



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MOTORS LIQUIDATION COMPANY DIP	:	
LENDERS TRUST,	:	No. 381, 2017
	:	
Plaintiff Below,	:	Court Below – Superior Court
Appellant/Cross-Appellee,	:	of the State of Delaware,
	:	C.A. No. N11C-12-022 PRW
v.	:	[CCLD]
	:	
ALLSTATE INSURANCE COMPANY, <i>et al.</i> ,	:	
	:	
Defendants Below, Appellees,	:	
and	:	PUBLIC VERSION
	:	
ONEBEACON INSURANCE COMPANY, <i>et</i>	:	
<i>ano.</i> ,	:	
Defendants Below,	:	
Appellees/Cross-Appellants.	:	

LONDON MARKET COMPANIES’ JOINDER TO MUNICH RE AMERICA, INC.’S ANSWERING BRIEF AND TRAVELERS CASUALTY & SURETY COMPANY’S ANSWERING BRIEF

Certain London Market Insurance Companies, as listed and described in Attachment A to their Amended Answer to the Fourth Amended Complaint,¹ (“London Market Companies”) hereby join Appellee Munich Reinsurance America, Inc.’s (“Munich Re”) Answering Brief as well as Appellee Travelers Casualty & Surety Company’s (“Travelers”) Answering Brief. To the extent that the Motors Liquidation Company DIP Lenders Trust’s (“the Trust”) Opening Brief (“Trust’s

¹ B1938-39.



Opening Brief”) appeals the Superior Court’s grant of summary judgment to London Market Companies specifically, they address the issues unique to themselves below.² London Market Companies filed a Limited Opposition to Plaintiff Motors Liquidation Company DIP Lenders Trust’s Motion for Entry of Judgment (“Limited Opposition to Motion for Entry of Judgment”) in order to correct certain incorrect statements made in the Trust’s framing of the Superior Court’s summary judgment rulings, noting their intention to preserve their “right to present their own briefing and argument on any resulting appeal.”³

While London Market Companies adopt the procedural history of the case set forth in Munich Re’s and Travelers’ Answering Briefs, they also note the following. On June 14, 2013, London Market Companies filed their own Consolidated Brief in Opposition to Plaintiff’s Motion for Partial Summary Judgment on the Issues of Number of Occurrences and Allocation, which they later supplemented on August 23, 2013⁴ On January 29, 2015, London Market Companies filed a Motion to Compel the Trust to Supplement Discovery.⁵ On February 25 of that year, they also filed a Brief in Opposition to Plaintiff’s Motion to Compel Discovery from

² London Market Companies deny points 2 through 5 of the Trust’s Summary of Argument. London Market Companies do not admit, deny, or otherwise respond to point 1 of the Trust’s Summary of Argument. *See* Trust’s Opening Brief at 6-7.

³ *See* B2753-57.

⁴ *See* B974-1302, B1354-61.

⁵ *See* B1505-1630.

Defendants.⁶ In early March 2015, London Market Companies joined the Munich Re Estoppel Motion⁷ and filed a Motion to Extend [Their] Time to Respond to Travelers' Motion⁸ Until a Briefing Schedule is Set at a Case Management Conference ("Motion to Extend").⁹ On March 17, 2015, London Market Companies filed an Amended Answer to the Fourth Amended Complaint, in compliance with the Case Management Order in place.¹⁰ They also filed a Response to Plaintiff's Cross-Motion for Summary Judgment on May 21, 2015.¹¹ Subsequently, London Market Companies filed an Opposition to Plaintiff's Motion for Reargument on December 11, 2015, and finally a Limited Opposition to Plaintiff's Motion for Entry of Judgment on August 4, 2017.¹²

In its Opening Brief on Appeal, the Trust states that "London joined Munich Re's motion on judicial estoppel, without relying on its policy language or putting

⁶ See B1631-1760.

⁷ The full title of this motion is Munich Reinsurance America, Inc.'s Motion for an Order Declaring that Plaintiff is Judicially Estopped from (1) Arguing that Delaware Law Applies and (2) Asserting Claims Against the Post-December 31, 1971 Excess Policies, Based on Successful Positions Taken by GM in Prior Asbestos Coverage Litigation in Delaware and Michigan Involving the Same Asbestos Claims ("Munich Re Estoppel Motion").

⁸ Travelers Casualty And Surety Company's Motion For Summary Judgment ("Travelers' Motion for Summary Judgment").

⁹ See B1853-54; B1855-56.

¹⁰ See B1867-940.

¹¹ See B2055-223.

¹² See B2470-91; B2753-57.

its policies in the record.”¹³ However, in fact, there are London Market policies in the record.¹⁴ [REDACTED]

[REDACTED]

¹³ Trust’s Opening Brief at 85.

¹⁴ See Opening Brief at 79; A728-756; B1009-1266; B1529-46; B2058-64, B2098-116, B2154-94; *see also* B1940 (listing the London Market Policies at issue).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Further, neither Munich Re nor any of the other excess insurers who joined the judicial estoppel motion submitted their policy language in connection with that motion, as that language was not the basis of the arguments presented.¹⁶ Rather, the Memorandum in Support of the Munich Re Estoppel Motion presented arguments in line with Munich Re's request that the Court find:

- (1) The plaintiff, Motors Liquidation Company DIP Lenders Trust is bound by, and may not contradict, GM's prior position that Michigan law applies to the resolution of insurance coverage issues presented by the asbestos claims that GM tendered to Royal beginning in October 2004; and
- (2) The plaintiff, Motors Liquidation Company DIP Lenders Trust, may not claim coverage for the asbestos claims that GM tendered to Royal beginning in October 2004 under post-December 31, 1971 excess policies issued by the defendants, given that GM previously represented that it would never assert a claim for coverage under the post-December 31, 1971 Royal primary and excess policies underlying defendants' policies.¹⁷

¹⁵ See B1655-746.
¹⁶ See B1764-805.
¹⁷ B1804.

[REDACTED]

London Market Companies joined the Munich Re Estoppel Motion, stating their belief that the Motion did “not impact any pending discovery, and present[ed] only a question of law.”¹⁸ The Munich Re Estoppel Motion was later granted.¹⁹

The Superior Court’s March 2, 2016 denial of the Trust’s subsequent motion for reargument of the Superior Court’s November 25, 2015 decision omitted London Market Companies from its list of the Defendants who were granted summary judgment by that decision.²⁰ London Market Companies in turn filed a Motion for Clarification Re: Court’s March 2, 2016 Order on Motors Liquidation Company DIP Lenders Trust’s Motion for Reargument (“Motion for Clarification”) pointing out that they did in fact file a timely joinder to the Munich Re Estoppel Motion.²¹ On March 31, 2016, the Court entered an Order Re: The Court’s Decisions of November 25, 2015 and March 2, 2016, adding London Market Companies to the footnote in the March 2, 2016 Order which named the parties being granted summary judgment.²² The Trust agrees London Market Companies fall within the category of

¹⁸ B1853-54.

¹⁹ Exhibit B to Trust’s Opening Brief, Motors Liquidation Co. DIP Lenders Trust v. Allianz Ins. Co., et al., 2015 WL 10376123, at *10 (Del Super. Ct. Nov. 25, 2015).

²⁰ See Exhibit C to Trust’s Opening Brief, Motors Liquidation Co. DIP Lenders Trust v. Allianz Ins. Co., et al., 2016 WL 825473, at *1, fn 1 (Del Super. Ct. March 2, 2016).

²¹ B2492-93.

²² See Exhibit D to Trust’s Opening Brief at 3-4.

“post-1971 insurance compan[ies]” which the “ruling on judicial estoppel excused [from their] coverage obligations.”²³

In their Motion for Clarification, London Market Companies also pointed out that they were entitled to summary judgment as post-1971 excess insurers under the Court’s ruling on Travelers’ Motion for Summary Judgment, which argued that the asbestos claims at issue do not trigger the Royal claims-made policies, and thus do not trigger the excess coverage.²⁴ The Court’s ruling stated:

Like Travelers, all the other excess insurers see themselves above the underlying policies, policies that must be triggered before the excess are triggered. Because no demand was made against, much less did a claim break through, the primary and umbrella coverage, the excess policies’ triggers did not convert the excess policies (sic) into primary insurance.

As it does with the Travelers (Aetna) policies, the court holds for the other excess insurers that GM cannot step-over its primary coverage to reach its excess tower. Before an insurance policy undeniably written as excess coverage can be forced to respond to an occurrence instead of the insured’s underlying insurance, the policy must include unmistakable language to that effect.²⁵

As discussed in their Limited Opposition to Motion for Entry of Judgment, London Market Companies were not able to join Travelers’ Motion for Summary

²³ Trust’s Opening Brief at 2; 2 fn 2.

²⁴ See B2493-94.

²⁵ Exhibit B to Trust’s Opening Brief, Motors Liquidation Co. DIP Lenders Trust v. Allianz Ins. Co., et al., 2015 WL 10376123, at *10 (Del Super. Ct. Nov. 25, 2015).

Judgment at the time it was filed, but certainly not because they did not agree that the relief it requested should be granted.²⁶ Rather, London Market Companies believed that their ongoing discovery pursuits made joining Travelers' Motion premature at the time. When Travelers' Motion was filed, London Market Companies had a pending Motion to Compel outstanding, and were in the process of finalizing their Amended Answer to the Fourth Amended Complaint.²⁷ Further, the Trust did not respond to London Market Companies' last set of discovery requests until well after the Travelers Summary Judgment Motion had been decided, on the same day that it filed its Motion for Reargument.²⁸

Therefore, London Market Companies filed their Motion to Extend [Their] Time to Respond to Travelers' Motion Until a Briefing Schedule is Set at a Case Management Conference, in the hope that summary judgment briefing might be coordinated between the parties and it might be clarified whether London Market Companies would be permitted to continue with discovery and file their own motion for summary judgment in the future.²⁹ Both Travelers and the Trust opposed the Motion, not wanting to delay argument.³⁰ London Market Companies also filed a

²⁶ See B2754-55.

²⁷ See B1505-630; B1867-940; B2224-355.

²⁸ See B2437-38; B2439-51.

²⁹ See B1855-56; B2343-47.

³⁰ See B1941-45; B1946-50.

Response to Plaintiff's Cross-Motion for Summary Judgment in order to preserve their arguments against the Trust and reiterate their belief that the summary judgment briefing should take place on a schedule approved by the Court.³¹

However, by the time London Market Companies' Motion to Extend was heard, the briefing on the Travelers Motion for Summary Judgment was almost complete, rendering London Market Companies' Motion essentially moot.³² At the hearing on the Motion to Extend (and other matters), London Market Companies went on the record stating "Travelers' motion is well founded, [and] it should be granted."³³

London Market Companies also produced various evidence and argument of its own throughout the time frame of the briefing on Travelers' Motion for Summary Judgment. At the June 4th hearing mentioned above, in connection with the Motions to Compel also being argued that day, London Market Companies presented various facts to the Court demonstrating the claims-made nature of the Royal Insurance Program.³⁴ For example, London Market Companies referenced various documents filed with the Affidavit [] in Support of [their] Opposition to Plaintiff Motors Liquidation Company DIP Lenders Trust's Motion to Compel Discovery from

³¹ See B2055-223.

³² See B2343-47.

³³ B2344.

³⁴ See B2267-71, B2278-83, B2299-301, B2314-15.

Defendants, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁵

Additionally, during the July 10, 2015 hearing on the Motions for Summary Judgment, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁶

When the Trust filed its Motion for Reargument, London Market Companies filed their own Opposition, which the Court cited to in its March 2, 2016 denial of the request for argument.³⁷ London Market Companies also presented evidence regarding the claims-made nature of the Royal Insurance policies in various other filings throughout the life of the case.³⁸

³⁵ See B2267-71, B2278-83; B1655-63, B1747-60.
³⁶ A1629; B2058-223.
³⁷ See B2470-81, B2490-91; See Exhibit C to Trust’s Opening Brief, *Motors Liquidation Co. DIP Lenders Trust v. Allianz Ins. Co., et al.*, 2016 WL 825473, at *1 (Del Super. Ct. March 2, 2016).
³⁸ See B1009-17, B1267-302; B1354-57; B1358-61; B1529-40, B1547-630.

[REDACTED]

Under Delaware law "a reason for sustaining the judgment, if based upon the record sent up, may be urged for the first time in the appellate court."³⁹ Therefore, even though London Market Companies did not join the Travelers Motion for Summary Judgment, this Court may now affirm the grant of summary judgment under that Motion as to London Market Companies, as they are post-1971 excess insurers included in the Superior Court's ruling on Travelers' Motion for Summary Judgment, whose policies are in the record, and who made various arguments supporting that motion.

³⁹ *Gottlieb v. Heyden Chem. Corp.*, 92 A.2d 594, 595 (Del. 1952) (citations omitted); *see also Saville v. Quaker Hill Place*, 531 A.2d 201, 205 (Del. 1987) (a party "may, for cause, urge upon appeal a reason for sustaining a commission's judgment, but to be permitted, the record must support the argument.") (citations omitted).

CONCLUSION

For the foregoing reasons, as well as those set forth in Munich Re's Answering Brief and Travelers' Answering Brief, this Court should affirm Superior Court's ruling that London Market Companies are entitled to summary judgment against the Trust.

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