

CAUSE NO. D-1-GV-12-001713

THE STATE OF TEXAS,
Plaintiff,

V.

GRAMERCY INSURANCE COMPANY,
Defendants

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

53RD JUDICIAL DISTRICT

**KEMPER COST MANAGEMENT, INC.'S MOTION AND OBJECTION IN RESPONSE
TO COMPANION PROPERTY AND CASUALTY INSURANCE COMPANY'S
MOTION FOR THE RELEASE OF RESTRAINED THIRD-PARTY TRUST FUNDS**

TO THE HONORABLE JUDGE OF SAID COURT:

Kemper Cost Management, Inc. ("Kemper"), a party-in-interest, submits its Motion and Objection in Response to Companion Property and Casualty Insurance Company's ("Companion") Motion for the Release of Restrained Third-Party Trust Funds, and in support thereof, would show this Court as follows:

I. Introduction and Factual Background

1. Kemper takes an interest in the rehabilitation of Gramercy Insurance Company (,"Gramercy") because Kemper had contracted with Gramercy to serve as the Administrator of service and equipment maintenance plans for solar panels and wind turbines that were covered by insurance provided by Gramercy. Companion's Ex. 4, p. 4. The commissions that Kemper had earned in relation to these maintenance plans still have not been paid to Kemper by Gramercy (or by Companion).

2. In the Court's Agreed Order filed on December 4, 2012, this Court "vested [in the Rehabilitator] by operation of law ... title to all of [Gramercy's] property as defined in TEX. INS. CODE § 443.004(a)(2)." The Order specified that "[s]uch property shall include property of any kind or nature... including but not limited to money, funds, cash, stock, bonds, account

deposits... funds held in shared, escrow or *trust accounts*” and that “the Rehabilitator shall be directed to take possession and control of [Gramercy’s] property, wherever located.” Agreed Order, p. 3, ¶¶ 2.4, 2.5 (emphasis added). The Order also “enjoin[ed] financial institutions or depositories from taking any actions in connection with [Gramercy’s] property, except as directed by the Rehabilitator or his designees” and ordered that “an automatic stay is in effect with respect to actions against [Gramercy] or its property, effective on the commencement of this proceeding.” Agreed Order, p. 4, ¶¶ 2.8, 2.9.

3. In its Motion, Companion argues that the assets held in the Bank New York Mellon, NA (“BNYM”) reinsurance trust are not Gramercy’s property and are therefore outside the scope of the Agreed Order. Companion’s Motion, p. 5-8. Kemper would show this Court that the trust agreement between Gramercy and Companion (the “Trust Agreement”), TEX. INS. CODE §§ 443.004(20)(A) and 443.008(c)(3), and Texas case law require that the trust and its assets remain under the receivership because: (1) Companion has not demonstrated that it sought to withdraw assets from the trust for the withdrawal purposes specified in the Trust Agreement; (2) Gramercy, the trust’s grantor, retained interests in the trust and its assets—the rights of termination and collection of the assets—and these rights became the Receivership’s rights as “property of the insurer;” and (3) Companion is attempting to gain possession or control of Gramercy’s property, and under the Texas Insurance Code, such attempts were stayed by the commencement of the State’s delinquency proceedings against Gramercy.

II. Arguments and Authorities

A. Companion Has Not Demonstrated by Its Motion That it is Entitled to the Trust Assets Because it Has Not Shown That its Attempts to Withdraw from the Trust Relate to the Purposes of the Trust.

4. The Trust Agreement between Gramercy and Companion specifies that Companion “shall undertake to use and apply any amounts withdrawn from the Trust Account” for certain enumerated purposes. Companion’s Ex. 3, p. 4 ¶ 3(d). These purposes include reimbursement for “losses and allocated loss expenses paid by [Companion] but not recovered from [Gramercy] or for unearned premiums due [Companion]...” and to pay Gramercy “any amounts held in the Trust Account that exceed 102 percent of the actual amount required to fund [Gramercy’s] entire Obligations,” “Obligations” being defined as relating to losses and allocated loss expenses. Companion Ex. 3, p. 4 ¶ 3 (d)(1, 2) and p. 5 ¶ 3(d)(i-v).

5. Nowhere in Companion’s motion is it asserted that it has incurred any losses that fall within the purposes for withdrawal specified in the Trust Agreement. *See generally* Companion’s Motion. Companion speaks only of Gramercy’s alleged failure to pay an amount for “fees and commissions due under the terms of the Reinsurance Agreement.” *Id.*, p. 4 ¶ 10. But Companion does not explain how these unspecified and unexplained “fees and commissions” are related to the Trust or the purposes that justify withdrawal from the Trust, and Companion even goes on to say in footnote 4 that it is not seeking these “outstanding fees.” *See id.* Since Companion’s Motion has not demonstrated that the conditions justifying withdrawal from the Trust as required by the Trust Agreement have been met, its Motion should be denied.

B. Gramercy Has Property Rights to the Trust Assets Which Are Now Properly Under the Receiver’s Control as “Property of the Insurer.”

6. Companion argues that it is the sole Beneficiary of the Trust and the owner of the Trust Assets, thus precluding the Receiver from stepping into Gramercy’s shoes and taking control of the Trust and its Assets. Companion’s Motion, p. 5-8. However, the Trust Agreement clearly acknowledges that Gramercy retained rights to the Trust and its Assets. Companion’s Ex. 3, p. 10 ¶ 8. Gramercy retained the power to terminate the Trust upon written notice to Companion

and the Trustee. *Id.* at ¶ 8(a). Moreover, “[U]pon termination of the Trust agreement, all Assets not previously withdrawn by [Companion] shall, at the prior written direction and approval of [Companion], be delivered by the Trustee to [Gramercy].” *Id.* at ¶ 8(b).

7. By the Trust Agreement’s terms, Gramercy, the Trust’s Grantor (as designated on page 2 of the Trust Agreement), clearly contemplated a situation in which the Trust would be terminated and Gramercy would recover “all Assets not previously withdrawn” from the Trust. *See id.* Therefore, Gramercy intended to retain rights to the Trust Assets, and this intent cannot be overlooked because Gramercy is the Trust’s Grantor. “The court’s primary objective in construing a will or a trust is to determine the intent of the maker,” and in doing so, a court “[is] limited to the four corners of the trust instrument” and “should construe the trust to give effect to all provisions so that no provision is rendered meaningless.” *Lesikar v. Moon*, 237 S.W.3d 361, 366 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

8. To date, the Trust has not been terminated by Gramercy or Companion and is still in effect. Consequently, the Receiver, acting for Gramercy, still retains the rights to terminate the Trust and collect remaining assets from the Trust, per the Trust Agreement. Accordingly, Companion and BNYM should continue to be enjoined from diminishing the Trust’s and Gramercy’s assets while the Receiver evaluates the Trust and the role it should play in the Receivership of Gramercy. *See* TEX. INS. CODE § 443.001(e) (directing that “the interests of insureds, claimants, creditors, and the public generally” should be protected through “improved methods for conserving and rehabilitating insurers”).

C. The Proceedings by the State Against Gramercy Act as a Stay Against Companion’s Attempts to Withdraw the Trust Assets.

9. Under the Insurer Receivership Act (TEX. INS. CODE Chapter 443), “the commencement of a delinquency proceeding under th[is] chapter operates as a stay, applicable to all persons, of:

... (3) any act to obtain or retain possession of property of the insurer or of property from the insurer or to exercise control over property or records of the insurer.” TEX. INS. CODE § 443.008(c)(3). Companion’s motion seeks to accomplish such an act, which is why this Court’s permanent injunction and automatic stay should continue to apply to Companion’s attempts to withdraw the entirety of the assets from the BNYM reinsurance trust. As explained *supra*, Gramercy, and now the Receiver, have property rights in the Trust, and its assets should be preserved in order to facilitate Gramercy’s rehabilitation or liquidation as directed by TEX. INS. CODE § 443.001(e).

10. Relatedly, Companion argues in its Motion that it delivered written notice to BNYM requesting to withdraw the Trust’s Assets before the State filed suit against Gramercy, implying that this should result in its escaping the injunction and stay ordered by the Court. Companion’s Motion, p. 5. Even if such notice were delivered to BNYM, the fact is that as of the date of the suit’s filing, the Trust Assets were not released to Companion and remained in the Trust, thus becoming part of the Receivership estate. Further, Companion has not alleged that Gramercy, or any other party such as Kemper, is responsible for BNYM’s choosing to not release the Trust’s Assets to Companion. *Id.* Companion even admits it does not know the reason for BNYM’s actions. *Id.* Consequently, the party toward whom Companion should direct this grievance is BNYM, not the Receiver or the Receivership Estate.

PRAYER

WHEREFORE, PREMISES CONSIDERED, party-in-interest Kemper Cost Management, Inc. respectfully requests that upon final hearing, the Court deny Companion Property and Casualty Insurance Company’s Motion for the Release of Restrained Third Party

Trust Funds and grant party in interest Kemper Cost Management, Inc. such other and further relief to which it may be justly entitled at law or in equity.

Respectfully submitted,

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Exhibit "A"

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