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Travis District

CAUSE NO. D-1-GV-08-000945

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

SPECIAL DEPUTY RECEIVER AND NOLHGA'S SPECIAL EXCEPTIONS AND MOTION TO STRIKE AND DISMISS, IN WHOLE OR IN PART, THE MOTION TO LIFT STAY BY NORTHSTAR REINSURANCE IRELAND LIMITED AND ITS REPLY BRIEF IN SUPPORT OF MOTION TO LIFT STAY

TO THE HONORABLE JUDGE OF THE COURT:

Donna J. Garrett, Special Deputy Receiver of Memorial Service Life Insurance Company, Lincoln Memorial Life Insurance Company and National Prearranged Services, Inc. (the "SDR" and "Lincoln", "Memorial", and "NPS" respectively) and the National Organization of Life and Health Insurance Guaranty Associations on behalf of all affected state insurance guaranty associations, including the Texas Life, Accident, Health, and Hospital Service Insurance Guaranty Association ("NOLHGA"), files these Special Exceptions and Motion to Strike and Dismiss, in whole or in part, the pleadings and documents filed by Northstar Reinsurance Ireland Limited ("Northstar") in connection with its *Motion to Lift Stay.*

I. INTRODUCTION AND SUMMARY

1.1 The SDR and NOLHGA file these special exceptions pursuant to TRCP 85 and 91 and TEX. INS. CODE § 443.008 (h) and moves to strike and dismiss, in whole or in part, the motion of Northstar Reinsurance Ireland Limited ("Northstar") and its Reply Brief, as more fully discussed below.

1.2 In summary, the SDR and NOLHGA object to and does not agree to try by consent or a trial amendment any pleading or "evidence" filed by Northstar that seeks to expand the scope of its motion or the scope of the proceeding before the Court. The SDR and NOLHGA further specially except to Northstar's motion to lift the stay barring its further prosecution of an effort to strip the receivership estate of over $38,000,000 in assets securing over $40 million in Northstar's liability. By statute, Northstar must (and cannot) prove its case by "clear and convincing evidence." The SDR and NOLHGA specially except to movant's argument that the burden of proof is less than that required by TEX. INS. CODE § 443.008 (h). The SDR and NOLHGA further specially except to Northstar's arguments that the SDR has any burden of proof regarding the estate's equity in the Northstar reinsurance agreement, as amended, and the letter of credit and the trust account securing Northstar's obligations to reinsure Lincoln.

1.3 The SDR and NOLHGA expressly reserve the right to file further special exceptions and do not, by filing these special exceptions, waive any additional objections to Northstar's pleadings or evidence.

II. SPECIAL EXCEPTIONS

2.1 The SDR and NOLHGA specially except to the following specific provisions of Northstar's pleadings:

A. *Northstar Motion, p.2,* ¶2 contending that it has a contractual right to arbitrate notwithstanding the automatic stay and the provisions of the Liquidation Order.

B. *Northstar Motion, p.4,* ¶7 contending that Northstar does not seek damages against Lincoln in the arbitration; Northstar's claims remain pending in the arbitration but Northstar does not waive such claims in its motion.

C. *Northstar Motion, p.5,* ¶10 contending that Northstar seeks relief under TEX. INS. CODE § 443.008 (h)(1) for "cause." Northstar submits no pleading or evidence to

establish "cause" as defined in the statute. The SDR should not be required to expend the estate's limited resources on a contention that even Northstar admits is not relevant.

D. *Northstar Motion, p.5-6,* ¶12 and elsewhere contending that case law under the United States Bankruptcy Code governs this proceeding. The lift stay provisions of the *Texas Insurer Receivership Act* differ significantly from the lift stay provisions of the United States Bankruptcy Code. Case law under that statute is particularly not applicable given the changes to the statutory language over time by the United States Congress.

E. *Northstar Motion, p.7-8,* ¶14-18 contending that alleged evidence and argument of "cause" under TEX. INS. CODE § 443.008 (h)(1) should be considered outside the express terms of the statute enacted by the Texas Legislature.

F. *Northstar Motion, p.8,* ¶19 contending, without evidence on an issue that Northstar has the burden of proof to establish by "clear and convincing evidence," that litigating before Northstar's arbitration panel does not impose a burden on the estate. There is no evidence to contradict the SDR's verified statement that litigating before Northstar's arbitration panel will be an immense burden to the estate.

G. *Northstar Motion* in whole contending that it has no obligations under the Reinsurance Agreement, as amended, while it's *Exhibit B*, claims to terminate the contract but further asserts claims under the same contract in arbitration.

H. *Northstar Reply*, p.2-3, ¶3 contending that the Liquidation Order does not affect Northstar's efforts to seize estate assets, that case law under the United States Bankruptcy Code governs this proceeding, and that the Northstar can sue the SDR without filing a proof of claim.

I. *Northstar Motion,* p.8, ¶18, *Northstar Reply*, p.10, ¶19 and *Tweedie Affidavit,* ¶ 10

contending that Northstar's alleged financial condition is relevant. There is nothing in the *Texas Insurer Receivership Act* that provides that a movant's alleged financial condition is admissible on a motion to lift stay.

J. *Northstar Reply*, p.18-19, ¶35 in which Northstar contends that not only federal bankruptcy law governs this proceeding but also that federal procedural law governs a state court's consideration of an affidavit. Northstar provides no authority for this novel statement of law.

III. LEGAL STANDARD GOVERNING THE SPECIAL EXCEPTIONS TO NORTHSTAR'S PLEADINGS

3.1 The Texas Rules of Civil Procedure govern special exceptions, as follows:

> TRCP 91 SPECIAL EXCEPTIONS
> A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to.

3.2 Northstar's motion is governed by the *Texas Insurer Receivership Act*, specifically, TEX. INS. CODE § 443.008 (h), which provides, as follows:

> § 443.008. Injunctions and Orders
>
> .....
>
> (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.
>
> (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.

3.3 The SDR and NOLHGA object to Northstar's demands that the Receivership Court consider matters outside the scope of the express statutory provisions of the *Texas Insurer Receivership Act* governing lift stay motions.

IV. RELIEF SOUGHT BY SDR AND NOLHGA

4.1 The SDR and NOLHGA move the Court to sustain these Special Exceptions, strike Northstar's pleadings, in whole or in part, as described above, and bar Northstar from submitting pleadings or evidence outside the scope of its lift stay motion. The alternative is a free for all by Northstar and other reinsurers desperate to abandon their liability. The threat that the estate can be required to expend millions of dollars of the very limited assets of these estates to defend the arbitrations itself gifts the reinsurers with a significant bargaining chip.

V. NOTICE

5.1 These Special Exceptions have been served on the attorney for Northstar, and the entire service list for this proceeding in the manner shown on the Certificate of Service.

VI. CONCLUSION

6.1 In conclusion, the SDR and NOLHGA urge the Court to sustain these Special Exceptions. Northstar cannot meet the stringent requirements of a motion to lift stay and, instead, seeks to go beyond those standards. The SDR objects to this "end around" and the Court should likewise reject it. The enforcement of the stay and the Permanent Injunction will fulfill the purpose of the protections that the Legislature has established, and enable the SDR to efficiently marshal the assets of the estate for the benefit of all creditors, not simply Northstar and the host of other reinsurers, which seek to deny their liability.

PRAYER

WHEREFORE PREMISES CONSIDERED, Donna J. Garrett, Special Deputy Receiver of Memorial Service Life Insurance Company, Lincoln Memorial Life Insurance Company and National Prearranged Services, Inc. and the National Organization of Life and Health Insurance Guaranty Associations on behalf of all affected state insurance guaranty associations ("NOLHGA") respectfully request this Court to sustain their special exceptions as described above and, after notice and hearing, to deny Northstar's motion, and grant such further relief to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 12, 2008, a true and correct copy of these Special Exceptions was served pursuant to the provisions of the Court's order on electronic service, the *Amended Order of Reference*, the Texas Rules of Civil Procedure and TEX. INS. CODE ANN. SEC. 443.007(d) on the following by electronic mail, except as specifically noted.

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