

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

ONEBEACON INSURANCE GROUP, INC., and	:	AUGUST TERM, 2004
ONEBEACON INSURANCE CO.,	:	
	:	No. 02670
Plaintiffs,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	Control No. 113134
LIBERTY MUTUAL INSURANCE CO., and	:	
PEERLESS INSURANCE CO.,	:	
	:	
Defendants.	:	

**ORDER AND MEMORANDUM**

**AND NOW**, this 21<sup>st</sup> day of January, 2005, upon consideration of defendants' Preliminary Objections to the Complaint, plaintiffs' response thereto, the briefs in support and opposition, and all other matters of record, upon hearing the oral arguments of counsel on January 7, 2005, and in accordance with the Memorandum Opinion issued simultaneously, it is hereby

**ORDERED** that said Preliminary Objections are **SUSTAINED in part** and plaintiff OneBeacon Insurance Co.'s claim for breach of contract against defendant Liberty Mutual Insurance Co. is **DISMISSED** in favor of arbitration, all arbitration proceedings between the parties are stayed until further order of this court, and defendants shall file an Answer to the remaining counts of the Complaint within twenty (20) days of the date of entry of this Order. The remaining Preliminary Objections are **OVERRULED**.

**BY THE COURT,**

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**GENE D. COHEN, J.**

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	:	
Defendants.	:	

**MEMORANDUM OPINION**

This action arises out of the alleged breach of a Pre-Closing Administrative Services Agreement (“PCASA”), which was entered into by OneBeacon Corp (“OB Corp.”), certain subsidiaries of OB Corp. listed in the PCASA (the “OB Insurers”), and Liberty Mutual Insurance Company (“Liberty”). Under the terms of the PCASA, Liberty agreed to provide claims handling services for the OB Insurers.

In the present action, OneBeacon Insurance (“OB Insurance”), which is one of the OB Insurers listed in the PCASA, and OneBeacon Group (“OB Group”), which is the successor-in-interest to OB Corp., have brought claims against Liberty for breach of the PCASA due to Liberty’s alleged mishandling of numerous claims on behalf of the OB Insurers.

The PCASA provides that

if any dispute shall arise between a OneBeacon Insurer and Liberty with reference to the interpretation or performance of [the PCASA], including the formation or validity thereof, or their rights with respect to any transaction involved . . . such dispute, upon the written request of either party, shall be submitted for resolution by arbitration.

Complaint, Ex. A, Art. XII, p. 12. Both parties admit that OB Insurance is an OB Insurer as defined in the PCASA. *See id*, Ex. B, p. B-16; Plaintiff's Responsive Memorandum, p. 2, n. 1, Defendants' Reply Memorandum, pp. 2-3. Therefore, OB Insurance's claims against Liberty for improper performance of the PCASA are subject to arbitration.

However, it is not at all clear to the court whether OB Group's claims against Liberty are subject to arbitration. Although OB Group's predecessor-in-interest, OB Corp., was a party to the PCASA, OB Corp.'s rights and liabilities under the PCASA were quite limited. Basically, OB Corp. was named as a party so that it could serve as the "Designated Representative" of the OB entities to facilitate their performance of the PCASA. *See* Complaint, Ex. A., §§5.1, 8.1 ("In consideration for Liberty providing [claims administering services], OneBeacon Insurers shall, through the OneBeacon Designated Representative, pay Liberty [the agreed upon fees].")

Under the terms of the PCASA, Liberty did not agree to provide claims administering services to OB Corp.; instead its agreement was to provide such services to the OB Insurers only. *Id.*, Art. II ("OneBeacon Insurers hereby appoint Liberty, and Liberty hereby accepts appointment, to provide as an independent contractor of OneBeacon Insurers," certain claims handling services.) Since Liberty was not obligated to perform services for OB Corp., OB Corp. could not bring a claim for breach for failure to perform such services, and neither may its successor, OB Group.

OB Group may have standing to bring such claims as assignee of the other OB Insurers, but it does not allege any such assignment in the Complaint.<sup>1</sup> Furthermore, if OB Group has somehow assumed or succeeded to the rights of the OB Insurers under the PCASA, presumably it has also assumed or succeeded to their obligation to arbitrate their claims for improper

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<sup>1</sup> Obviously, if OB Group does not have any authority to assert the claims of the other OB Insurers against Liberty, then they must file their own claims against Liberty for breach of the PCASA.

performance. Based on the limited facts presented in the Complaint, the court cannot determine at this juncture whether OB Group has standing to bring claims against Liberty for breach of the PCASA, and, if so, whether OB Group's claims must be sent to arbitration.

In addition to their claim for breach of contract against Liberty, OB Group and OB Insurance have also asserted claims against Liberty and its subsidiary, Peerless Insurance Co. ("Peerless"), for negligence, breach of fiduciary duty, and unjust enrichment due to defendants mishandling of claims for plaintiffs.<sup>2</sup> Plaintiffs allege that Peerless performed much of the claims handling work that Liberty promised to do under the PCASA and that Peerless received payment for such work from OB Group. However, since Peerless is not a party to the PCASA, it is not clear what duties it owes directly to plaintiffs. It may be that Peerless is an assignee of Liberty's obligations under the PCASA, or that Peerless acted as Liberty's agent in providing the contractually required services. Until such issues are resolved, the court is unable to determine if the arbitration provision of the PCASA somehow applies to Peerless.

At this point, only one of the claims asserted by plaintiffs, OB Insurance's breach of contract claim against Liberty, is subject to arbitration. Plaintiffs' argue that, under New York law, which the parties chose to govern the enforceability of the PCASA, if OB Insurance's sole arbitrable claim against Liberty "is inextricably intertwined with their [non-arbitrable] claims against the other defendants" then this court must retain jurisdiction over the arbitrable claim. See Young v. Jaffe, 282 A. D.2d 450, 723 N.Y.S.2d 90 (2d Dept. 2001); Brennan v. Becker, 127 A.D.2d 951, 953, 512 N.Y.S.2d 555 (3d Dept. 1987); Complaint, Ex. A, Sec. 13.7, p. 14. On the other hand, defendants' argue that, under the Federal Arbitration Act ("FAA"), which trumps

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<sup>2</sup> It appears to the court that the gist of the action doctrine may apply in this case. The gist of the action "doctrine precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims. . . . Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals." Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. 2002).

contrary state law that interferes with contractually agreed upon arbitration, this court should send OB Insurance's arbitrable claim to arbitration and stay the remainder of this action pending the outcome of that arbitration. *See* 9 U.S.C. § 3; Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S.Ct. 1212 (1995). The court finds that neither option is reasonable at the present stage of this case.

Given that the court is presently unable to determine the arbitrability (and viability) of the plaintiffs' remaining claims, and mindful that neither judicial nor arbitration resources should be wasted, the court opts for a temporary resolution:

- 1) OB Insurance's claim against Liberty shall be heard by the arbitrator;
- 2) The arbitration proceedings shall be stayed pending this court's subsequent determination of the arbitrability and/or viability of the remaining claims;
- 3) Once the pleadings are closed, defendants shall file a motion requesting the court to determine the arbitrability and viability of plaintiffs' remaining claims.

### **CONCLUSION**

For all these reasons, defendants' Preliminary Objections to plaintiffs' Complaint are sustained in part and overruled in part.

**BY THE COURT,**

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**GENE D. COHEN, J.**