IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

HILLYARD, INC., et al., Plaintiffs,	)	
v.	)	Case No. 16-6062-CV-SJ-FJG
APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., et al., Defendants.	)	

ORDER

Pending before the Court are (1) Plaintiffs' Motion for a Stay of Arbitration Proceedings (Doc. No. 4); (2) Defendants' Motion to Compel Arbitration and Dismiss or Stay (Doc. No. 9); and (3) Plaintiffs' Motion for Leave to File Response to Defendants' Supplemental Authority (Doc. No. 16). As an initial matter, plaintiffs' unopposed motion for leave to file a response to defendants' supplemental authority will be **GRANTED**, and the Court will consider the response filed as Doc. No. 16-1 to be properly filed. Furthermore, given that both plaintiffs' motion to stay and defendants' motion to compel arbitration involve the same issues, the Court considers both together.

I. Background

Plaintiffs bring this action seeking a declaratory judgment, an accounting, and restitution or disgorgement due to defendants' allegedly unlawful business practices. Specifically, plaintiffs argue that in December 2012, Defendant Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA) entered into an agreement where AUCRA and related companies would provide workers' compensation insurance to plaintiffs. Plaintiffs assert that the agreement between the two consisted of two parts: guaranteed cost insurance policies issued to Hillyard for each state where its employees

were located, and a Reinsurance Participation Agreement ("RPA"). From 2013-2015, plaintiffs made payments to defendant as billed. In November and December of 2015, however, plaintiffs' billing statements were significantly greater than those from previous years, and plaintiff did not pay those billings because defendant AUCRA allegedly failed to substantiate the billings.

Defendants filed a Demand for Arbitration with the American Arbitration Association ("AAA") on February 8, 2016, based on an arbitration provision contained in the RPA. Specifically, the arbitration provision requires binding arbitration through the AAA for "[a]ll disputes between the parties relating in any way to (1) the execution and delivery, construction *or enforceability* of [the RPA], (2) the management or operations of the Company, or (3) any other breach or claimed breach of [the RPA] or the transactions contemplated herein." Doc. No. 1-2, p. 4. (emphasis added).) After defendants' demand for arbitration was filed, plaintiffs filed the present lawsuit.

Plaintiffs note that, pursuant to R.S.Mo. § 435.350 arbitration clauses within insurance contracts are unenforceable. Plaintiff states that because the RPA is part of an insurance contract, the arbitration clause within the RPA is unenforceable. In response, defendants argue that the RPA is not part of an insurance contract, but rather provides Hillyard the opportunity to participate in profits and losses from its workers' compensation policies through a captive arrangement. Doc. No. 1, p. 1. Plaintiffs request an order from the Court staying any arbitration proceedings in this matter.

Defendants argue that the RPA is entirely separate from the workers' compensation policy, which is between Hillyard and a third party not named in this action. Further, as noted by defendants, the RPA contains a mandatory arbitration provision, with a delegation clause by which the parties agreed to assign all issues relating to arbitrability

exclusively to the arbitrator. Defendants move for an order of this Court compelling arbitration and dismissing the action or, in the alternative, staying this action pending the final outcome of arbitration.

II. Legal Standard

Pursuant to the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Eighth Circuit follows a two-step process in determining whether to compel arbitration. First, the Court determines whether a valid agreement to arbitrate exists between the parties. Second, the Court determines whether the specific dispute falls within the scope of that agreement. Kenner v. Career Educ. Corp., No. 4:11CV00997 AGF, 2011 WL 5966922, at *3 (E.D. Mo. Nov. 29, 2011) (citing Pro Tech Indus., Inc. v. URS Corp., 377 F.3d 868, 871 (8th Cir. 2004)).

III. Plaintiffs' Motion for a Stay of Arbitration Proceedings (Doc. No. 4) and Defendants' Motion to Compel Arbitration and Dismiss or Stay (Doc. No. 9)

At an initial glance, it appears that the arbitration agreement would be enforceable under the two-part test, above, as the parties do not dispute that they entered into the RPA of which the arbitration agreement is a part. Furthermore, all of plaintiffs' claims against AUCRA appear to arise out of or relate to the RPA, so the dispute falls within the scope of the agreement.

However, plaintiff argues that, pursuant to R.S.Mo. § 435.350 arbitration clauses within insurance contracts are unenforceable. R.S.Mo. § 435.350 provides, in part:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract, *except contracts of insurance* and contracts of adhesion, to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. (emphasis added).[1] Plaintiff further notes that while under the FAA arbitration clauses are generally enforceable, one exception to this general rule of preemption is contained in the McCarran-Ferguson Act ("McCarran-Ferguson"). 15 U.S.C. § 1012. McCarran-Ferguson provides "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act [of Congress] specifically relates to the business of insurance." See Standard Sec. Life Ins. Co. v. West, 127 F.Supp.2d 1064, 1066-67 (W.D. Mo. 2000). Plaintiff argues that because the RPA is part of an insurance contract, the arbitration clause within the RPA is unenforceable.

Defendants note that plaintiff did not challenge in its opening motion the validity of the delegation clause within the RPA, in which the parties agreed that all issues relating to arbitrability (including the enforceability of the RPA) were to be delegated to the arbitrator. In Rent-A-Center West, Inc. v. Jackson, 561 U.S. 63, 70-72 (2010), the Supreme Court found that where an arbitration agreement contains a delegation clause, a court may consider disputes about arbitrability only if the party makes a specific challenge to the delegation clause itself. See also Milan Express Co. v. Applied Underwriters Captive Risk Assur. Co., Inc., 590 Fed. Appx. 482, 484-85 (6th Cir. 2014) (citing Rent-A-Center, and finding on a substantially similar RPA prepared by the same defendant that the parties manifestly intended to submit the threshold question of arbitrability to the arbitrator); South Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co., Inc., 840 F.3d 138, 145-46 (3d Cir. 2016) (finding that challenges to an arbitration clause in an RPA substantially similar to those raised here are for the arbitrator to decide).

[1] Notably, under R.S.Mo. § 435.350, "reinsurance contracts are not 'contracts of insurance . . .' for purposes of the arbitration provisions of this section."

Defendants further note that the RPA incorporates the rules of the AAA (Doc. No. 1-2, ¶ 13(I)). The AAA's Commercial Rules also provide the arbitrator with the power to rule on his or her own jurisdiction, as well as the power to determine the existence or validity of a contract of which an arbitration clause forms a part. See Doc. No. 7, Decl. of Yvette M. Boutaugh, Ex. A, at 13 (R-7(a) and (b)). Defendants further argue that, in any event, the RPA is not a contract of insurance.

In its reply (Doc. No. 13), plaintiff argues that the delegation clause is invalid because the RPA is a contract of insurance. Plaintiffs also note in a footnote that the arbitrator in the Milan Express Co. case ultimately found that he lacked jurisdiction to handle the matter and sent the matter back to the district court. This Court, however, finds that such an issue is for the arbitrator to decide in the first instance under the guidance of the Supreme Court, as well as the language of the RPA and its delegation clause. As noted by the Third Circuit in South Jersey Sanitation Company,

> [f]aced with a disputed agreement whose fundamental nature remains obscure, we conclude that, by the clear and comprehensive arbitration provision in the RPA, it is for the arbitrator to determine what the precise nature of the RPA is and whether the RPA falls within [the state laws regarding arbitrability of insurance contracts].

840 F.3d at 146. Accordingly, the Court finds that the arbitrator is the proper party to determine issues of arbitrability and whether the underlying RPA is a contract of insurance.

Plaintiff further argues that forcing it to proceed with arbitration is against public policy, as insurance (particularly worker's compensation insurance) is heavily regulated by the state of Missouri and if Hillyard is forced to proceed in arbitration, this Court would be giving those tradition state rights to a private tribunal (the AAA) to decide. However, the Supreme Court has noted that the Federal Arbitration Act reflects "a liberal federal

policy favoring arbitration agreements." Moses H. Cone Mem. Hosp. v. Mercury Constru. Corp., 460 U.S. 1, 24 (1983). Given the liberal public policy in enforcing arbitration agreements, the Court does not believe that compelling arbitration in these circumstances is against public policy as discussed by plaintiff.

Accordingly, for all the above-stated reasons, the Court finds that defendants' motion to compel arbitration should be **GRANTED.** Although defendants request the Court dismiss this action pending arbitration, the Court finds their alternative request for a stay pending arbitration to be the better result. Accordingly, this matter will be stayed pending arbitration pursuant to 9 U.S.C. § 3.

IV. Conclusion

For the reasons set forth in this order, (1) Plaintiffs' Motion for a Stay of Arbitration Proceedings (Doc. No. 4) is **DENIED**; (2) Defendants' Motion to Compel Arbitration and Dismiss or Stay (Doc. No. 9) is **DENIED IN PART** as it relates to dismissal of this matter and **GRANTED IN PART** in all other relevant aspects. The parties shall file status reports every six months indicating the status of arbitration, with the first of those reports due on or before **OCTOBER 4, 2017.**

IT IS SO ORDERED.

Date February 28, 2017
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge