all property of the insurer” Tex. Ins. Code § 443.005(c). (emphasis added) *See In re Forever Enterprises, Inc.*, 2008 WL 4587770, at *1 (Tex. App.—Beaumont, Oct. 16, 2008) (“The receivership court retains exclusive jurisdiction over all property of the receivership estate.”).

30. “Delinquency proceeding” means “any proceeding instituted against an insurer for the purpose of liquidating, rehabilitating, or conserving the insurer, and any proceeding under Section 443.051.” Tex. Ins. Code § 443.004(a)(4). On October 24, 2007, Lincoln was placed under supervision by the Confidential Order, entered by the Texas Commissioner of Insurance in order “to conserve or rehabilitate [Lincoln] and to protect [its] assets.” *See* Ex. A at 1. As permitted by Tex. Ins. Code § 441.104, the Confidential Order barred Lincoln from disposing of or transferring any assets or property. Ex. A at 2.

31. On May 14, 2008, this Court entered an order placing Lincoln in rehabilitation pursuant to Tex. Ins. Code § 443.057, vesting title to all of Lincoln’s property (as defined in Tex. Ins. Code § 443.004(a)(20)) in the Commissioner of Insurance as Rehabilitator, and permanently enjoining all claimants from asserting any claims against Lincoln, except as permitted by Section 443. *See* Ex. B. After determining that Lincoln could not be rehabilitated, on September 22, 2008, the Court entered an order appointing a liquidator and approving a plan of liquidation. *See* Ex. C. This order gave the Liquidator title to all of Lincoln’s property, specifically including “funds held in . . . trust accounts,” and permanently enjoined certain parties, specifically including creditors and reinsurers, from “[m]aking any claim” or “prosecuting any . . . arbitration” against Lincoln’s estate or its property “except as permitted by Tex. Ins. Code Chapter 443.” *Id.* at 3, 7, 9.

32. Northstar’s Motion and Reply request that the Court lift the stay to allow an arbitration panel to determine that the disputed property held by the Lincoln estate is not really property of the estate, and that the property should be released to Northstar. Motion at ¶ 10; Reply at ¶ 1.⁵ But under Section 443.005(c), which Northstar does not address, this Court has “*exclusive jurisdiction*” to determine what is the property of Lincoln’s estate.

33. Northstar admits that “whether or not the collateral that Northstar posted under [its reinsurance treaty] constitutes property of the [Lincoln] estate” is a “threshold question.” Reply at ¶ 9; *see also* Reply at ¶¶ 17, 19, 20. Despite this admission, Northstar argues that the threshold question should be decided by an arbitration panel rather than by this Court. In doing so, Northstar unilaterally assumes the collateral is not property of the estate and, therefore, may be disposed of by arbitrators. *See, e.g.*, Motion at ¶ 11; Reply at ¶¶ 1, 12-13. Such an exercise in circular “logic” cannot serve as a basis for this Court to surrender its exclusive jurisdiction over an important threshold question.

34. Northstar offers no principled reason why an arbitrator, rather than the Court, should decide the threshold question. In fact, it is established that exclusive-jurisdiction statutes like Section 443.005(c) “*give the state court the power to decide all issues relating to*

⁵ Northstar inconsistently argues in its Reply that there is no automatic stay to be lifted at all, and that it has the right to have the Court decide these issues immediately. Reply at ¶ 18. It cites Section 443.008(e)(7), which provides,

Notwithstanding Subsection (c) [the automatic stay], the commencement of a delinquency proceeding under this chapter does not operate as a stay of . . . (7) enforcement of rights against single beneficiary trusts established pursuant to and in compliance with laws relating to credit for reinsurance

But Northstar does not seek to “enforce rights against” its trust. The only party who could enforce rights against the trust would be its beneficiary, Lincoln. Northstar simply seeks to dissolve the trust, and that claim is stayed.

disposition of an insolvent insurance company's assets, including whether any given property is part of the insolvent estate in the first place,” and override contractual arbitration agreements. *Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585, 593 (5th Cir. 1998) (emphasis added) (holding that reinsurer’s claim against the estate must be decided by receiver). *See also, e.g., Davister Corp. v. United Republic Life Insurance Co.*, 152 F.3d 1277, 1280-81 (10th Cir. 1998) (same). Indeed, Northstar itself argues that it would be proper for the Court to decide the threshold issue, belying the supposed necessity of sending the issue to an arbitral forum. Reply at ¶ 18.

35. Determination of what constitutes the property of an insolvent estate is at the heart of a receivership court’s duties. There is no basis to cede that core jurisdiction to an arbitration panel.

B. There is No Statutory Basis to Lift the Stay.

1. Section 443.008(h) Does Not Apply.

36. Northstar argues that the Court has the power to lift the stay and allow the arbitration to proceed, pursuant to Section 443.008(h). Motion at ¶ 10. But Northstar seriously misstates this provision, and virtually ignores the following provision, Section 443.008(i), which is integral to its meaning.

37. Section 443.008(h) provides:

(h) On request of a party in interest and after notice and any hearing the receivership court determines is appropriate, the receivership court may grant relief from the stay of Subsection (c) or (d), such as by terminating, annulling, modifying, or conditioning the stay:

(1) for cause as described by Subsection (i); or

(2) with respect to a stay of an act against property under Subsection (c) if:

(A) the insurer does not have equity in the property; and

(B) the property is not necessary to an effective rehabilitation plan.

Northstar asserts that both subsection (h)(1) and subsection (h)(2) apply (Motion at ¶ 10), but plainly neither does.

a. Northstar Does Not Satisfy Subsection (h)(1).

38. Subsection (h)(1) does not apply. Northstar claims that there is “cause” to lift the stay (Motion at ¶¶ 10, 14-15), but it ignores the fact that, by its express terms, subsection (h)(1) applies only when there is “cause as described by Subsection (i).” Subsection (i) provides:

(i) For purposes of Subsection (h), “cause” includes the receiver canceling a policy, surety bond, or surety undertaking if the creditor is entitled, by contract or by law, to require the insured or the principal to have a policy, surety bond, or surety undertaking and the insured or the principal fails to obtain a replacement policy, surety bond, or surety undertaking not later than the later of:

(1) the 30th day after the date the receiver cancels the policy, surety bond, or surety undertaking; or

(2) the time permitted by contract or law.

Subsection (i)’s definition of “cause” bears no relationship to the present circumstances. Northstar argues in its Reply that subsection (i), by using the term “includes,” is only “a non-exclusive list” of examples of “cause.” Reply at ¶ 14. This argument overlooks the fact that subsection (h)(1) limits “cause” to what is listed in subsection (i) — if subsection (h)(1) was intended to mean “cause” expansively, it would not have used the limiting language, “cause *as described by Subsection (i).*”

b. Northstar Does Not Satisfy Subsection (h)(2).

39. Nor does subsection (h)(2) apply. It applies only when (A) the estate has no equity in the property, and (B) the property is unnecessary to a rehabilitation plan. Here,

Northstar asserts simply that an arbitrator should rule that the property is Northstar's and does not belong to the Lincoln estate. Motion at ¶¶ 10-11. This assertion is wrong, both procedurally and substantively.

40. Procedurally, Northstar again puts the cart before the horse: rather than having the Court decide the threshold issue (does the insurer have equity in the property?) necessary to consider lifting the stay, Northstar proposes that the Court lift the stay in order to have the arbitrator decide the threshold issue.

41. Substantively, Northstar assumes that if the reinsurance treaty has been terminated, then Lincoln's estate has no equity in the property and the property is unnecessary to a rehabilitation plan. But these assumptions are wrong.

42. As discussed in Section I above, even if Northstar exercised its full termination rights, its reinsurance obligations for paid-up policies were not terminable, and it owes the Lincoln estate "terminal accounting" for the policies that were terminable. Both obligations remain secured by the disputed property. The estate therefore does have equity in the property, and Northstar fails to satisfy subsection (h)(2)(A).

43. Nor does Northstar satisfy subsection (h)(2)(B). Northstar argues that the property is not "necessary to an effective rehabilitation plan," since Lincoln is in liquidation rather than rehabilitation. Motion at ¶ 11. But if property is necessary to a rehabilitation plan, it is at least equally important in liquidation. By Northstar's argument, an estate in liquidation (and its creditors) would have fewer rights than an estate in rehabilitation. That distinction would be irrational. Especially when an estate is incurably insolvent, every asset is "necessary."

44. But even if Northstar is correct that the subsection (h)(2)(B) criterion is inapplicable in a liquidation proceeding, Northstar still does not satisfy the remaining subsection

(h)(2)(A) criterion: it has not demonstrated that the estate lacks equity in the disputed property.

2. Section 443.005(e) Does Not Apply.

45. Northstar also argues that it has a “statutory right to have this issue determined by arbitration” under Tex. Ins. Code § 443.005(e). Motion at ¶ 13. Section 443.005(e) provides:

(e) If, on motion of any party, the receivership court finds that any action, as a matter of substantial justice, should be tried in a forum outside this state, the receivership court may enter an appropriate order to stay further proceedings on the action in this state. Except as to claims against the estate, nothing in this chapter deprives a party of any contractual right to pursue arbitration. A party in arbitration may bring a claim or counterclaim against the estate, but the claim or counterclaim is subject to Section 443.209.

46. Northstar argues that Section 443.005(e) authorizes the Court to allow arbitration here, but the statute’s plain terms provide otherwise. Northstar makes a claim against the estate — to obtain the assets it pledged as security — and the statute provides that the Court may allow a party to pursue arbitration “[e]xcept as to claims against the estate.” That means that when there *is* a claim against the estate (as here), the party does *not* have the right to seek arbitration.

47. Northstar argues that its request for release of its pledged assets is not a “claim against the estate.” Reply at ¶ 20. Once again, it assumes that it “bears no further liability under the [treaty]” and therefore that “the amounts that Northstar previously posted as security may be released to Northstar.” *Id.* But whether the estate has an interest in the property is admittedly “the threshold issue that Northstar seeks to resolve.” *Id.* If the insurer’s estate does have a potential interest in the property (as it does), Northstar’s request that it be given the property, in preference to all other claimants, is certainly “a claim against the estate.” *Cf.* Tex. Ins. Code § 443.004(a)(3) (“‘Creditor’ or ‘claimant’ means a person having any claim against an insurer, whether the claim is matured or not, liquidated or unliquidated, secured or unsecured, absolute, fixed, or contingent.”). As demonstrated above, Northstar’s circular “logic” utterly fails to

disguise the fact that it is asserting a claim against the estate – a claim which must be brought in these receivership proceedings.

C. Bankruptcy Analogies Are Not a Basis to Lift the Stay.

48. Northstar also urges the Court to follow analogies from federal bankruptcy case law, apart from the Texas Insurance Code. Federal bankruptcy authorities are not controlling, but even if they were, Northstar’s cited bankruptcy cases are inapposite. For example, Northstar’s citations, upon closer examination, do not support its argument that bankruptcy courts lift the stay to allow other proceedings to determine whether certain assets are part of the bankruptcy estate (Motion at ¶ 13).⁶ Moreover, many of these propositions, even if true, would not apply here: for example, Lincoln was placed in conservatorship before Northstar sought to terminate, and Lincoln’s estate would be prejudiced by removal of assets in which it has an interest.

49. The more apt bankruptcy analogy is the principle that a bankruptcy court has exclusive jurisdiction to determine what is the property of the bankrupt estate, just as this Court has exclusive jurisdiction to determine what is the property of the insolvent insurer’s estate. In *Sigmar v. Anderson*, 212 S.W.3d 789, 794 (Tex. App.–Austin 2006), the court noted that “[a]fter a debtor files a bankruptcy proceeding, the determination of what constitutes property of the

⁶ The cases Northstar cites for this proposition all involved narrow deferrals to state courts with specialized expertise on particular issues of state law. *See In re White*, 851 F.2d 170, 172-74 (6th Cir. 1988) (divorce court with “exclusive domestic relations authority”); *In re Paro*, 362 B.R. 419, 423-27 (Bankr. E.D. Ark. 2007) (quiet title action in which debtor, who had no prior notice of foreclosure, would have opportunity to challenge foreclosure sale); *In re Stockwell*, 262 B.R. 275, 280-83 (Bankr. D. Vt. 2001) (in “exceptional circumstances” when personal bankruptcy and home foreclosure proceedings had each concluded without notice of the other, court crafted “narrow” remedy of validating foreclosure nunc pro tunc, subject to restarting debtor’s redemption rights). Here, however, *this Court* is the specialized state court with expertise on the issues of state insurance company receivership law.

estate is a core proceeding over which the bankruptcy court has exclusive jurisdiction.” Similarly, in *In re Reliance Group Holdings, Inc.*, 273 B.R. 374, 395 (Bankr. E.D. Pa. 2002), the court declared: “[A] determination of what is property of the estate and concurrently, of what is available for distribution to creditors of that estate, is precisely the type of proceeding over which the bankruptcy court has exclusive jurisdiction.” See also, e.g., *All American Laundry Serv. v. Ascher*, 128 B.R. 639, 643 (Bankr. N.D. Ill. 1991) (“When a debtor and its creditors assert interests in property asserted to be part of the estate, the bankruptcy court has core jurisdiction to adjudicate all of those interests.”); *Sattin v. Brooks*, 217 B.R. 98, 100 (Bankr. D. Ct. 1998) (“This court has exclusive jurisdiction over property of the bankruptcy estate This court also has the authority to make a determination of what constitutes property of the estate.”).

50. Since the Court has exclusive jurisdiction, and no statutory or other basis to lift the stay applies, the Court must deny Northstar’s request that it lift the stay and surrender jurisdiction to an arbitrator.

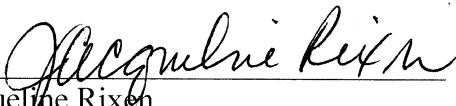
Conclusion

Northstar asks the Court to lift the stay to allow an arbitration panel to determine that, as Northstar asserts, the property it pledged to secure performance of its reinsurance obligations to Lincoln is not property of the Lincoln estate. Northstar’s request is doubly incorrect. As a matter of procedure, this Court has exclusive jurisdiction to determine whether the assets are property of the estate, and there is no basis for the Court to surrender its exclusive jurisdiction to an arbitrator. As a substantive matter, Northstar’s assertion that the estate has no interest in the disputed property is incorrect, because under the terms of the reinsurance treaty Northstar owes the estate reinsurance obligations for paid-up policies and Terminal Accounting, secured by the property. Northstar’s motion therefore should be denied.

Dated: December 1, 2008

Respectfully submitted,

Law Office of Jacqueline Rixen
8500 North Mopac, Suite 605
Austin, Texas 78759
(512) 474-1577
(512) 474-1026 (fax)

By: 
Jacqueline Rixen
State Bar No. 16962550

Counsel for the National Organization of Life and
Health Insurance Guaranty Associations

CERTIFICATE OF SERVICE

I certify that a true and correct copy of *NOLHGA'S Objection to Northstar's Motion to Lift Stay* was served upon the parties listed below on December 1, 2008, via email or first class mail, as indicated.


Jacqueline Rixen

CERTIFICATE OF SERVICE

Via Email: Leanne.Layne@tdi.state.tx.us
Leanne Layne
Texas Department of Insurance
Liquidation Oversight - 305-1D
PO Box 149104
Austin, TX 78714-9104

Via Email: Rachel.Giani@tdi.state.tx.us
Rachel Giani
Texas Department of Insurance
Financial Counsel/Legal Services - 821
PO Box 149104
Austin, Texas 78714-9104

Via Email: James.Kennedy@tdi.state.tx.us
James Kennedy
Texas Department of Insurance
872- Legal Services\Liquidation Allocated
110-1A
PO Box 149104
Austin, Texas 78714-9104

Via Email: Kathy.Gartner@tdi.state.tx.us
Kathy Gartner
Texas Department of Insurance
582 - Rehabilitation & Liquidation Oversight
305-1C
PO Box 149104
Austin, Texas 78714-9104

Via Email: Jean.Sustaita@tdi.state.tx.us
Jean Sustaita
Texas Department of Insurance
582 Liquidation Oversight
PO Box 149104
Austin, Texas 78714-9104

Via Email: cfuller@fullerlaw.org
Christopher Fuller
4612 Ridge Oak Drive
Austin, TX 78731
Counsel to SDR

Via Email: foloughlin@rothgerber.com
Frank O'Loughlin
Rothgerber, Johnson & Lyons LLP
One Tabor Center, Suite 3000
1200 Seventeenth Street
Denver, CO 80202
Counsel to NOLHGA Task Force

Via Email: karen.pettigrew@oag.state.tx.us
Karen Pettigrew
Ass't. Attorney General
PO Box 12548
Austin, TX 78711-2548

Via Email: hdeleon@dbilaw.com
Hector De Leon
De Leon, Boggins & Icenogle
221 W. 6th Street, Suite 1050
Austin, Texas 78701
Counsel for National Heritage Enterprises, Inc.
and Forever Enterprises, Inc.

Via Email: mkeller@winstead.com
Mary Keller
Winstead PC 401 Congress Avenue, Suite
2100
Austin, TX 78701
Counsel for Northstar Reinsurance

Via Email: SNewberg@banking.state.tx.us
Stephanie Newberg
Texas Department of Banking

Via Email: jglover@rothgerber.com
Joel A. Glover
Rothgerber, Johnson & Lyons LLP
One Tabor Center, Suite 3000
1200 Seventeenth Street
Denver, CO 80202
Counsel to NOLHGA Task Force

Via Email: coliver@rothgerber.com
Cindy C. Oliver
Rothgerber, Johnson & Lyons LLP
One Tabor Center, Suite 3000
1200 Seventeenth Street
Denver, CO 80202
Counsel to NOLHGA Task Force

Via Email: jennifer.jackson@oag.state.tx.us
Jennifer Jackson
Ass't. Attorney General
PO Box 12548
Austin, TX 78711-2548

Via Email:
Douglas.schmidt@huschblackwell.com
Douglas Schmidt
Husch Blackwell & Sanders
4801 Main Street #1000
Kansas City, MO 64112

Via Email: hskelton@skeltonwoody.com
J. Hampton Skelton
Skelton & Woody
PO Box 1609
Austin, TX 78767-1609

Via Email: ekaye@skeltonwoody.com
Edward F. Kaye
Skelton & Woody
PO Box 1609
Austin, TX 78767-1609

Via Email: eric.haab@lovells.com
Eric Haab
Lovells, LLP
330 N. Wabash Avenue
Suite 1900
Chicago, IL 60611
Counsel for Hannover Life Re

Via Email: kyelkin@gardere.com
Kimberly Yelkin
Gardere Wynne Sewell
600 Congress Ave. Suite 3000
Austin, TX 78701-2978

Via Email: sharon.euler@ago.mo.gov
Sharon K. Euler
Assistant Attorney General
Fletcher Daniels State Office Bldg.
615 E 13th Street Suite 401
Kansas City MO 64112

Via Email: phobbs@mcginnislaw.com
Penny Hobbs
McGinnis, Lochridge & Kilgore
600 Congress Avenue #2100
Austin, TX 78701
Counsel for Henneke Funeral Home

Via Email: mponder@cbmplaw.com
J. Michael Ponder
Cook, Barkett, Maguire & Ponder, L.C.
715 N. Clark
P.O. Box 1180
Cape Girardeau, MO 63702-1180
Interim Class Counsel for James & Gahr

Via Email: Marybeth.wilkinson@lovells.com
MaryBeth Wilkinson
Lovells, LLP 330 N. Wabash Avenue
Suite 1900
Chicago, IL 60611
Counsel for Hannover Life Re

Via Email: kay.wilde@lovells.com
Kay Wilde
Lovells, LLP
330 N. Wabash Avenue
Suite 1900
Chicago, IL 60611
Counsel for Hannover Life Re

Via Email: jwerner@rmqlawfirm.com
John Werner
Reaud, Morgan & Quinn LLP
801 Laurel Street
PO Box 26005
Beaumont, TX 77720-6005
Counsel for Broussard's Mortuary, Inc.

Via First Class Mail
Internal Revenue Service
Special Procedures Branch
P.O. Box 250
300 East 8th Street, Suite 352
Mail Stop 5022AUS
Austin, TX 78701

Via Email: lyork@mcginnislaw.com
Larry York
McGinnis, Lochridge & Kilgore
600 Congress Avenue #2100
Austin, TX 78701
Counsel for Henneke Funeral Home

Via Email: tbutler@wdkllaw.com
Thomas J. Butler
Whatley Drake & Kallas, LLC
2001 Park Place North, Suite 1000
Birmingham, AL 35203
Interim Class Counsel for James & Gahr

Via Email: bcculley@mcculleymccluer.com
R. Bryant McCulley
McCulley McCluer, PLLC
One Independent Drive, Suite 3201
Jacksonville, FL 32202
Interim Class Counsel for James & Gahr

Via Email: mhassan@butlerrubin.com
Michael R. Hassan
Butler Rubin Saltarelli & Boyd, LLP
70 West Madison Street, 18th Floor
Chicago, Illinois 60602
Counsel for Northstar Reinsurance

Via Email: charles@elpolaw.com
Charles E. English
English Lucas Priest & Owsley, LLP
1101 College Street
P.O. Box 770
Bowling Green, Kentucky 42102-0770
Counsel for Hardy & Son Funeral Homes

Via Email: smccluer@mcculleymccluer.com
Stuart H. McCluer
McCulley McCluer, PLLC
1109 Van Buren Avenue
Oxford, MS 38655
Interim Class Counsel for James & Gahr

Via Email: jwhatley@wdklaw.com
Joe R. Whatley
Whatley Drake & Kallas, LLC
1540 Broadway, 37th Floor
New York, NY 10036
Interim Class Counsel for James & Gahr