

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

AMERICAN BANKERS INSURANCE
COMPANY OF FLORIDA,

Case No. 2:08-cv-13522

ATLAS ASSURANCE COMPANY OF
AMERICA, n/k/a PEERLESS INDEMNITY
INSURANCE COMPANY,

Judge George Caram Steeh

MONARCH GENERAL INSURANCE
COMPANY OF OHIO, n/k/a GENERAL STAR
INSURANCE COMPANY,

Magistrate Donald A. Scheer

NORTH AMERICAN COMPANY FOR
PROPERTY AND CASUALTY INSURANCE,
n/k/a XL REINSURANCE AMERICA, INC.,

Petitioners,

and

NATIONAL CASUALTY COMPANY,

Respondent.

**MEMORANDUM OF LAW IN SUPPORT OF
RESPONDENT'S MOTION TO SEAL TWO
ITEMS PURSUANT TO LOCAL RULE 5.3(b)**

TABLE OF CONTENTS

Index of Authoritiesii

Statement of Issue Presentediii

Controlling or Most Appropriate Authority
for Relief Requestediv

Statement of the Case.....1

Argument2

Conclusion4

INDEX OF AUTHORITIES

Page(s)

Cases

Ford v. Hamilton Investments, Inc., 29 F.3d 255 (6th Cir. 1994).....3

F. T.C. v. Standard Financial Management Corp., 830 F.2d 404 (1st Cir. 1987)3

Joy v. North, 692 F.2d 880 (2d Cir. 1982).....3

Lugosch v. Pyramid Company of Onondaga, 435 F.3d 110 (2d Cir. 2006).....2

Picard Chem. Inc. Profit Shar. Plan v. Perrigo Co.,
951 F. Supp. 679 (W.D. Mich. 1996)3

U.S. v. Amodeo, 44 F.3d 141 (2d Cir. 1995).....2

STATEMENT OF ISSUE PRESENTED.

Should the Final Award and National Casualty's Motion and Memorandum to Dismiss for Lack of subject matter jurisdiction be sealed because they are items to which the common law right of public access does not attach?

**CONTROLLING OR MOST APPROPRIATE
AUTHORITY FOR RELIEF SOUGHT.**

F. T.C. v. Standard Financial Management Corp., 830 F.2d 404 (1st Cir. 1987)

Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982)

Lugosch v. Pyramid Company of Onondaga, 435 F.3d 110 (2d Cir. 2006).

Picard Chemical Inc. Profit Sharing Plan v. Perrigo Co., 951 F. Supp. 679, 690-691
(W.D. Mich. 1996)

U.S. v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995).

STATEMENT OF THE CASE

Respondent National Casualty Company (“National Casualty”) submits this memorandum of law in support of its motion, under LR 5.3(b), requesting that the Final Award and the Rule 12(b)(1) motion and memorandum to dismiss the petition for lack of subject matter jurisdiction be placed under seal.

According to Sixth Circuit precedent, the Court lacks subject matter jurisdiction over this action because the Final Award does not satisfy the amount in controversy requirement. To establish this lack of subject matter jurisdiction, National Casualty must provide the Court with a copy of the Final Award. National Casualty would simply file the Final Award with the Court, but like the Petitioners, National Casualty is hesitant to do so because that would violate the Arbitration Panel’s Confidentiality Order. National Casualty’s LR 5.3(b) motion seeks, then, to supply the Court with what it needs to determine whether jurisdiction exists while at the same time honoring the Arbitration Panel’s order.

Impeding resolution of the jurisdictional issue is Petitioners’ assertion that the public is entitled to access the Final Award. Petitioners are so concerned with asserting the right of public access that they miss the most important question, namely, whether the Final Award is a document to which the common law right of public access attaches. Previous cases addressing this subject demonstrate that public access attaches only to those documents used by the court to adjudicate the parties’ substantive rights.

In this instance, National Casualty would be submitting the Final Award for the sole purpose of demonstrating that the Court lacks subject matter jurisdiction over the Petition. Resolution of the jurisdictional issue is not an adjudication of the parties’

substantive rights. Consequently, the Final Award and National Casualty's motion to dismiss are not items to which the common law right of public access attaches.

Therefore, ordering that the Final Award and motion to dismiss be placed under seal is not a transgression of the law.

If the Court determines that it lacks subject matter jurisdiction, then the issue of public access becomes moot because there is no matter to which the right can attach. In the unlikely event the Court were to determine that it possesses subject matter jurisdiction, then the Court could revisit whether the Final Award and motion to dismiss should remain under seal.

ARGUMENT

The Final Award and National Casualty's Motion and Memorandum to Dismiss for Lack of Subject Matter Jurisdiction should be sealed because they are items to which the common law right of public access does not attach.

There are no material facts in dispute relevant to National Casualty's sealing motion. The only question of law is whether the Final Award and motion to dismiss are items to which the common law right of public access to court records attaches.

National Casualty does not dispute that a common law right of public access to court records exists. But before that right attaches, the court must first determine whether the document in question is a judicial document. *Lugosch v. Pyramid Company of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). Indeed, "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." *Id.* (quoting *U.S. v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995)). In order to be designated a judicial document the item must be relied upon by the

court in determining the litigants' substantive rights and in performing its adjudicatory function. *Picard Chemical Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F. Supp. 679, 690-691 (W.D. Mich. 1996)(quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) and citing *Federal Trade Commission v. Standard Financial Management Corp.*, 830 F.2d 404, 410 (1st Cir. 1987)); *Amodeo*, 44 F.3d at 145 (in order to be designated a judicial document, the item filed must be relevant to the performance of the judicial function and useful in the judicial process).

Sixth Circuit precedent is clear on how courts are to determine the amount in controversy for jurisdictional purposes when asked to confirm an arbitration award. If the amount awarded by the arbitration panel is less than the \$75,000 jurisdictional requirement, then subject matter jurisdiction is lacking. *Ford v. Hamilton Investments, Inc.*, 29 F.3d 255, 260 (6th Cir. 1994)(the amount in dispute during the arbitration is irrelevant).

The only reason then that National Casualty needs to submit the Final Award is solely for the purpose of providing the Court with the one item it needs to determine whether it has jurisdiction to hear the parties' dispute. The Final Award is not being filed so that the Court can perform the adjudicatory function of resolving the parties' substantive rights. These circumstances, when combined with the principles announced in the aforementioned cases, supports the conclusion that the Final Award is not a judicial document. Thus, the Court may place the Final Award and National Casualty's motion to dismiss under seal without violation of the public's common law right of access to court records.

If the Court lacks jurisdiction, then the sealing/public access issue becomes moot.

Stated another way, the public's right of access cannot attach to a case that does not exist. If the Court were to find, however, that jurisdiction does exist and the Court were ultimately to arrive, then, at adjudicating the confirmation issue (the parties' substantive right), it could revisit the sealing/public access issue at that time.

CONCLUSION

The right of public access to court records only comes into play if the document in question is used by the court to adjudicate the litigants' substantive rights. National Casualty asks that the Final Award and its motion to dismiss be placed under seal so that the Court can determine whether it possesses subject matter jurisdiction. The Court's resolution of the jurisdictional issue is not an adjudication of the parties' substantive rights. Consequently, the right of public access has not attached to the Final Award or National Casualty jurisdictional dismissal motion, and thus, sealing these two items does not contravene the law. Therefore, National Casualty respectfully requests an order of the Court placing the Final Award and National Casualty's 12(b)(1) motion to dismiss under seal.

Respectfully submitted,

CLARK HILL PLC

By: s/James E. Brenner
Attorneys for Respondent
500 Woodward Avenue, Suite 3500
Detroit, MI 48226-3435
(313) 965-8300
jbrenner@clarkhill.com
(P11178)

Of Counsel:

Mark C. Kareken
National Casualty Company
400 Westwood Drive
P.O. Box 8101
Wausau, WI 54402
Phone: 715.843.8739
Facsimile: 715.843.8798
E-mail: karekenm@nationwide.com

Dated: October 1, 2008

Certificate of Service

I hereby certify that on Wednesday, October 1, 2008, my assistant electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to Ronald S. Siegel, and I hereby certify that my assistant mailed by United States Postal Service the paper to the following non-ECF participant: James Veach, Mound Cotton Wollan & Greengrass, One Battery Park Plaza, New York, New York 10004 and Mark C. Kareken, National Casualty Company, 400 Westwood Drive, P.O. Box 8101, Wausau, WI 54402.

CLARK HILL PLC

s/James E. Brenner
Attorneys for Respondent
500 Woodward Avenue, Suite 3500
Detroit, MI 48226-3435
(313) 965-8300
jbrenner@clarkhill.com
(P11178)

Dated: October 1, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN BANKERS INSURANCE
COMPANY OF FLORIDA, ET AL.,

Case No. 08-13522

Plaintiffs,

Honorable Nancy G. Edmunds

v.

NATIONAL CASUALTY COMPANY,

Defendant.

ORDER GRANTING IN PART DEFENDANT'S MOTION TO SEAL TWO ITEMS [7]

On October 8, 2008, this matter came before the Court on Defendant's motion to seal two items pursuant to Local Rule 5.3(b). Being fully advised in the premises, having read the pleadings, and for the reasons stated on the record, the Court GRANTS Defendant's motion IN PART. Defendant shall be allowed to temporarily file its Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and the Final Award under seal until the Court has rendered a decision on the subject matter jurisdiction issue.

SO ORDERED.

s/Nancy G. Edmunds
Nancy G. Edmunds
United States District Judge

Dated: October 8, 2008

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on October 8, 2008, by electronic and/or ordinary mail.

s/Carol A. Hemeyer
Case Manager