

(EDky-111)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

CIVIL MINUTES -- GENERAL

Case No. 83-226 At PIKEVILLE

Date October 25, 1983

Style BALLOU CLAIMS SERVICE, INC. VS: UNDERWRITERS ADJUSTING COMPANY,  
An Illinois Corporation

DOCKET ENTRY

PRESENT:

HON. G. WIX UNTHANK, JUDGE

M. Bevins  
Deputy Clerk

S. Lindstrom  
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Francis Dale Burke

ATTORNEYS PRESENT FOR DEFENDANTS:

Marrs Allen May

David Butler  
(By Phone)

PROCEEDINGS: HEARING ON MOTION TO DISMISS OR TRANSFER (BY TELEPHONE CONFERENCE)

An informal conference was had in chambers and thereafter recessed to the law offices of Honorable Francis Dale Burke, on proceedings as stated above with counsel present as noted. The Court heard counsel and being sufficiently advised,

ORDERED HEREIN:

- (1) Motion of the defendant to dismiss or in the alternative, to transfer this action to the State of New York, be, and hereby is, TAKEN UNDER ADVISEMENT;
- (2) Discovery by all parties shall be completed within sixty (60) days, on or before December 27, 1983;

CONTINUED ON PAGE TWO

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY

CIVIL MINUTES -- GENERAL

PIKEVILLE

Case No. 83-226 At PIKEVILLE

Date October 25, 1983

Style BALLOU CLAIMS SERVICE, INC. VS: UNDERWRITERS ADJUSTING COMPANY,  
An Illinois Corporation

DOCKET ENTRY

CONTINUATION PAGE TWO

PRESENT:

HON. G. WIX UNTHANK, JUDGE

M. Bevins  
Deputy Clerk

S. Lindstrom  
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

PROCEEDINGS: CONTINUED FROM PAGE ONE

- (3) The parties shall file memoranda on or before December 27, 1983, which shall contain the following:
  - A. The parties shall establish that there is jurisdiction of the subject matter in New York;
  - B. A statement of the logistics of trying this case either in the United States District Court at Pikeville, Kentucky, or in the State of New York;
  - C. The length of time that will be utilized in trying this case;
  - D. A list of all witnesses each party proposes to use at the trial of this case;
  - E. A list of all exhibits each party proposes to use at the trial of this case;
- (4) Responsive memoranda by each party shall be filed within ten (10) days, on or before January 3, 1984, at which

CONTINUED ON PAGE THREE

Initials of Deputy Clerk MB

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY

PAGE THREE

PIKEVILLE

CIVIL MINUTES --- GENERAL

Case No. 83-226 At PIKEVILLE

Date October 25, 1983

Style BALLOU CLAIMS SERVICE, INC. VS: UNDERWRITERS ADJUSTING COMPANY,  
An Illinois Corporation

DOCKET ENTRY

CONTINUATION PAGE THREE

PRESENT:

HON. G. WIX UNTHANK, JUDGE

M. Bevins  
Deputy Clerk

S. Lindstrom  
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

PROCEEDINGS: CONTINUED FROM PAGE TWO

time the matter shall stand submitted for consideration  
by the Court.

This the 31<sup>st</sup> day of October, 1983.

G. Wix Unthank  
G. WIX UNTHANK, JUDGE

Initials of Deputy Clerk MB

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE DIVISION

CIVIL ACTION NO. 83-226

BALLOU CLAIMS SERVICE, INC.,

PLAINTIFF,

VS.

MEMORANDUM OPINION AND ORDER

UNDERWRITERS ADJUSTING COMPANY,

DEFENDANT.

\* \* \* \*

This matter is before the Court on the defendant's motion to dismiss this action, or in the alternative, to transfer same to the United States District Court for the Southern District of New York.

The merits of this controversy notwithstanding, the parties are presently at odds over the enforcement of one of terms of their contract concerning forum selection.

Section XXI.B. of their contract provides:

The parties agree that any action brought by either party in any court, whether federal or state, shall be brought within the State of New York and do hereby waive all questions of personal jurisdiction or venue for the purposes of carrying out this provision.

Generally speaking, the Court is of the opinion that the parties to any contract should be bound by the terms of that contract, assuming that the contractual terms are not illegal, overreaching, or unconscionable, that neither party

was coerced into executing the contract, and that the parties are of relatively equal bargaining positions.

A review of the record reveals that none of the terms of the disputed contract are illegal, overreaching, or unconscionable. Additionally, neither party appears to have been coerced into executing said contract, and the parties hereto are of relatively equal bargaining positions, being sophisticated in the ways of the business world.

Therefore, the Court is guided by the language of M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), which held that the party opposing the enforcement of a forum selection clause must show that the "trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." Ibid, at 18.

It is obvious to the Court that the plaintiff's arguments advanced in favor of non-enforcement of the forum selection clause do not pass muster under the foregoing test.

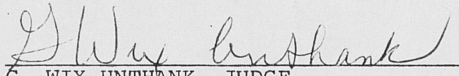
In passing, the Court notes that it indeed has subject matter jurisdiction and personal jurisdiction over this action; however, such facts are presently irrelevant. The issue is whether the parties should be bound by the terms of their contract, wherein they each waived jurisdiction and venue in any court, state or Federal, except for the state of New York.

The Court has considered the record below and the memoranda of the parties in relation to the defendant's motion to dismiss or to transfer this action, and being duly and sufficiently advised,

IT IS HEREBY ORDERED, as follows:

1. The plaintiff's motion for partial summary judgment is PASSED.
2. The defendant's motion to dismiss this action or to transfer same is SUSTAINED, and this action is now TRANSFERRED to the United States District Court for the Southern District of New York.
3. This action is now DISMISSED and STRICKEN from the Court's active docket.

This the 6<sup>th</sup> day of March, 1984.

  
G. WIX UNTHANK, JUDGE

TO: Judge  
FROM: Donald  
DATE: 10-24-83  
RE: Ballou Claims Service, INc. v. Underwriters Adjusting Company  
Hearing, Tues., 10-25-83, at 2:30.

Synopsis: This action concerns breach of contract.

Def. has moved the Court to dismiss or, in the alternative, to transfer to the U.S. District Court for the Southern District of New York on the grounds that (1) the contract specifies that any action brought concerning said contract specifies that it shall be brought in N.Y., and (2) there is a related action pending in the court there.

Section XXI.B. of the contract provides that:

"The parties agree that any action brought by either party in any court, whether federal or state, shall be brought within the State of New York and do hereby waive all questions of personal jurisdiction or venue for the purposes of carrying out this provision.

Comments:

1. Def.'s motion seems to be in order. Its memo in support of its motion to dismiss or transfer (Item 3) is good.
2. Factors the Court should consider in enforcing a forum-selection clause:
  - a. which law governs the formation and construction of the contract
  - b. the residency of the parties;
  - c. the place of execution and/or performance of the contract;
  - d. the location of the parties and witnesses probably involved in the litigation;
  - e. the inconvenience to the parties;
  - f. whether the provision was equally bargained for.
3. The law seems to be pretty well-settled that the courts are enforcing forum-selection provisions in contracts unless there are elements of fraud, coercion, unequal bargaining power, lack of sophistication on the part of one of the parties, etc., involved.
4. I vote to enforce the forum-selection clause in this contract and transfer this case to the Southern District of New York.
5. Items 3, 5, & 7 of the record pertain to the motion to dismiss.

Other pending motions:

1. Plff has moved for partial S/J.

*See back*

