Thursday, December 17, 2015

It is very common in insurance and reinsurance litigation for one party to seek to remove a case first brought in state court to the federal court sitting in that venue. The reasons for this are myriad and often the stuff of myth and legend. Some believe only federal courts are capable of adjudicating complex commercial disputes and consider insurance and reinsurance disputes to be complex disputes warranting the attention only of a federal judge. Others use removal for tactical reasons. But can the terms of an insurance or reinsurance contract preclude a party from removing a case from state court to federal court?

Removal is relatively easy as long as there is federal jurisdiction. Most often the jurisdictional issue is resolved by a showing of diversity of citizenship as opposed to direct federal question jurisdiction. Regardless, without federal jurisdiction, removal will be unsuccessful. Federal jurisdiction has to be there; it cannot be agreed by the parties.
While removal from state court to federal court, in the proper circumstance, may be readily available, the parties’ contract may preclude removal. Here’s an example. The parties enter into a reinsurance contract. The reinsurance contract has a service of suit clause that applies to reinsurers not domiciled in the United States. The clause provides as follows:

It is agreed that in the event of the failure of the Reinsurer hereon to pay any amount claimed to be due hereunder, the Reinsurer hereon, at the request of the Company, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all the requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

In a recent decision, an Illinois federal court remanded a reinsurance dispute back to state court after holding that a service of suit clause like this one constituted a voluntary removal waiver. Pine Top Receivables of Ill., LLC v. Transfercom, Ltd., No. 15-CV-8908, 2015 U.S. Dist. LEXIS 167202 (N.D. Ill. Dec. 14, 2015). In Pine Top, the now-insolvent ceding insurer commenced a breach of contract action against its reinsurer, a UK company, removed the case to federal court. The cedent asked that the case be remanded to state court arguing that removal contravened the service of suit clause. The federal court agreed and remanded the dispute back to state court.

In analyzing the issue, the court found that the plain and ordinary meaning of the service of suit clause was a voluntary removal waiver. The reinsurer not only agreed to submit to the court selected by the cedent, but agreed to comply with all the requirements necessary to give the court jurisdiction. As characterized by the court, the reinsurer agreed to submit itself to the cedent’s court-choice, and stay there. The terms of the service of suit clause, including the term that required all matters to be determined under the law and practice of the court, according to the court, specified that the cedent reserved the exclusive authority to select both jurisdiction and venue and that the reinsurer agreed to oblige. Thus, said the court, the service of suit clause was a clear and unequivocal waiver of the reinsurer’s removal right.

The contract drafting point here is that if the parties want to forego the ability to remove a case to federal court they may do so by expressly waiving the parties’ right to removal by specifically and clearly waiving that removal right. In this case, the plain and ordinary meaning of the service of suit clause was a clear and unequivocal waiver of removal rights.

© Copyright 2022 Squire Patton Boggs (US) LLP

National Law Review, Volume V, Number 351