Breakaway Courier Corp. v Berkshire Hatahway Inc.
2017 NY Slip Op 32751(U)
July 17, 2017
Supreme Court, New York County
Docket Number: 654806/2016
Judge: Marcy Friedman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN **PART** 60
Justice

BREAKAWAY COURIER CORP. d/b/a BREAKAWAY COURIER SYSTEMS

INDEX NO. 654806/2016

-against-

BERKSHIRE HATAHWAY INC. et al.

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____ were read on this motion.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	No (s). _____
Answering Affidavits — Exhibits _____	No (s). _____
Replying Affidavits _____	No (s). _____

Cross-Motion: ☒ Yes ☐ No

It is hereby ORDERED that the motion of plaintiff Breakaway Courier Corporation d/b/a Breakaway Courier Systems (Breakaway) for an order compelling certain defendants to post a bond before appearing in this action and enjoining defendants from filing a demand for arbitration, and the cross-motion of defendants California Insurance Company, Commercial General Indemnity Inc., Applied Underwriters, Inc., Applied Risk Services, Inc., Applied Risk Services of New York, Inc., ARS Insurance Agency, Inc., North American Casualty Company, Continental Indemnity Company, and Applied Underwriters Captive Risk Assurance Company, Inc. to dismiss the complaint are decided in accordance with the attached decision/order of today's date.

Dated: 7-17-17

_____, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

BREAKAWAY COURIER CORPORATION d/b/a BREAKAWAY COURIER SYSTEMS

Plaintiff,

– against –

BERKSHIRE HATHAWAY INC., CALIFORNIA INSURANCE COMPANY, COMMERCIAL GENERAL INDEMNITY INC., APPLIED UNDERWRITERS, INC., A NEBRASKA CORPORATION, APPLIED RISK SERVICES, INC., A NEBRASKA CORPORATION, APPLIED RISK SERVICES OF NEW YORK, INC., A NEW YORK CORPORATION, ARS INSURANCE AGENCY, INC., NORTH AMERICAN CASUALTY COMPANY, A NEBRASKA CORPORATION, CONTINENTAL INDEMNITY COMPANY, AN IOWA CORPORATION, and APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., AN IOWA CORPORATION,

Defendants.

Index No.: 654806/2016

DECISION/ORDER

Plaintiff Breakaway Courier Corporation d/b/a Breakaway Courier Systems (Breakaway) brings this action against defendant Berkshire Hathaway Inc. (Berkshire Hathaway) and defendants California Insurance Company, Commercial General Indemnity Inc., Applied Underwriters, Inc., Applied Risk Services, Inc., Applied Risk Services of New York, Inc., ARS Insurance Agency, Inc., North American Casualty Company, Continental Indemnity Company, and Applied Underwriters Captive Risk Assurance Company, Inc. (collectively, the Applied Defendants), based on their alleged participation in an illegal workers' compensation reinsurance scheme. The complaint pleads causes of action for, among other things, violations of the

Insurance and General Obligations Laws, fraud, and breach of fiduciary duty.

The commencement of this action was accompanied by a flurry of motion practice. By order to show cause, dated September 14, 2016, Breakaway moved, pursuant to Insurance Law § 1213 (c) and CPLR Article 63, for an order compelling any defendants not authorized to do business in New York to post a bond before appearing in this action. Breakaway also sought, pursuant to CPLR Articles 63 and 75, to enjoin defendants from filing a demand for arbitration. At the time Breakaway's order to show cause was presented to the court for signature, the Applied Defendants filed and presented to the court a memorandum of law in which they argued, among other things, that Breakaway failed to make a showing of a likelihood of success on its claims. (NYSCEF No. 37.) Following issuance of the signed order to show cause, Breakaway moved, pursuant to CPLR 3024 and Insurance Law § 1213, to "strik[e]" the Applied Defendants' opposition memorandum "to the extent it was filed on behalf of any unauthorized defendants" and to restrict oral argument on its prior motion for a bond and an injunction to the issues of whether the defendants are authorized to do business in New York and, if not, the amount of the bond required under the Insurance Law as a condition of their appearance. (NYSCEF No. 60.)

On October 14, 2016, the Applied Defendants filed a cross-motion to dismiss to the complaint, pursuant to CPLR 3211 (a) (1), (3), (5), and (7), on a number of substantive grounds, including lack of standing, untimeliness, and failure to state a claim. They filed a new memorandum, both in opposition to Breakaway's motions and in support of their own motion for dismissal. Defendant Berkshire Hathaway separately moved to dismiss the complaint, pursuant to CPLR 3211 (a) (8), for lack of personal jurisdiction. On October 21, 2016, Berkshire Hathaway filed an amended notice of motion and moving papers asserting additional substantive grounds for dismissal of the complaint.

The court heard oral argument on Breakaway's motions. Consistent with the requirements of Insurance Law § 1213 (c), discussed further below, and given that Berkshire Hathaway's motion to dismiss was not, at that time, fully briefed, the court restricted argument to the threshold issues of whether a bond should be imposed on defendants and whether defendants should be enjoined from commencing arbitration. (Transcript of Oral Argument [Tr.], at 3 [NYSCEF No. 152].) This decision therefore addresses only those issues.

BACKGROUND

The complaint pleads that Breakaway is a Manhattan-based bicycle courier service with roughly three hundred employees. (Compl., at 1, 4.) In 2009, Breakaway sought to purchase workers' compensation insurance and was presented with a recommendation by its broker that it purchase "Premier Exclusive" workers' compensation insurance through defendant Applied Underwriters, Inc. (Applied Underwriters).[1] (Id., ¶¶ 42-43.) This plan was allegedly marketed as "a profit-sharing plan that would save Breakaway money on workers[']compensation insurance premiums with 'maximum' and 'minimum' premiums that would, at the same time, permit Breakaway to participate in underwriting profits." (Id., ¶ 44.) According to Breakaway, it was promised that premiums paid under the plan would be held in a "protected cell" as an investment, and that a share of those funds would be returned upon favorable underwriting results. (See id., at 4.)

Four workers' compensation policies (the Policies) were issued to Breakaway between 2009 and 2013 by defendant Continental Indemnity Company (Continental), a New York-licensed insurer. (Id., ¶ 61 & Exhs. G-J; Breakaway Memo. In Supp. Of Mtn. To Strike, at 2.) Breakaway does not dispute that the Policies are facially valid. (Compl., at 2. See also id.,

[1] "Applied" in the complaint appears to refer to defendant Applied Underwriters, Inc. (see Compl., ¶¶ 45-46), although the complaint elsewhere defines Applied Underwriters, Inc. as "Applied Underwriters." (Compl., ¶ 11.)

Wherefore Clause [requesting that the court "declare the Continental policies to be lawful and in full effect"].) In order to obtain the Policies, however, Breakaway allegedly was required to execute a "Request to Bind Coverages & Services" form addressed to Applied Underwriters (Request to Bind) (id., ¶ 46 & Exh. A), and a Reinsurance Participation Agreement (RPA) with defendant Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA). (Id., ¶¶ 46, 13 & Exh. B.)

Breakaway pleads that the Request to Bind is illegal and void under New York law for a number of reasons, including that it requires that "Breakaway waive its right to select a deductible" (id., ¶ 49), and "modif[ies] the conditions of a workers' compensation policy" by "requir[ing] a minimum commitment to purchase workers' compensation insurance of three (3) years." (Id., ¶¶ 50, 48.) Breakaway also alleges that the Request to Bind is illegal because its "terms of the Request to Bind have not been disclosed to the NYCIRB [the New York Compensation Insurance Rating Board]." (Id., ¶¶ 50, 35.)

Breakaway further pleads that the RPA requires it to participate in a reinsurance scheme contrary to New York law. According to Breakaway, "AUCRA has interpreted the RPA[] in such a manner [as] to shift unlimited liability [for workers' compensation claims] back onto Breakaway[,] while retaining the funds that Breakaway believed were deposited in a protected cell as an investment." (Id., ¶ 63. See also id., at 5 [pleading that "[t]he RPA's terms (as interpreted by Berkshire Hathaway) provide that insureds such as Breakaway will be—and indeed have been—billed . . . for every single loss their injured employees suffer, compounded by a multiplier"].) Indeed, Breakaway asserts that the RPA "requires insureds to cover each other's losses." (Id., at 2.) As summarized in the complaint: "Breakaway never received the workers' compensation it sought but instead purchased an alleged investment vehicle in the form

of reinsurance that reflects all risk and unlimited liability back on to the insured." (Id., ¶ 63.) Breakaway argues that "[n]ot only is it illegal to sell reinsurance to an insured in New York, it is also illegal to rebate underwriting proceeds to an insured or to make misleading statements in connection with the sale of insurance in New York." (Id., at 5.)

Finally, relying on an Iowa Insurance Examiner's Report of AUCRA, dated as of December 31, 2013 (Compl., Exh. F), Breakaway alleges that "AUCRA is not putting any client insurance premiums into 'protected cells.'" (Id., ¶ 58 [emphasis in original].) Rather, the funds are allegedly being "siphon[ed] off" by entities not licensed in New York and transferred, by means of an "excess loss agreement," to defendant Continental General Indemnity, Inc. (CGI), a Hawaiian captive entity, from which the funds are then distributed to shareholders of Berkshire Hathaway. (See id., ¶¶ 59-60, and at 4-5.) As the "premiums" paid by Breakaway and other insured employers are thus not actually available under this alleged scheme to pay claims, Breakaway contends that defendants have created "a massive systemic risk of undercollateralization that threatens all New Yorkers." (See id., at 6.)

DISCUSSION

Insurance Law § 1213 (c) Bond Requirement

Section 1213 (c) (1) of the New York Insurance Law provides that, "[b]efore any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:"

> "(A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure payment of any final judgment which may be rendered in the proceeding, but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust

> or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding, or
>
> (B) procure a license to do an insurance business in this state."

Section 1213 is also a jurisdictional statute. Subdivision (b) (1) (A)-(D) sets forth a list of "acts in this state, effected by mail or otherwise, by an unauthorized foreign or alien insurer" that will subject the insurer to the jurisdiction of New York Courts in any proceeding by an insured arising out of a contract of insurance. These acts include, but are not limited to, "the issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein," "the solicitation of applications for such contracts," "the collection of premiums, membership fees, assessments or other considerations for such contracts," or "any other transaction of business." Section 1213 (c) (3) "excuses a foreign carrier from the bond posting requirement when it files a 'motion' to set aside service on the ground that the carrier. . . did not commit the acts in this State that form the predicate for the court's jurisdiction." (See Levin v Intercontinental Cas. Ins. Co., 95 NY2d 523, 527 [2000] [Levin].)

In Levin, the Court of Appeals considered whether a motion to dismiss made by a defendant foreign reinsurer, based on the statute of limitations and a defense founded upon documentary evidence, constituted a "pleading" under section 1213 (c) and thus required the reinsurer to post a bond. (Id., at 525.) The Court concluded that "[w]hether any particular motion to dismiss—other than the one carved out [i.e., a motion to set aside service pursuant to Section 1213 (c) (3)]—falls within the category of a 'pleading' must be determined in accordance with the Legislature's objectives in enacting the statute." (Id., at 528.) The Court described those "clear objectives" as follows:

> "[The statue] imposes accountability on foreign or alien carriers who, although not authorized to do business in this State, issue or deliver insurance policies here. Moreover, the enactment provides a local forum

> for resolving disputes that arise out of those policies (including reinsurance treaties). Finally, by requiring a foreign carrier to post a bond at the outset of a proceeding, the statute seeks to assure that a foreign carrier's funds will be available in this State to satisfy any potential judgment against it from the proceeding."

(Id., at 526-527 [internal citations and footnote omitted]. See also id., at 528 n 3 [stating that the "legislative history indicates that defending on the merits requires the posting of a bond"].)

In view of these objectives, the Levin Court held that the defendant reinsurer's motion to dismiss based on the statute of limitations and a defense founded upon documentary evidence constituted a "pleading." (Id., at 528.) In so holding, the Court expressly rejected the reinsurer's argument that, "if a complaint is so flawed that it cannot survive a motion to dismiss, there is no possibility that a judgment for plaintiff will be entered and no need to ensure that funds are available to satisfy one." (Id. [internal quotation marks, brackets, and citation omitted].) The Court reasoned, in pertinent part:

> "Allowing Intercontinental to raise its defenses without posting a bond would compromise section 1213 (c)'s goal of assuring that funds are available in New York to satisfy any judgment in plaintiff's favor. A foreign carrier could wage extensive, costly motion practice, and yet avoid the bond requirement by simply advancing a host of defenses before interposing a formal answer. If defeated, the carrier could simply ignore the remainder of the proceedings and relegate the plaintiff to a default judgment with no in-State collateral. This is what the Legislature sought to avoid by enacting section 1213 (c)."

(Id. [footnote omitted].)

The Applied Defendants

On the above authority, this court holds that the Applied Defendants' cross-motion to dismiss the complaint on the grounds, among others, of lack of standing, untimeliness, and failure to state a claim, constitutes a "pleading" within the meaning of Insurance Law § 1213 (c).

The court thus turns to the issue of whether the Applied Defendants should be required to post a bond before their cross-motion is considered.

Breakaway concedes that defendants Continental, California Insurance Company (CIC), and Applied Risk Services of New York, Inc. (ARS NY) are licensed in New York and are not required to post a bond. (Breakaway Memo. In Supp. Of Mtn. To Strike, at 2-3.) The remaining Applied Defendants, namely Applied Underwriters, AUCRA, CGI, Applied Risk Services, Inc., ARS Insurance Agency, Inc., and North American Casualty Company, are not licensed in New York (collectively, the Unlicensed Applied Defendants).[2]

It is well settled that section 1213 (c) applies to foreign reinsurers. (Levin, 95 NY2d at 525-527 [applying section 1213 (c) to foreign reinsurer]; Curiale v Ardra Ins. Co, Ltd., 88 NY2d 268 [1996] [rejecting challenge by foreign reinsurer to constitutionality of section 1213 (c)]; British Intl. Ins. Co. Ltd. v Seguros La Republica, S.A., 212 F3d 138 [2d Cir 2000], cert denied 531 US 1010 [2000] [Seguros] [same].) As the U.S. Court of Appeals for the Second Circuit concluded in Seguros, the express language of New York's Insurance Law "demonstrates that although the legislature recognized that the business of reinsurance was to be distinguished for some purposes from the business of insurance, it did not intend that unauthorized reinsurers be exempted from New York's long-arm statute and security requirement."[3] (212 F3d at 141 [internal quotation marks, ellipses, and citation omitted].)

---

[2] The complaint pleads that ARS Insurance Agency, Inc. is "registered with the New York State Department of Financial Services License Number 937411 . . . as the property and casualty agent of Continental . . . ." (Compl., ¶ 14.) The complaint also pleads that North American Casualty Company is "licensed to do business in the State of New York." (Id., ¶ 23.) The Applied Defendants do not claim that these licenses satisfy the requirements of Insurance Law § 1213 (c). The court will therefore assume that they do not.

[3] Section 1101 (b) (1) sets forth a broad list of acts that constitute doing an insurance business in this state, including: "(D) doing any kind of business, including a reinsurance business, specifically recognized as constituting the doing of an insurance business within the meaning of this chapter." Section 1101 (b) (2) provides: "Notwithstanding the foregoing, the following acts or transactions, if effected by mail from outside this state by an unauthorized foreign or alien insurer duly licensed to transact the business of insurance in and by the laws of its domicile, shall not constitute doing an insurance business in this state, but [§ 1213] of this chapter shall nevertheless

Although the RPA includes the word "reinsurance" in its title, this case may present an issue as to whether the business transacted under the RPA technically qualifies as reinsurance. (See Matter of Shasta Linen Supply, Inc. v California Ins. Co., Decision & Order, dated June 20, 2016, File No. AHB-WCA-14-31, at 25 [Shasta Linen] [decision by California Insurance Commissioner in dispute involving many of the same parties and agreements, holding that "[a]lthough titled a 'Reinsurance Participation Agreement,' the RPA is not 'reinsurance' as defined by [California] Insurance Code section 620 . . . . Reinsurance is the process by which an insurance company buys insurance on its own risks"]; see generally Matter of Midland Ins. Co., 79 NY2d 253, 258 [1992] ["A reinsurance contract is one by which a reinsurer agrees to indemnify a primary insurer for losses it pays to policyholders. . . . Typically, reinsurance permits a small insurer to minimize its exposure to catastrophic loss by the distribution of its risks to another insurer or group of insurers"].)

On these motions, however, this court need not make a final determination as to whether the RPA constitutes reinsurance. Even if it does not, the definition in the Insurance Law of "doing an insurance business" includes, as a catchall, "doing or proposing to do any business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of this chapter."[4] (See Insurance Law § 1101 [b] [1] [E].) Several authorities have held that the RPAs offered by the Applied Defendants modify workers' compensation policies in violation of state insurance law, or have found such claims to be potentially viable. (See Shasta Linen, at 1, 55 [finding that the RPA, although not reinsurance, was a "collateral agreement" that modified the

---

be applicable to such insurers: . . . (G) transactions with respect to the reinsurance of risks of authorized insurers to the extent that such reinsurance is permitted by this chapter."

[4] The "foregoing" in subsection (b) (1) (E) refers to acts defined in subsections (b) (1) (A)-(D), as instances of insurance business, including making insurance contracts, soliciting applications for insurance policies, collecting premiums, and "doing any kind of business, including a reinsurance business, specifically recognized as constituting the doing of an insurance business within the meaning of this chapter."

terms of a guaranteed cost workers' compensation policy under the California insurance law]; National Convention Servs., L.L.C. v Applied Underwriters Captive Risk Assur. Co., Inc., 2017 WL 945189, * 6 [SD NY, Mar. 9, 2017, No. 15 CV 07063, Koeltl, J.] [denying in part motion to dismiss similar claims, and noting that "[t]he state departments of California, Vermont, and Wisconsin have concluded that the defendants' marketing and sale of a guaranteed cost plan compliant with the laws of those respective states, coupled with the RPA, does not comply with the insurance laws of those respective states"].)

In a recent case brought against most of the same defendants based on similar allegations and RPAs, Justice Grays of this Court, Queens County, required the foreign unauthorized defendants to post a bond based on the pleadings, without finally resolving the issue of whether the RPAs and related programs are in effect policies of insurance or reinsurance. (Energy Conservation Group, LLC v Applied Underwriters, Inc., Short Form Order, dated Mar. 15, 2016, at 5 [Sup Ct, Queens County, No. 710762/2015, Grays, J.] [Energy Conservation].)[5] The Court reasoned that section 1213 (c) "does not require a resolution of the case on the merits at such a preliminary stage and that whether or not the statute should be applied may be determined on the sufficiency of the plaintiffs' allegations." (Id.)

Here, the court holds similarly that the complaint sufficiently pleads that defendants Applied Underwriters, AUCRA, and CGI engaged in acts subjecting them to the requirements of § 1213 (c). Applied Underwriters was allegedly involved in the marketing of and billing for the program, and is the addressee of the Request to Bind executed by Breakaway. (Compl., ¶¶ 43-

[5] A copy of the Energy Conservation decision is annexed as exhibit 1 to the Affirmation of Raymond J. Dowd (Counsel for Breakaway) in support of Breakaway's motion for a bond and injunction. (NYSCEF No. 19.) The defendants in Energy Conservation at the time of Justice Grays' decision were Applied Underwriters, Inc., Applied Risk Services, Inc., Applied Risk Services of New York, Inc., North American Casualty Company, Continental Indemnity Company, Applied Underwriters Captive Risk Assurance Company, Inc., and Capacity Group of NY, LLC.

46, 62 & Exhs. A [Request to Bind], D [Plan Analysis], K [Breakaway Promissory Note to Applied Underwriters].) AUCRA, among other things, signed the RPA with Breakaway. (Id., ¶ 69 & Exh. B [RPA].) CGI is alleged to have played a role in the scheme by siphoning off premiums paid by Breakaway for the benefit of shareholders of Berkshire Hathaway. (Compl., ¶¶ 19-20, 60.) These allegations are sufficient to trigger application of § 1213 with respect to these defendants.

The complaint does not, however, plead any allegations linking defendants Applied Risk Services, Inc., ARS Insurance Agency, Inc., or North American Casualty Company to Breakaway in connection with this matter. The complaint merely pleads in general terms that these entities are affiliates, agents and co-conspirators of the other defendants (¶¶ 12-14, 23, 26-27), then refers collectively to "defendants" (¶¶ 26-27, 47, 56, 99), "affiliates" of AUCRA or other specific defendants (¶¶ 52-53), or the "Berkshire Hathaway Group"[6] (¶¶ 56, 92) in making additional, largely conclusory allegations against these entities. Given that discovery in this action has not yet commenced, Breakaway cannot be expected to know all of the complicated inner workings of the Applied Defendants' operations. The complaint nonetheless appears to rely on no more than affiliation, speculation, and innuendo to support its claim that Applied Risk Services, Inc., ARS Insurance Agency, Inc., and North American Casualty Company were involved in the provision of "insurance" to Breakaway. The court holds on this pleading that the Insurance Law § 1213 (c) bond requirement is not triggered with respect to these specific defendants.

[6] Each of the causes of action in the complaint is pleaded against the "Berkshire Hathaway Group." The complaint's definition of the "Berkshire Hathaway Group" does not include defendants Berkshire Hathaway, California Insurance Company, CGI, and ARS Insurance Agency, Inc. in the list of defendants in the Group. (Compl., ¶ 13.) Breakaway asserts that this omission was a mistake. The court need not decide the consequence of this error at this stage of the litigation, as the court holds that the complaint otherwise pleads sufficient allegations to trigger the section 1213 (c) bond requirement as to CGI.

In opposing the bond requirement, the Applied Defendants principally argue that this court has discretion to, and should in this case, dispense with the bond requirement for all of the Unlicensed Applied Defendants. They argue that a bond is unnecessary because Continental, the entity that issued Breakaway's workers' compensation insurance Policies, is a party to this action, is licensed in New York, is rated "A+ (superior)" by A.M. Best, has a financial size according to A.M. Best of $500-750 million, and is claimed to be jointly and severally liable with the other Applied Defendants for all of the claims in the complaint. (Applied Defs.' Memo. In Opp., at 6-8.) They also assert that all of Breakaway's claims have been paid except one, which is reserved for $45,000 and which Continental, due to its size, is indisputably in a financial position to pay. (Id., at 8.)

Insurance Law § 1213 (c) (1) (A), quoted in full above, provides that "the court may in its discretion make an order dispensing with [the] deposit or bond if the superintendent certifies to it that such insurer [defined in this section as "any unauthorized foreign or alien insurer"] maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding." The Applied Defendants have not submitted any certification from the superintendent. Nor do they contend that any Unlicensed Applied Defendant itself maintains within New York funds or securities sufficient to satisfy a final judgment. The conditions required under the plain language of the statute for this court to dispense with the bond requirement therefore are not satisfied.

In lieu of the statutorily required certifications, the Applied Defendants rely upon a December 17, 2004 opinion from the Office of General Counsel (OGC) of the Department of Financial Services (DFS). (DFS, OGC Opinion 4-12-17, "Re: Bond-posting requirement under § 1213 [c] [1] [A]," dated Dec. 17, 2004, available at http://www.dfs.ny.gov/insurance/ogco2004/

rg041217.htm.)[7] The Opinion frames the questions presented to the OGC, in pertinent part, as follows: "(1) Does the Insurance Department maintain a list of unauthorized insurers that it has certified under [§ 1213 (c) (1) (A)] as having sufficient assets to avoid the bond-posting requirement?" and "(2) What is the process for applying for such certification?" The Opinion answers that these questions "reflect a misunderstanding of the statute," and that "[t]here is no such certification function by the Department" or "process to apply to be certified." OGC states:

> "There is no absolute right to avoid bond-posting requirements under [§ 1213 (c) (1)] because the statute clearly allows the court the discretion as to whether to permit an unauthorized insurer to dispense with filing a bond. Therefore, the court may demand such a filing of a bond by an insurer in any proceeding against it."[8]

The Applied Defendants also submit affirmations from two former Superintendents of Insurance for New York: James P. Corcoran, who was superintendent between 1983 and 1990; and Gregory V. Serio, who was superintendent between 2001 and 2005. Both former superintendents opine that no bond is necessary under the circumstances of this case, in which Continental is licensed in New York and is able to pay any outstanding workers' compensation claims. (See Corcoran Aff., ¶¶ 1-5; Serio Aff., ¶¶ 1-8, 13-14.)

This is not a case in which the court must defer to the agency's interpretation of a statute. Not only is the OGC Opinion unclear (see fn. 8), but agency expertise is not required in order to

---

[7] The OGC Opinion is also annexed as exhibit D to the Dowd Affirmation in support of Breakaway's motion to strike. (NYSCEF No. 65.)

[8] It is unclear to the court from this confusingly phrased Opinion whether OGC in fact takes the position that a Court has discretion to dispense with the filing of a bond even absent a certification from the superintendent. That position would be at odds with the statutory language of 1213 (c). Consistent with the statute, however, the Opinion may be read as opining merely that, even if DFS were to provide such a certification, a Court could nonetheless "demand such a filing of a bond." Put another way, the Opinion may be construed as follows: "There is no absolute right to avoid bond-posting requirements under [§ 1213 (c) (1)] because the statute clearly allows the court the discretion as to whether to permit an unauthorized insurer to dispense with filing a bond [even where such a certification is provided]. Therefore, the court may demand such a filing of a bond by an insurer in any proceeding against it." Read this way, the Opinion says nothing about a Court's discretion to dispense with filing a bond where no certification has been provided.

enable this court to determine whether the court has discretion to dispense with a bond. (See Matter of Belmonte v Snashall, 2 NY3d 560, 565-566 [2004] ["[W]here the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency . . . . . In such circumstances, the judiciary need not accord any deference to the agency's determination, and is free to ascertain the proper interpretation from the statutory language and legislative intent" (internal quotation marks omitted)].)

Nor is this a case in which expert opinion is properly considered in construing the statute. While this court does not question the qualifications of the former superintendents or of the DFS Office of General Counsel, it is the court's role to interpret statutory language. In fulfilling that responsibility, "the Court's role is clear: our purpose is not to pass on the wisdom of the statute or any of its requirements, but rather to implement the will of the Legislature as expressed in its enactment." (People v Ryan, 82 NY2d 497, 502 [1993]; NY Statutes § 73 ["The courts in construing statutes should avoid judicial legislation; they do not sit in review of the discretion of the Legislature or determine the expediency, wisdom, or propriety of its action on matters within its powers"].) "Where words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation." (NY Statutes § 76.)

Here, the Legislature has mandated that unlicensed foreign insurers post a bond unless a specific condition is met—certification by the superintendent of particular facts. The Applied Defendants do not cite any precedent in which a Court has dispensed with the § 1213 (c) bond requirement under any other circumstances, and this court's own research has not identified any such authority. The court will not read additional exceptions into a statute that is clear on its face

and intended to protect insurers from exactly the type of "extensive, costly motion practice" being waged in this case.[9] (See Levin, 95 NY2d at 528; see also NY Statutes § 74 ["[T]he failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended"].) Applied Underwriters, AUCRA, and CGI accordingly must post a bond or procure a license to do an insurance business in this state before their cross-motion to dismiss is considered.

Berkshire Hathaway

Berkshire Hathaway contends that Insurance Law § 1213 (c) does not apply to it "because Berkshire Hathaway is not an insurer within the meaning of the Insurance Law generally, and because it engaged in no conduct in connection with this case that might be characterized as conducting insurance business." (Berkshire Hathaway Memo. In Opp., at 2.) In support of this contention, Berkshire Hathaway argues that it "does not issue insurance policies or reinsurance agreements in New York or in any other state." (Id., at 1.) Although Berkshire Hathaway admits that it "is the parent company of the other defendants named in this Complaint," it denies that it "share[s] employees, executive staff, internal finances, or ground-level business decisions with any of the other defendants in this case." (Id.)

Berkshire Hathaway has also separately filed a motion to dismiss Breakaway's complaint against it on the ground, among others, of lack of personal jurisdiction. On the instant motion, Berkshire Hathaway argues that, even if Insurance Law § 1213 (c) applies to it, the statute does not preclude its motion to dismiss for lack of personal jurisdiction because "such a motion . . .

[9] The question of whether there are additional circumstances under which a Court may exercise discretion to dispense with the bond requirement is different from the question considered in Levin regarding the meaning of the word "pleading." As the Court of Appeals explained in Levin, the exception in Insurance Law § 1213 (c) (3) for a "motion to set aside service" creates an inference that other motions may qualify as "pleadings" for purposes of the statute. (95 NY2d at 527-528.) Here, the statutory language permits no inference of additional exceptions to the bond requirement, and the Legislature's objectives are furthered by strict construction of the statute in this regard.

does not relate to the purported merits of Breakaway's case, but only [to] the defendants' due process rights." (Id., at 5.)

The court holds that Insurance Law § 1213 (c) does not require Berkshire Hathaway to post a bond or procure a license before moving to dismiss based on lack of personal jurisdiction. (See Insurance Law § 1213 [c] [3]; Levin, 95 NY2d at 528 n 3 [holding, in contrast, that "Section 1213's legislative history indicates that defending on the merits requires the posting of a bond"]; Associated Aviation Underwriters v Arab Ins. Group, 2003 WL 1888731, * 2 n 3 [SD NY, Apr. 16, 2003, No. 02 Civ 4983, Daniels, J.] ["Since [reinsurer] defendants' motion to dismiss is based upon lack of personal jurisdiction, it therefore falls under § 1213 (c)'s exception"].) The court will accordingly hear oral argument on the jurisdictional question before determining whether Berkshire Hathaway is subject to Insurance Law § 1213 (c). The remaining branches of Berkshire Hathaway's motion will be held in abeyance and argued together with the overlapping branches of the Applied Defendants' cross-motion to dismiss.

Amount of Bond

Insurance Law § 1213 (c) (1) (A) provides that the amount of the bond must be "sufficient to secure payment of any final judgment which may be rendered in the proceeding." Breakaway argues that this amount should be set at $6,061,659.02, the amount calculated by its expert, Martin A. Schwartzman, the principal of an insurance and regulatory consulting firm and, before that, the senior advisor to the superintendent of the New York State Department of Financial Services. The Applied Defendants argue that a dramatically lower sum of $45,000, representing Breakaway's sole outstanding workers' compensation claim, would be sufficient to satisfy a judgment in this case.

In his expert affidavit, Mr. Schwartzman asserts that "[t]he RPA subjects Breakaway to potentially unlimited liability in the event of multiple catastrophic losses." (Schwartzman Aff. In Supp., ¶ 25.) Mr. Schwartzman notes that workers' compensation policies, including the Continental Policies, are "occurrence" policies, as they provide coverage for injuries incurred but not reported during the policy period. The only example that Mr. Schwartzman cites of such an injury is an asbestos injury. (Id., ¶¶ 62-63.) Mr. Schwartman then applies an actuarial analysis, using data from the Policies and RPAs, to estimate the "value at risk" to Breakaway for the losses to injured workers. (See id., ¶¶ 70-71.) He calculates this value as $6,061,659.02, although he also asserts that "the risk [to Breakaway] is so great in the case of multiple catastrophic losses that it is not susceptible of precise calculation." (Id., ¶ 40.)

The court finds that Mr. Schwartzman's affidavit, calculating the $6,061,659.02 figure, does not furnish a reliable basis for setting the bond in that amount. Mr. Schwartzman's affidavit uses numerous terms of art without comprehensible explanation. He does not explain how the analysis he conducted results in a rational approximation of the value of claims likely to be made by Breakaway's employees at this point in the parties' relationship, when all of the Policy periods have expired and there remains only the possibility of incurred but unreported claims. Notably, under Workers' Compensation Law § 28, claims generally must be made within two years of an accident, or within two years of a death resulting from an accident; but the two-year period is not applicable to "disablement" caused by any occupational disease resulting from exposure to hazardous substances.[10] Breakaway does not plead any allegations that support Mr.

[10] Section 28 provides that "[t]he right to claim compensation under this chapter shall be barred, except as hereinafter provided, unless within two years after the accident, or if death results therefrom within two years after such death, a claim for compensation shall be filed . . . ." However, "[t]he right of an employee to claim compensation under this chapter for disablement caused by any occupational disease including but not limited to compressed air illness or its sequelae, silicosis or other dust disease, latent or delayed pathological bone, blood or lung changes or malignancies due to occupational exposure to or contact with arsenic, benzol, beryllium, zirconium, cadmium, chrome, lead or fluorine or to exposure to x-rays, radium, ionizing radiation, radio-active substances, or

Schwartzman's assertion that "multiple catastrophic losses" from injuries incurred years ago, such as losses from exposure to asbestos or other harmful substances, are likely to be suffered by employees of Breakaway, which is engaged in a bicycle courier business. Moreover, as the Applied Defendants correctly note (Applied Defs.' Memo. In Opp., at 8), Continental—a New York licensed insurer—is contractually obligated to pay any future claims. Breakaway does not seek to rescind its Policies with Continental. The possibility that Continental will not pay, or that the Applied Defendants might seek, pursuant to the RPA, to recoup from Breakaway amounts paid by Continental to employees, is too remote and speculative at this time for estimates of such amounts to form a part of the bond.[11] Breakaway's bond figure, as calculated by Mr. Schwartzman, is accordingly rejected.

Conversely, the court rejects the Applied Defendants' request for a bond in the minimal amount of $45,000, as that amount also lacks a rational relationship to Breakaway's claims or potential recovery in this litigation. This is not a suit to compel coverage of a workers' compensation claim.

As the Court of Appeals held in Levin, "[t]he task of fixing the amount [of the bond] necessarily falls within the trial court's discretion. The calculation must be made at an early stage of the litigation, prior to the resolution of potentially complex factual and legal issues." (95 NY2d at 529 [internal citation omitted].) Upon review of the allegations of the complaint and the evidence in the record, and having rejected both sides' proposed bond amounts as not rationally related to Breakaway's potential recovery in this action, the court determines that a

---

any other chemical compound shall not be barred by the failure of the employee to file a claim within such period of two years, provided such claim shall be filed after such period of two years and within two years after disablement and after the claimant knew or should have known that the disease is or was due to the nature of the employment."

[11] In the event of a change in circumstances—e.g., that Continental disclaims coverage or the Applied Defendants demand payment from Breakaway for such claims—this decision will not preclude Breakaway from seeking appropriate relief from this court.

bond in the amount of $863,048.74 is appropriate. This figure represents the full amount Breakaway has paid to defendants under their alleged workers' compensation and reinsurance participation program. (Compl., ¶ 62.) Although this figure apparently includes premiums paid by Breakaway for the Continental Policies, which Breakaway may not be entitled to recover as it does not seek rescission of the Policies, the figure also includes fees for Breakaway's participation in the RPA program and other amounts which defendants allegedly promised to return to Breakaway in the future under the RPA. (See Compl., Exh. K [promissory note from Breakaway to Applied Underwriters for amounts "including workers' compensation premiums"]; see also Shasta Linen, at 29-30, 34-35, 38-39 [finding that RPA program mechanics required participant Shasta Linen to pay significantly more in program costs than its cumulative losses on workers' compensation claims; that AUCRA could withhold excess funds from participants for up to seven years after expiration of their policies; and that, as of June 20, 2016, AUCRA had "not made any profit-sharing distributions" to participants].) It is not possible, at this preliminary stage, to further segregate and exclude the portion of Breakaway's payments for premiums that it may not be entitled to recover.

Although Breakaway seeks further damages in its complaint, including $18 million in damages for alleged misrepresentations and violations of the Donnelly Act, Breakaway does not appear to seek to include those amounts in the bond or attempt to explain the basis for or rationality of the amounts demanded on this motion. The court accordingly declines to include such amounts in the amount of the bond. (See Matter of MF Global Holdings Ltd. v Allied World Assur. Co. Ltd., 2017 WL 2533353, * 8 [SD NY, Bankr Ct, June 12, 2017, No. 11-15059] [declining to include in amount of section 1213 (c) bond $40 million in damages for "'bad faith refusal to provide coverage'" absent "any rational limiting principle that would prevent a

plaintiff from requesting a gargantuan bond based on a hypothetical payday, which may nevertheless have no basis in reality"].)

The court further declines to apply a discount to the amount of the bond based on the fact that defendant Continental is licensed in this State and has significant assets. Although the Applied Defendants, including Continental, are presently represented by the same counsel and have taken identical positions on Breakaway's motions, the extent to which each defendant ultimately will be held liable to Breakaway is uncertain at this stage of the litigation. As previously noted, Breakaway acknowledges that Continental's Policies are themselves valid. (Supra, at 3-4.) Breakaway also pleads that none of its premiums have been paid to Continental but, rather, have been collected by and distributed to other entities. (See e.g. Compl., ¶¶ 52, 62, 66, and at 6.) If it is determined, after further litigation, that Continental is not liable to Breakaway, Breakaway may be left with little assurance that its judgment will ultimately be satisfied, frustrating the aims of Insurance Law § 1213 (c).[12] (See Levin, 95 NY2d at 528.)

Responsibility for Posting Bond(s) & Argument on Defendants' Motions

In summary, Applied Underwriters, AUCRA, and CGI are subject to the bond-posting requirement of Insurance Law § 1213 (c). A bond must be posted before their cross-motion to dismiss is considered. The determination as to whether Berkshire Hathaway is subject to the bond-posting requirement of § 1213 (c) must await determination of its challenge to personal jurisdiction. $863,048.74 will be "sufficient to secure payment of any final judgment which may be rendered in the proceeding." (See Insurance Law § 1213 [c] [1] [A].)

[12] Nothing in this decision should be read as suggesting that the complaint fails to state a claim against Continental. The issue is solely whether Continental's assets should be taken into account in determining the amount of the bond that the Unlicensed Applied Defendants must file.

The question remains whether Applied Underwriters, AUCRA, and CGI must each post a bond individually, or whether they may collectively post a single bond. The parties have not cited any decision addressing application of the bond requirement to multiple unauthorized foreign insurers claimed to be jointly and severally liable for the damages suffered by the plaintiff. The court holds that a single bond posted by these defendants collectively will be satisfactory, provided that they can agree that the entire bond amount will remain available to satisfy a judgment in Breakaway's favor against any one of these three unauthorized foreign insurers. To be clear, the dismissal of Applied Underwriters, AUCRA, or CGI from this action shall not provide a basis for releasing any portion of the bond, which must remain available in full to satisfy a potential judgment in Breakaway's favor until the case is dismissed, discontinued, or otherwise resolved against all three of the aforesaid insurers. If Applied Underwriters, AUCRA, and CGI cannot reach agreement on their respective contributions or responsibilities with respect to the posting of a collective bond, they must each post a bond individually in the amount specified above.

To avoid the risk of inconsistent adjudications and the waste of judicial resources, the court will hear the substantive branches of defendants' various motions and cross-motions to dismiss at one time, after the court has determined whether Berkshire Hathaway is subject to the jurisdiction of this court or whether jurisdictional discovery should be ordered. (See CPLR 2201.) If Applied Underwriters, AUCRA, and CGI wish to expedite this process, they may file a bond on behalf of themselves and Berkshire Hathaway on the above terms, in the amount of $863,048.74, at least two weeks prior to the date of oral argument on the jurisdictional question, in which event the court will hear argument on the substantive grounds for dismissal in the same

oral argument. It bears repeating that these defendants are all members of the same corporate family.

Stay of Arbitration

Breakaway also seeks an order, pursuant to CPLR Articles 63 and 75, "enjoining Defendants from seeking to commence arbitration against Plaintiffs pursuant to any alleged Reinsurance Participation Agreement." (Order to Show Cause, dated September 14, 2016, at 2.) It is well settled that Courts plays a "gatekeeping role" in deciding whether to compel or stay arbitration—a role that permits a Court to decide, as a threshold matter, "whether public policy precludes arbitration of the subject matter of a particular dispute." (Merrill Lynch, Pierce, Fenner & Smith v Benjamin, 1 AD3d 39, 43-44 [1st Dept 2003]; Matter of City of N.Y. v Uniformed Fire Officers Assn., Local 854, IAFF, AFL-CIO, 95 NY2d 273, 280-281 [2000].)

CPLR 7502 (c) provides that a Court "may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state . . . ." Here, however, no arbitration is pending, no demand for arbitration has been made, and there is no evidence that defendants intend to demand arbitration against Breakaway. Breakaway's request for a stay is therefore premature, and will be denied without prejudice.[13]

The court has considered the parties' remaining contentions and considers them without merit. It is accordingly hereby

(I) ORDERED that the motion of plaintiff Breakaway Courier Corporation d/b/a Breakaway Courier Systems (Breakaway) for an order compelling certain defendants to post a

[13] It is noted that Justice Grays in Energy Conservation recently stayed an arbitration demanded by many of the same defendants based on a substantially similar RPA arbitration provision, on the grounds that the provision was illegal and unenforceable. (See Energy Conservation, Short Form Order, dated Mar. 15, 2016, at 5.)

bond before appearing in this action and enjoining defendants from filing a demand for arbitration (Seq. 001) is decided as follows:

1. It is hereby ORDERED that defendants Applied Underwriters, Inc., Applied Underwriters Captive Risk Assurance Company, Inc., and Commercial General Indemnity Inc. (collectively, the Unlicensed Applied Defendants), as a condition of their appearance in this action, shall either (i) deposit with the clerk of this court cash or securities or file with such clerk a bond with good and sufficient sureties in the amount of $863,048.74 consistent with this decision (supra, at 20-22), or (ii) procure a license to do an insurance business in this state; and it is further

2. ORDERED that the branch of Seq. 001 seeking to have defendant Berkshire Hathaway, Inc. (Berkshire Hathaway) post a bond before appearing in this action is severed and held in abeyance pending determination of whether this court has jurisdiction over defendant Berkshire Hathaway, Inc. or whether jurisdictional discovery should be ordered; and it is further

3. ORDERED that the branch of Seq. 001 seeking an order enjoining defendants from commencing arbitration against Breakaway pursuant to any Reinsurance Participation Agreement is denied without prejudice to a new motion in the event that a demand for arbitration is served upon it; and it is further

4. ORDERED that Seq. 001 is otherwise denied; and it is further

(II) ORDERED that the cross-motion of defendants California Insurance Company, Commercial General Indemnity Inc., Applied Underwriters, Inc., Applied Risk Services, Inc., Applied Risk Services of New York, Inc., ARS Insurance Agency, Inc., North American Casualty Company, Continental Indemnity Company, and Applied Underwriters Captive Risk

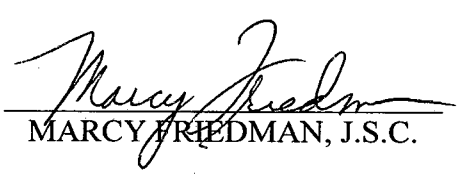
Assurance Company, Inc. (collectively, the Applied Defendants) to Seq. 001 to dismiss the complaint is severed and held in abeyance pending the Unlicensed Applied Defendants' compliance with paragraph I (1), above, and pending determination of Berkshire Hathaway's motion to dismiss for lack of jurisdiction, at which point the cross-motion will be heard together with the branches of Berkshire Hathaway's motion to dismiss the complaint on substantive grounds. Provided that: If the Unlicensed Applied Defendants wish to expedite this process, they may file a bond on behalf of themselves and Berkshire Hathaway in the amount of $863,048.74 at least two weeks prior to the date of oral argument on the jurisdictional question, in which event the court will hear argument on the substantive grounds for dismissal in the same oral argument; and it is further

(III) ORDERED that the motion of Breakaway to "strik[e]," in part, the initial opposition memorandum of the Applied Defendants (NYSCEF No. 37) and to restrict the subjects of oral argument on November 1, 2016 (Seq. 002) is granted solely to the extent that this court will defer consideration of defendants' substantive arguments for dismissal of this action until the conditions set forth above are satisfied; and it is further

(IV) ORDERED that oral argument on the branch of the motion of Berkshire Hathaway, Inc. to dismiss the complaint on the grounds of lack of personal jurisdiction will be held on September 12, 2017 at 10:00 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
July 17, 2017



MARCY FRIEDMAN, J.S.C.