

SUMMER 2006



Recent Developments in
Insurance Company Insolvency



Dear Friends:

As Dennis LaGory's enclosed article illustrates, our once comfortable assumptions about the legal and regulatory framework surrounding insurance company insolvency are being vigorously challenged. In Pennsylvania and elsewhere, courts are showing increased sympathy for policyholder attempts to cut through their contractual relationship with the insolvent direct carrier and collect instead from the insolvent's reinsurer. The willingness to recognize policyholder rights against reinsurers with whom the policyholder is not in privity raises all kinds of issues. Not least among them the prospect that such reinsurers face dual liability to both the cedent estate and the policyholder. In such dangerous territory, reinsurers should very carefully consider

when and how they deal with these two sets of competing claimants.

New Hampshire's Home Insurance Company receivership is putting at issue the very nature and definition of statutory priorities of distribution. There, the receiver has advanced a novel proposal to offer cedents to the estate monetary incentives to file reinsurance claims against the estate. Historically, cedents of an insolvent estate have rarely found it worthwhile to make such filings, since receiverships usually do not have sufficient assets to make any payment at all on account of such general creditor status claims. It is not expected that the Home estate will have sufficient assets either. Nevertheless, under the statutory insolvency clause, approval of such cedent claims, even if not paid, may trigger the receiver's right to collect corresponding retrocessional recoveries from retrocessionaires. Given this potential to augment the estate, it is a little surprising that the Home Liquidation represents the first prominent example of a receivership attempting to incentivise cedent filings. Whether such incentives violate the statutory scheme regulating priorities of distribution is presently before the New Hampshire Supreme Court.

A major insurer insolvency development, and one that deserves a lot more attention than it has received, is the recent enactment of Chapter 15 of the U.S. Bankruptcy Code, which significantly expands the scope of relief available to foreign debtors in the United States bankruptcy courts and streamline the procedures for obtaining that relief.

The federal government is not the only entity engaged in statutory redrafting and innovation. The National Association of Insurance Commissioners recently adopted its Insurer Receivership Model Act ("IRMA"). IRMA is a picnic basket of statutory "reforms" sought for years by insurance regulators including, inter alia, expansion of state receivership court jurisdiction, preferential receiver right to recover costs of litigation, enhanced status of "Conservation" proceedings, mandatory reinsurance commutations, and express statutory authorization for the type of reinsurance incentive scheme advocated by the receiver in the Home Insurance Company receivership.

For more than 30 years, lawyers in Schiff Hardin's Reinsurance Group have advised cedents, reinsurers, receivers, brokers, and other financial institutions concerning the increasing complexities of insurer insolvency law. The new developments that Dennis discusses in his article only further complicate what has long been an unusually complex and technical area of the law. We will be pleased to try and help you with any questions or issues you may have with respect to these matters.

Sincerely,

David M. Spector

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Recent Developments in Insurance Company Insolvency



RECENT DEVELOPMENTS IN INSURANCE COMPANY INSOLVENCY

By Dennis LaGory

An unusual number of eventful developments in the law of insurance company insolvencies have recently occurred, both in the courts and the legislatures. Given the increasing frequency of catastrophic losses and the persistent growth of long-tail liabilities such as asbestos, there is every indication that these developments may represent a trend. To assist our clients and friends in staying abreast of this trend, we have published the following report of notable recent judicial and legislative developments in the area of insurance company insolvency. It is our intention to update and distribute similar reports on as developments warrant.

NOTABLE COURT DECISIONS

We have witnessed a significant number of cases dealing with issues arising in connection with insurance company insolvencies. Courts have addressed the ability of an insolvent company's policyholders to recover direct payments from the company's reinsurers. One court has approved a receiver's plan to augment the estate's recovery from the insolvent company's reinsurers by paying incentives for the filing of claims. Others have defined the parameters of a creditor's right of offset and specified the appropriate forum for adjudicating that right. The more notable of these cases are discussed below.

Direct Actions

Courts determining the rights of policyholders of the insolvent Legion, Villanova and Reliance Insurance Companies have continued to stray from the heretofore well-established doctrine that policyholders of an insolvent insurance company, lacking privity with the company's reinsurers, generally cannot obtain direct access to proceeds of the company's reinsurance absent an express cut-through agreement. Policyholders have advanced a variety of theories in support of such claims — including one by which the reinsurer becomes liable under its ceding company's policies.

Direct Insured as Third-Party Beneficiary

In *Koken v. Villanova Insurance Co.*,¹ the Supreme Court of Pennsylvania issued a terse, per curiam order affirming the Commonwealth Court's controversial decision allowing intervenors who were corporate policyholders of Legion and Villanova to recover their carriers' reinsurance proceeds, based upon the policyholders' status as third-party beneficiaries of the reinsurance. According to the Commonwealth Court, general rules insulating reinsurers from liability to direct policyholders are irrelevant to the relationship between Legion and the intervenors:

The usual occasion for reinsurance has no application to Legion. The Policyholder Intervenor, not Legion, placed the reinsurance; Legion neither adjusted nor funded claims; and Legion did not seek to expand its underwriting capacity through reinsurance. Indeed, it sought to avoid any underwriting because its business plan called for the generation of fees not underwriting profits.²

¹583 Pa. 400, 878 A.2d 51 (Pa. 2005).

²*Koken v. Legion Ins. Co.*, 831 A.2d 1196, 1234 (Pa. Commw. Ct. 2003).

The lower court decision can be seen as an effort to ignore the formalities of a "fronting" arrangement and enforce the expectations of policyholders who, at the time their policies were issued, dealt almost exclusively with the reinsurer and intended that the reinsurer should assume all underwriting risk and claims administration.

Justice Newman dissented from the Supreme Court's order, joined by Justice Castille. The Dissent argued that the majority's position contravened Section 534 of the Insurance Department Act.³ This provision provides in pertinent part that "[p]ayment made directly to an insured or other creditor shall not diminish the

reinsurer's obligation to the insurer's estate except when the reinsurance contract provided for direct coverage of an individual named insured and the payment was made in discharge of that obligation."⁴ Noting that the statute makes no exceptions for insureds engaged in "fronting" arrangements,⁵ the Dissent contended that the lack of any such express language in the provisions of the reinsurance agreement precluded recovery by the policyholders.

Constructive Novation

In another per curiam order, the Pennsylvania Supreme Court vacated the decision of the Commonwealth Court in *Koken v. Reliance Insurance Company* and remanded the case for discovery relating to the issue of whether the policyholder physicians were entitled to direct access to the reinsurance proceeds otherwise payable to their insolvent malpractice insurer.⁶

The Commonwealth Court had vacated a report and recommendation, made by a referee as a matter of law without conducting discovery, which dismissed the policyholders' claims for direct access to the reinsurance. In doing so, the lower court relied on the physicians' use of Reliance as a fronting company to channel business to its subsidiary reinsurer, noting "that the insureds . . . had little or no contact with Reliance and seemingly exclusive contact with the reinsurer."⁷ The Commonwealth Court found that the reinsurer's conduct, including the direct administration of policyholder claims, effected a novation of the reinsurance contracts, by which the policyholders became entitled to direct payment of proceeds.⁸

³*Villanova*, 583 Pa. at 409-410, 878 A.2d at 56-57 (citing 40 P.S. §221.34).

⁴*Id.* (emphasis in original).

⁵883 Pa. at 411 n. 7, 878 A.2d at 57.

⁶891 A.2d 704 (Pa. 2006).

⁷846 A.2d 167, 171 (Pa. Commw. Ct. 2004).

⁸*Id.* at 172.

“The lower court decision can be seen as an effort to ignore the formalities of a ‘fronting’ arrangement and enforce the expectations of policyholders who, at the time their policies were issued, dealt almost exclusively with the reinsurer and intended that the reinsurer should assume all underwriting risk and claims administration.”

It is unclear how the case might be decided on remand. However, two facts appear significant. First, the reinsurance agreements at issue in *Reliance* do appear to contain provisions expressly excluding the third-party beneficiary status of parties not in privity.⁹ It is not at all clear that this language was before the Commonwealth Court when it issued its decision. If considered, this language might prove significant because, as the *Legion* court recognized, “when a reinsurance contract intends to exclude a third-party beneficiary, there is express language that accomplishes that intent.”¹⁰

Second, the court’s own guidelines for direct access to reinsurance proceeds state that “the reinsurance contract must specifically provide for payment to an individual named insured, and that insured must be identified with particularity either by name or policy number in the reinsurance contract.”¹¹

However, whether the foregoing factors will make a difference on remand is open to question. As Justice Newman reiterated in his Concurring Statement, Section 534 of the Insurance Department Act “explicitly prohibits an insured from obtaining direct access to reinsurance funds absent express language in the provisions of the reinsurance contract.”¹² Notwithstanding, the Commonwealth Court may well attempt to distinguish the language of the statute, the contract and the order in the interest of obtaining what it considers an equitable result.

Reinsurer as Undisclosed Principal

In *Law Offices of David J. Stern v. SCOR Reinsurance Corporation*,¹³ a U.S. District Court in Florida held that policyholders stated a cause of action against their direct insurer’s reinsurer on the theory that the reinsurer was an undisclosed principal of the direct insurer’s policies.

The plaintiffs, an attorney and his professional corporation, were insured under professional liability policies issued by Legion. Legion was reinsured by SCOR Reinsurance Corporation (“SCOR”). The plaintiffs had brought a coverage action against Legion, alleging a breach of Legion’s obligation to indemnify them for the settlement of a claim. During discovery in the coverage action, the plaintiffs learned the facts on which they based their allegations that SCOR was an undisclosed principal. However, they did not plead SCOR as a defendant. While cross-motions for summary judgment were pending in the coverage action, Legion was placed in rehabilitation and the action was stayed.

Plaintiffs thereupon brought an action in the District Court, alleging that SCOR was directly liable to them as undisclosed principal of the policies because SCOR: (i) intentionally conferred upon Legion authority to enter into the policies; (ii) assumed one hundred percent of the risk on the policies, which were merely fronted by Legion; (iii) exercised direct oversight over the third-party administrators that administered the underlying claim; and (iv) possessed approval authority over the settlement of claims under Legion’s policies. In the alternative, the plaintiffs alleged that SCOR tortiously interfered with their contractual relationship with Legion by employing its claims counsel and third-party administrator to induce Legion to breach its policy obligations to the plaintiffs.

⁹Statutory Liquidator’s Motion for Post-Trial Relief from the March 18, 2004 Amended Opinion and Order, at 15 (March 29, 2004).

¹⁰Legion, 831 A.2d at 1239.

¹¹Guidelines 4(a) (quoted in Liquidator’s Motion for Post-Trial Relief, supra, at 8 n.3).

¹²Reliance, 891 A.2d at 704.

¹³354 F. Supp. 2d 1338 (S.D. Fla. 2005).

SCOR moved to dismiss the complaint, arguing that under well established Florida law, a reinsurer has no obligation to direct policyholders such as plaintiffs and, further, that because Legion is insolvent, all reinsurance proceeds are payable to Legion, its receiver, liquidator, conservator or statutory successor.

The court refused to dismiss, noting that SCOR’s arguments based on its reinsurance agreement with Legion were irrelevant to the plaintiff’s claims:

Plaintiff’s Complaint seeks recovery for SCOR Re’s alleged breach of the Legion Policies, not the Reinsurance Agreement. Alternatively, Plaintiffs are seeking recovery for SCOR Re’s alleged tortious interference with the Legion Policies.

As Plaintiffs are not seeking recovery under the Reinsurance Agreement, Defendant’s arguments regarding a reinsurer’s liability to a policyholder, whether correct as a matter of law or not, are misplaced.¹⁴

The court also rejected SCOR’s contention that the plaintiffs had made a binding election of remedies by failing to join SCOR in their coverage action against Legion after learning the facts on which they based their undisclosed principal claim. The court noted that “commencement and prosecution of a suit against the agent short of final judgment does not constitute an election.”¹⁵

The court held that the tortious interference claims were not barred by the economic loss doctrine. Finally, the court decided that SCOR’s contention that alleged acts of tortious interference were privileged actions, taken to protect its economic interests, constituted an affirmative defense that raised questions of fact inappropriate for determination in a motion to dismiss.

Priorities of Distribution

Judge Kathleen McGuire of the Superior Court for Merrimack County, N.H., approved a compromise whereby certain English companies that ceded risk to the now insolvent Home Insurance Company (the “Home”) might recover up to \$50 million as an incentive to file and pursue claims against the Home estate.¹⁶ The court classified the incentive payments as administrative expenses, incurred by the liquidator in collecting reinsurance proceeds from the Home’s retrocessionaires.

The Home transacted certain reinsurance business, through its unincorporated UK Branch, as a member of the American Foreign Insurance Association (“AFIA”). Numerous overseas companies ceded risks to the Home as a member of AFIA (the “AFIA Cedents”). The Home, in turn, retroceded these risks to the other members of AFIA. In 1984, the Insurance Company of North America (“INA”) assumed AFIA’s reinsurance obligations to the Home, executing an *Insurance*

“Plaintiff’s Complaint seeks recovery for SCOR Re’s alleged breach of the Legion Policies, not the Reinsurance Agreement.”

¹⁴Id. at 1343.

¹⁵Id. at 1344 (citations omitted).

¹⁶Order, *In the Matter of the Liquidation of the Home Ins. Co.*, Docket No. 03-E-0106 (Sept. 22, 2005) (the “9/22/05 Order”).

and Reinsurance Assumption Agreement (the "Assumption Agreement"). Through a succession of complicated transactions, INA's obligations under the Assumption Agreement came to be exercised by certain members of the ACE Group of Companies ("ACE").

After a long period of troublesome results, the Home was placed in receivership, with primary liquidation proceedings being initiated in New Hampshire on June 13, 2003. The Home's UK Branch had written generally profitable business, so that there was a substantial sum that needed to be repatriated to the liquidator in the primary proceedings. Accordingly, ancillary proceedings were initiated in the UK, in which the High Court of Justice in London appointed Joint Provisional Liquidators ("JPLs"). An Informal Creditors Committee ("ICC") was also assembled, consisting of nine AFIA Cedents representing 75 percent of the creditors' claims by value.

The ICC members expressed concern to the JPLs and the New Hampshire liquidator that they would not obtain a recovery from the Home estate in the primary proceeding, because they would be considered Class V residual creditors under New Hampshire law.¹⁷ Under these circumstances, filing proofs of claim and thereafter pursuing their claims in excess of the amounts necessary to establish setoffs would be futile acts. The liquidator alleged he also had reason to believe some AFIA Cedents were considering entering into cut-through agreements with the ACE.

According to the liquidator, any such failure of the AFIA Cedents to file and prosecute claims against the Home estate would reduce the assets available for distribution to direct policyholders of the Home. In New Hampshire, as in every other state, no claims can be allowed unless they are filed with the liquidator.¹⁸ Once a claim is allowed, however, the Assumption Agreement provides that "this reinsurance is payable directly to [the Home], or its liquidator, . . . on the basis of liability of [the Home] **without diminution because of the insolvency of [the Home] or because the liquidator . . . has failed to pay all or a portion of any claim.**"¹⁹ The liquidator, therefore, needed the AFIA Cedents to file claims in order to trigger retrocessional cover that would exceed any amounts the estate paid to the AFIA Cedents.

The liquidator and JPLs devised a compromise by which they intended to provide the incentives they believed were necessary to induce the AFIA Cedents to file and pursue claims. As a first step in this compromise, a Scheme of Arrangement was entered into between the Home and the AFIA Cedents, pursuant to Section 425 of the English Companies Act. By the terms of the Scheme, the estate would retain 50 percent of the "net proceeds" received from the Home's AFIA retrocessionaires and, then, pay the other 50 percent to the AFIA Cedents. These payments, plus certain costs awarded for wrongly decided claims, would constitute "net recoveries," which would be paid to the AFIA Cedents, *pari passu*, according to the value of their claims against the Home, as determined in the New Hampshire liquidation. This AFIA compromise was subject to approval by the High Court of Justice in London and the Superior Court in New Hampshire.

ACE opposed the compromise, contending that the liquidator exceeded his authority by providing the AFIA Cedents a greater recovery than that to which they

¹⁷RSA 402-C:44.V. Under New Hampshire law, obligations to the first four classes of creditors must be satisfied before any Class V creditor receives a payment.

¹⁸RSA 402-C:37 & 402-C:57.

¹⁹Assumption Agreement, at 6 (emphasis added).

would have been entitled as Class V creditors. Benjamin Moore, a Class II creditor and member of the Berkshire Hathaway Group of Companies, also opposed the compromise. The Superior Court approved the compromise in April 2004. ACE and Benjamin Moore appealed the decision to the New Hampshire Supreme Court which, in September 2004, remanded the case with orders for the Superior Court to, *inter alia*, determine whether the proposed payments to the AFIA Cedents constituted Class I administrative expenses under New Hampshire Law and to create a factual record regarding the fairness and reasonableness of the compromise.

In October 2004, the Superior Court ruled that the payments to the AFIA Cedents constituted "actual and necessary costs of recovering assets of the insurer" and, therefore, constituted Class I administrative expenses.²⁰ After the conclusion of a period of extensive discovery, the Superior Court conducted a five-day hearing at which 11 witnesses testified on the reasonableness of the liquidator's fears that the AFIA Cedents would negotiate cut-throughs and would fail to pursue their claims in excess of setoffs.

On September 22, the court issued its ruling. Observing that "[t]he hearing provided a glimpse into the rough and tumble world of the reinsurance business within the liquidation setting,"²¹ Judge McGuire found "that the Liquidator has met his burden of proving that a reasonable liquidator under the circumstances would have concluded that the agreement was necessary to preserve access to and marshal the AFIA reinsurances."²²

The ACE companies and Benjamin Moore have appealed the decision to the New Hampshire Supreme Court, raising the following issues: (i) whether the liquidator's general authority to act in the best interest of the Home's policyholders overrides the specific provisions of the priority statute; (ii) whether the payments to the AFIA Cedents constitute administrative expenses; (iii) whether the Superior Court applied the wrong test in determining the necessity of the compromise; (iv) whether the Superior Court paid undue deference to the liquidator's business judgment; and (v) whether the Superior Court improperly failed to examine whether the AFIA Cedents would have filed claims in the absence of the compromise.

Briefing has now closed. The Reinsurance Association of America has filed an *amicus* brief in opposition to the Agreement. The National Association of Insurance Commissioners and the National Conference of Insurance Guaranty Funds have filed *amicus* briefs in support of the Agreement. In the course of this briefing, a drafting note in the recently adopted NAIC Insurance Receivers Model Act has figured prominently. The drafting note appears to recognize that payments made to lower priority claimants to assist in the recovery of assets for distribution to higher priority claimants, may constitute administrative costs.²³

Oral arguments took place on June 7, 2006. The justices posed probing questions to the representatives of both sides. A final decision is likely to be entered by the Fall. Both the Superior Court and the Supreme Court denied the appellants' motions to stay proceedings related to the AFIA Cedents claim pending a resolution of the appeal. In November 2005, the High Court of Justice approved the Scheme of Arrangement, holding that granting approval would not

²⁰See RSA 402-C:44.I.

²¹9/22/05 Order at 26-27.

²²*Id.* at 30.

²³See *infra*, at __.

interfere with the New Hampshire Supreme Court's ultimate authority to approve the compromise.

Setoffs

Several recent cases have addressed the circumstances under which a creditor of an insolvent insurance company may successfully claim a right of setoff.

Triangular Setoffs

In *Koken v. Legion Insurance Company*,²⁴ the Commonwealth Court of Pennsylvania approved a form of "triangular" setoff, whereby net balance accounting was deemed an appropriate means of determining an insolvent company's debts to its affiliate and a creditor.

Eagle Star Reinsurance Company Ltd. ("Eagle Star"), Legion Insurance Company ("Legion Insurance") and its Illinois affiliate, Legion Indemnity Company ("Legion Indemnity"), participated in an international property insurance program managed by Global Managers, Inc. (the "GMI Program"). Eagle Star served as lead underwriter for the reinsurers participating in the GMI Program. Because neither Legion Insurance nor Legion Indemnity were licensed to write direct coverage outside the United States, Eagle Star served as a fronting company on their behalf for certain international risks. Eagle Star also fronted certain large domestic risks that were beyond the underwriting capacity of the Legion entities. Legion Insurance or Legion Indemnity, as appropriate, would retrocede this fronted business to various quota share reinsurers, including Eagle Star.

Legion Insurance and Legion Indemnity were referred to either as "the Company" or "Legion" in the contracts governing the GMI Program. Account balances on cession statements were reported on a consolidated basis. Employing this net balance accounting, Legion sent Eagle Star a cession statement in March 2002, indicating that Legion owed Eagle Star approximately \$2.3 million. Five months later, however, after Legion Insurance was placed into receivership, Eagle Star received a new cession statement, which stated that as of March 2002, Legion Insurance owed Eagle Star \$14.5 million and that Eagle Star owed Legion Indemnity \$12.2 million. Soon thereafter, Legion Indemnity was placed in liquidation.

After considerable procedural maneuvering, Eagle Star sought a declaration in the Commonwealth Court that the revised cession statement was invalid and that payments due to or from Legion Insurance and Legion Indemnity had to be netted before either company could demand a payment from Eagle Star. The Liquidator of Legion Insurance contended that because both Legion Insurance and Legion Indemnity were subject to liquidation proceedings, net balance accounting was no longer possible.

The court noted, among other things, that the validity of Eagle Star's position depended on whether the debts and credits it wished to set off were mutual in capacity. The court explained that "[m]utuality in capacity requires that debts exist between the same persons or entities, although the debts may arise from multiple contracts."²⁵ While acknowledging that mutuality in capacity does not normally exist among affiliate insurers, the setoff urged by Eagle Star was appropriate in this case. Although no contract expressly authorized triangular setoffs, the parties' course of conduct in the GMI Program demonstrated that Legion

²⁴ 865 A.2d 945 (Commw. Ct. Pa. 2005).

²⁵ *Id.* at 954.

Insurance and Legion Indemnity should be treated as one insurer:

Here, multiple contracts established the GMI Program, which operated for almost two years, as a unitary insurance program. "Legion" and "Eagle Star" each played the role of direct writer, ceding company, assuming company and retrocessionaire. In their entire course of dealing, Legion and Legion Indemnity functioned not as separate companies but as a single entity . . . Legion and Legion Indemnity acted as the alter ego of the other in the GMI Program from inception. At any one time, net balance accounting may have resulted in a debt from Legion Indemnity to Legion or vice versa. They were both parties to all the contracts that made the GMI Program operational.²⁶

Judge Leavitt also decided that the Liquidator had no authority to revise the cession statement after Legion Insurance was placed into receivership. The court held that the original cession statement set forth a pre-liquidation debt which, by statute, became fixed as of the date of the petition to place Legion into rehabilitation.²⁷

Unliquidated Claims

In *Clark v. Cannon Steel Erection Company*,²⁸ an intermediate appellate court in Illinois held that a policyholder could not set off its unliquidated claims for defense and indemnity expenses against the liquidator's claim for unpaid premiums and assessments.

Back of the Yards Neighborhood Council Risk Management Association ("BYRMA") is a self-insured workers compensation fund that was placed in liquidation pursuant to the Illinois Insurance Code. As a member of BYRMA, Cannon Steel received an insurance policy that required BYRMA to pay workers compensation benefits to its employees and to defend and indemnify it for certain employers liability claims. Cannon Steel signed a pooling agreement under which it was obligated to pay certain audit premiums and assessments that would become due if initial premiums collected by BYRMA proved insufficient to meet the fund's obligations.

After the liquidator of BYRMA sued Cannon Steel for unpaid audit premiums and assessments, Cannon Steel filed a counterclaim seeking a setoff of all sums it had paid or would be required to pay in respect of BYRMA's failure to defend and indemnify it after entry of the order of liquidation. Cannon Steel argued that although some of the fees and costs in question were not liquidated, this fact would not affect the validity of its setoff claim. According to Cannon Steel, even though there was uncertainty regarding the amount of BYRMA's liability for the fees and costs, there was no uncertainty regarding the existence of BYRMA's liability. In support of this argument, Cannon Steel cited *O'Connor v. INA*²⁹ and

²⁶ *Id.* at 954-55 & 957.

²⁷ *Id.* at 958 (citing 40 Pa. Stat. §221.20(d)).

²⁸ 359 Ill. App. 3d 739, 835 N.E.2d 394 (2005).

²⁹ 622 F. Supp. 611 (N.D. Ill. 1985).

“Although no contract expressly authorized triangular setoffs, the parties’ course of conduct in the GMI Program demonstrated that Legion Insurance and Legion Indemnity should be treated as one insurer...”

“Citing authority holding that statutes in derogation of the common law are to be construed narrowly, the court reiterated that only mature and liquidated debts may be set off — even though the applicable Insurance Code provision³³ imposes no such requirement.”

*Stamp v. INA*³⁰, two related federal cases arising from an Illinois insurance receivership, for the proposition that the Illinois Insurance Code does not require debts to be mature or liquidated before they can be set off.

In affirming a summary judgment dismissing the counterclaim, the court noted that under the common law of Illinois, “in order for the plaintiff to receive a setoff against the defendant, it had to establish that the debt was (1) mutual between the parties; (2) mature; and (3) liquidated.”³¹ The court distinguished *O'Connor* and *Stamp*, noting that “both of those decisions examined whether the debts at issue satisfied the mutuality requirement for setoff, not whether the debts to be set off should be extended to claims which had not matured and were unliquidated.”³²

Citing authority holding that statutes in derogation of the common law are to be construed narrowly, the court reiterated that only mature and liquidated debts may be set off — even though the applicable Insurance Code provision³³ imposes no such requirement. The court, therefore, rejected Cannon Steel’s counterclaims, including its claim for past attorneys’ fees:

In the instant case, it was uncontroverted that the three workers’ compensation claims were still pending and that defendant’s liability as to those claims, if any, had not been established. Likewise, it was uncontroverted that the third-party claims against defendant were ongoing and that defendant expected additional attorney fees and costs to be incurred. While defendant’s attorney attested in a supplemental affidavit attached to defendant’s motion to reconsider that defendant had incurred attorney fees and costs totaling \$51,619 in defending the third-party actions as of March 30, 2004, defendant did not provide a detailed computation of these fees to support its claim. As we explained . . . liquidated damages are ascertained by computation and calculation with reference to specific data. Furthermore, defendant’s claim in the supplemental affidavit that it would incur an additional \$30,000 in attorney fees and costs was speculative and did not constitute a mature or liquidated claim.³⁴

Accordingly, the liquidator was entitled to judgment for the full amount of his claim, without reduction for setoffs.

Fiduciary Capacity

In *Urias v. PCS Health Systems, Inc.*,³⁵ an Arizona appellate court held that a company was entitled to offset funds it had collected from drug manufacturers, pursuant to a volume discount rebate program, against sums an insolvent health

insurer owed to it, notwithstanding the liquidator’s claim that the company held the funds as the insurer’s fiduciary or agent.

Premier Healthcare, Inc. (“Premier”) offered health insurance plans to employer groups and Medicare-eligible individuals. These plans included the provision of certain prescription drugs. PCS Health Systems, Inc. (“PCS”) entered into an agreement with Premier whereby, in exchange for certain scheduled fees, it would provide various services connected with the administration of the prescription drug program.

Pursuant to this agreement, PCS established a network of pharmacies, which bought pharmaceuticals from manufacturers. The network pharmacies would submit invoices for these purchases to PCS which would, in turn, submit claims for reimbursement to Premier. Premier would remit reimbursement sums to PCS for distribution to the pharmacies.

The agreement also required PCS to negotiate, collect and distribute certain volume rebates from drug manufacturers. PCS was required to remit 85 percent of the rebates it collected to Premier, retaining the remaining 15 percent as a fee for its services.

When Premier was placed in receivership, PCS reimbursed the pharmacies and retained the full amount of the rebates it retained as an offset to the reimbursement. Premier challenged PCS’s right to setoff in the liquidation court, contending that the debts were not sufficiently mutual.

In deciding whether the setoffs were permissible, the court first noted that neither the relevant Arizona statutes nor case-law defined “mutual debts” in the context of the right of setoff. Consulting dictionary definitions and cases arising under the analogous section of the Bankruptcy Code,³⁶ the court held that debts may be offset as “mutual debts” if they are due to and from the same parties in the same capacities.

The liquidator initially contended that the debts were not due to and from the same parties because Premier owed the pharmaceutical reimbursement payments ultimately to the network pharmacies, with PCS serving as a mere conduit for the sums. The court rejected this claim, noting that the agreement expressly required Premier to pay to PCS all amounts to be disbursed to the pharmacies. Because Premier’s drug reimbursement obligation was thus owed to PCS, and PCS owed rebate funds to Premier, the court held that “[t]he obligations were owed between the ‘same parties.’”³⁷

The liquidator then contended that the sums were not owed in the same capacity. According to the liquidator, whereas PCS was a general creditor of Premier with respect to the pharmaceutical reimbursement payments, it acted in the capacity of an agent, trustee or fiduciary on behalf of Premier when collecting and forwarding rebate funds.

The court first disposed of the liquidator’s fiduciary duty claims. The court noted that “[a] commercial contract creates a fiduciary relationship only when one party agrees to serve in a fiduciary capacity.”³⁸ In the present case, however, the agreement between Premier and PCS provided that they were “independent

³⁰908 F.2d 1375 (7th Cir. 1990).

³¹359 Ill. App. 3d at 748; 835 N.E.2d at 402.

³²*Id.* Both *O'Connor* and *Stamp* held that for the purpose of determining whether debts were mutual in time, an obligation could be considered a pre-petition debt if the obligation arose prior to the petition, even though, at the time the petition was filed, it was immature or unliquidated. See *Stamp*, 908 F.2d at 1380; *O'Connor* 622 F. Supp. at 618-19.

³³215 ILCS 206.

³⁴359 Ill. App. 3d at 749; 835 N.E.2d at 402-03.

³⁵211 Ariz. 81, 118 P.3d 29 (2005).

³⁶11 U.S.C. §533.

³⁷118 P.3d at 34.

³⁸*Id.* at 35.

“In the agreement between Premier and PCS. . . the court held that the PCS had not assumed fiduciary duties to Premier.”

contractors” and that “they shall have no other legal relationship.” Given this language and the absence of any express language purporting to establish a fiduciary relationship, the court held that the PCS had not assumed fiduciary duties to Premier.

Nor did language in the agreement providing that PCS collected rebates “on behalf of” Premier establish PCS as Premier’s fiduciary. The court observed that “[t]he mere fact that funds are collected ‘on behalf of’ another party does not, however, create a fiduciary relationship.”³⁹

Finally, the court rejected the liquidator’s contention that PCS’s obligation to pay rebate funds to Premier created an agency relationship. In doing so, the court noted that the liquidator had produced no evidence Premier possessed a right to control the manner in which PCS collected rebates. Therefore, the liquidator had failed to carry its burden of proof on an essential element of an agency relationship. The court summarized its decision as follows:

PCS owed money to Premier under the Agreement, and Premier in turn owed money to PCS under the Agreement. Because these reciprocal obligations were owed by the same parties in the same capacity, they constituted “mutual debts” . . . and PCS was entitled to retain rebate funds as a offset against money owed to PCS by Premier.⁴⁰

The court exercised its discretion to award PCS its reasonable attorneys fees on appeal.

Withdrawal of Proofs of Claim

The Pennsylvania Supreme Court has reversed a decision of the Commonwealth Court allowing a third party claimant to withdraw a proof of claim (“POC”) he had filed in the liquidation proceedings. In yet another decision captioned *Koken v. Reliance Insurance Company*,⁴¹ a party injured in a traffic accident with the Reliance policyholder filed a third party POC against Reliance. As the trial date for the claimant’s suit against the policyholder approached, the claimant discovered that the policyholder possessed \$10 million in excess coverage from a solvent insurer.

The claimant immediately attempted to withdraw his proof of claim, which had remained inactive from the date it was filed. The policyholder filed a motion in the Commonwealth Court to enforce the proof of claim, contending that the POC operated as an irrevocable release of liability. The provision of the Pennsylvania statutes that authorizes the filing of third party claims provides that the filing of such a claim releases the policyholder from liability to the third party in an amount equal to the extent of the insolvent insurer’s policy limits.⁴²

Notwithstanding the statutory language, the Commonwealth Court ruled that the

³⁹*Id.* The court rejected the liquidator’s claim that PCS held the rebate funds as a trustee for the same reasons it rejected the claims that PCS acted as a fiduciary.

⁴⁰*Id.* at 36-37.

⁴¹893 A.2d 70 (Pa. 2006).

⁴²40 P.S. §221.40(a).

⁴³*Koken v. Reliance Insurance Co.*, 841 A.2d 588 (Pa. Commw. Ct. 2004).

claimant was entitled to withdraw the POC and rescind the release.⁴³ In doing so, the court noted that there is no express statutory prohibition on the withdrawal of POCs. The court analogized the filing of a POC to the filing of a petition, which a litigant can withdraw at any time prior to the time it is ruled upon. The court also noted that holding the release to be irrevocable would deprive the claimant of access to the policyholder’s excess insurance coverage. The court was not willing to accept this result:

[T]his Court is not inclined to adopt such a draconian position particularly in the context of an insurance liquidation where the harshest results fall not upon the executives and owners of the insolvent insurance company, but rather, fall equally on the insured and the injured.⁴⁴

Having allowed the claimant to withdraw his claim, the court ruled that “[l]ogically, once withdrawn, the third party claims provision in the POC [which incorporated the statutory release language] is rendered a nullity.”⁴⁵

The Pennsylvania Supreme Court reversed. In doing so, the Supreme Court rejected the lower court’s petition analogy, choosing to rely instead on the express language of the statute. The absence of an express prohibition on withdrawal did not render the statute ambiguous.

[T]he statute does not state that the party who tenders the POC cannot later withdraw it. But this circumstance neither creates an ambiguity nor warrants interpreting the statute in a fashion that would negate what its affirmative language commands. The statute commands that the filing operates as a release. Given the mandatory language employed, it was not necessary for the General Assembly to tediously list, and then disavow, all litigation measures that might seek to undo the imperative language. Where mandatory language is employed, there is no need to engage in the redundancy of disapproving individual exceptions.⁴⁶

The court also found the prohibition on the withdrawal of third party claims consistent with the Liquidation Act’s purpose of minimizing legal uncertainty and litigation and providing for an equitable apportionment of unavoidable losses.

The Act poses a difficult decision for a third party plaintiff, a difficulty made necessary by the unfortunate and uncontrollable fact of the insolvency, a fact which affects the plaintiff and the insured alike. The Act also fixes the point of that decision at the time when the plaintiff files the POC, thus indicating his election to seek relief via the liquidation proceeding. That filing creates an expectation of some measure of security for the plaintiff as well as the insured policy holder. There is nothing harsh or draconian in the General Assembly’s determining that, once such an election is made to participate in the liquidation proceeding, the election controls.⁴⁷

The Pennsylvania court’s decision that a third party POC cannot be withdrawn is

⁴⁴*Id.* at 591.

⁴⁵*Id.* at 593.

⁴⁶893 A.2d at 82.

⁴⁷*Id.* at 85.

“...the state-law issues presented in this case appear conventional, are not discretionary policy or administrative judgments and could arise in any common-law action.”⁵⁰”

consistent with that of the Florida courts, which appear to be the only other decisions to have addressed the issue.⁴⁸ However, because these decisions are based on language peculiar to third party claim statutes, it is doubtful that they would provide any authority for prohibiting the withdrawal of first party POCs.

Abstention

In *Sevigny v. Employers Ins. of Wausau*,⁴⁹ the U.S. Court of Appeals for the First Circuit held that the issue of whether a reinsurer was entitled to set off sums it owed to an insolvent ceding company against sums due from the company's insolvent affiliate was not a question so intertwined with state regulation as to justify *Burford* or *Colorado River* abstention.

The Employers Insurance of Wausau (“Wausau”) reinsured the Home under several agreements entered into during the 1980s (the “outwards agreements”). Under separate agreements the Home and its affiliate, U.S. International Reinsurance (“USI Re”) reinsured Wausau (the “inwards agreements”). The Home allegedly took a 100 percent retrocession of USI Re’s obligations under the inwards agreements.

During the mid 1990s, Wausau began to take a triangular setoff, whereby it would reduce the amounts it owed under the outwards agreements against the amounts owed to it under the inwards agreements. Home and USI Re objected to these setoffs on the grounds that they lacked mutuality. The issue was arbitrated and the panel ruled that Wausau’s triangular setoffs were “proper and valid.”

After the Home was placed in liquidation, the liquidator sued Wausau in the Superior Court of Merrimack County, N.H., seeking a judgment that Wausau’s setoffs were impermissible under New Hampshire’s Insurance Liquidation Act because they lacked the requisite mutuality of parties. Wausau removed the case to the federal court on the basis of diversity jurisdiction.

The liquidator moved to remand, on authority of the *Burford* and *Colorado River* abstention doctrines. The liquidator argued that New Hampshire’s “comprehensive and uniform” scheme of insurance company liquidations would be disrupted by intrusion of the federal courts. Wausau argued that a federal determination of the setoff issue, which merely involved the preclusive effect of the prior arbitration award, would not have the far-reaching repercussions claimed by the liquidator. The District Court granted Wausau’s motion to remand and Wausau appealed.

The First Circuit reversed. In doing so, the court noted that the only issues implicated by the removed action were the construction of the state statute governing setoff and the preclusive effect of the arbitration award. Viewing these issues in light of “*Burford*’s central concern with protecting state-agency schemes,” the court found abstention inappropriate because “the state-law issues presented in this case appear conventional, are not discretionary policy or administrative judgments and could arise in any common-law action.”⁵⁰ The court acknowledged that determining the propriety of Wausau’s setoff would affect the

amount of money available to the Home estate, “[b]ut the financial effects on the liquidation cannot be enough.”⁵¹ Moreover, procedures for certification of state law questions assured that the setoff statute would be properly interpreted. The court quickly disposed of the liquidator’s claims based on the *Colorado River* doctrine, holding that “the circumstances of this case are neither close to those in *Colorado River* nor do they suggest any reasons for abstention so powerful as to justify some new exception to the (often fractured) duty of federal courts to exercise jurisdiction.”⁵² Accordingly, the court vacated the remand order.

The court did observe that “abstention would be the presumptive answer had the Commissioner made an administrative decision—say, claiming an equitable discretion to disallow any setoff injurious to Home policyholders—and had Wausau then challenged that action in a federal court diversity suit.”⁵³ In an apparent effort to satisfy these conditions, the liquidator filed a new suit in state court seeking equitable relief with respect to the setoffs. Wausau has removed the new case to the federal court and a motion to remand is pending.

LEGISLATIVE DEVELOPMENTS

The past year has witnessed the enactment by Congress of a United Nations model law applicable to cross-border insolvencies and the promulgation by the National Association of Insurance Commissioners of a model law that may one day significantly alter the various states’ approaches to domestic insurance company receiverships.

Ancillary and Other Cross-Border Cases

Buried deep within the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005⁵⁴ (the “Act”) are provisions of considerable interest to the insurance industry. Article VIII of the Act added a new chapter 15 to the U.S. Bankruptcy Code, which is based on the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law (“UNCITRAL”).⁵⁵

Chapter 15 was enacted, *inter alia*, to: enhance cooperation between United States and foreign courts and authorities that are involved in cross-border insolvencies; provide greater legal certainty for trade and investment; provide for the fair and efficient administration of cross-border insolvencies; protect the interests of creditors and other interested parties, including the debtor; and protect and maximize the value of the debtor’s assets.⁵⁶ Chapter 15 supersedes former Section 304 of the Bankruptcy Code and governs ancillary proceedings initiated after October 17, 2005.⁵⁷ Although it is informed by the basic principles underlying Section 304, the new chapter significantly expands the scope of relief available to foreign debtors in U.S. bankruptcy courts and streamlines the procedures for obtaining that relief.

⁴⁸*Id.* at 30.

⁴⁹*Id.* at 28.

⁵⁰Pub. L. No. 109-8, 119 Stat. 23 (2005).

⁵¹The UNCITRAL Model Law has been adopted by the following 11 countries: Eritrea (2000); Japan (2000); Mexico (2000); Poland (2003); Montenegro (2002); Romania (2003); Serbia (2004); USA (2005); British Virgin Islands (2005); UK (2006).

⁵²See 11 U.S.C. §1501(a).

⁵³See *In re ARTIMM*, S.r.L., 335 B.R. 149, 158 (Bankr. C.D. Cal. 2005).

⁴⁸See, e.g., *Ramos v. Jackson*, 510 So. 2d 1241 (Fla. Ct. App. 1987).

⁴⁹411 F.3d 24 (1st Cir. 2005).

⁵⁰411 F.3d at 28.

⁵¹*Id.* at 29.

Applicability to Insurance Companies

Under chapter 15, the bankruptcy courts' core jurisdiction extends to all cases in which "assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding."⁶⁸ Chapter 15 expressly governs ancillary proceedings brought by the representatives of foreign insurance companies doing business within the United States.⁶⁹ However, a court may not grant relief under chapter 15 "with respect to any deposit, escrow, trust fund, or other security required or permitted under any applicable State insurance law or regulation for the benefit of claim holders in the United States."⁶⁰

A wide variety of insolvency procedures affecting foreign insurance companies may fall within the ambit of chapter 15, which defines a "foreign proceeding" broadly to include:

a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.⁶¹

Because this definition encompasses an "administrative proceeding in a foreign country . . . relating to adjustment of debt," it is hardly surprising that the first case recognized under chapter 15 related to a solvent scheme of arrangement, sanctioned in the United Kingdom, respecting a book of marine insurance written by the UK branch of a French insurance company.⁶²

"Port of Entry" Requirement

Congress intended chapter 15 "to be the exclusive door to ancillary assistance in foreign proceedings."⁶³ Accordingly, a foreign representative must obtain an order of recognition of a foreign proceeding by the appropriate U.S. bankruptcy court before seeking any other relief from any state or federal court located within the United States.⁶⁴ The foreign representative must file the petition for recognition in the district where the debtor has its principal place of business or principal assets in the United States.⁶⁵ If the debtor has no such place of business or assets, then the petition must be filed in the district where a state or federal action is pending against the debtor or, if no such action is pending, in the district where "venue will be consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the foreign representative."⁶⁶

⁶⁰11 U.S.C. §1501(b)(1) (emphasis added). Chapter 15 also applies where: (i) assistance is sought in a foreign country in connection with a U.S. bankruptcy case, (ii) a foreign proceeding and a U.S. bankruptcy case are pending concurrently; or (iii) foreign creditors or foreign interested parties have an interest in commencing or participating in a U.S. bankruptcy case. See 11 U.S.C. §1501(b)(2)-(4). See also 28 U.S.C. §157(b)(2)(P) (providing that core jurisdiction extends to "recognition of foreign proceedings and other matters under chapter 15").

⁶¹11 U.S.C. §1501(c)(1).

⁶²11 U.S.C. §1501(d).

⁶³11 U.S.C. §101(23).

⁶⁴*In re Petition of Lloyd*, 2005 WL 3764946 (Bankr. S.D. N.Y. Dec. 7, 2005).

⁶⁵H.R. Rep. No. 109-31, pt. 1, at 110 (2005) (hereinafter, "House Report").

⁶⁶11 U.S.C. §1515(a). See also *U.S. v. J.J. Jones Constr. Group, LLC*, 333 B.R. 637, 639 (E.D. N.Y. 2005) (foreign representative of Canadian corporation in receivership was denied a stay of U.S. litigation against its subsidiary because "[i]n the absence of recognition under chapter 15, this Court has no authority to consider [the foreign representative's] request for a stay").

⁶⁷28 U.S.C. §1410(1).

⁶⁸28 U.S.C. §1410(3).

The procedures for filing and approving petition "are designed to make recognition as simple and expedient as possible."⁶⁷ The petition must be accompanied by the following documents, translated into English: (i) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or (ii) a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative. In the absence of the foregoing, the court may accept any other evidence of the existence of the foreign proceeding and of the appointment of the foreign representative.⁶⁸ In reviewing this evidence, "[t]he court is entitled to presume that the documents presented in support of the petition for recognition are authentic, whether or not they have been legalized."⁶⁹

After notice and a hearing, petitions must be "decided upon at the earliest possible time."⁷⁰ Recognition is virtually mandatory if the foregoing minimal requirements are met. The court is entitled to refuse recognition only in rare instances when "such action would be manifestly contrary to the public policy of the United States."⁷¹

While the petition is pending, the court may grant provisional relief, including a stay on execution, "where relief is urgently needed to protect the assets of the debtor or the interests of creditors."⁷² The standards and procedures applicable to an injunction apply to such relief.⁷³ Unless expressly extended, such relief terminates when the petition is granted.⁷⁴

Foreign Main Proceedings

The nature and extent of relief available under chapter 15 turns on whether the court recognizes the foreign insolvency as a "foreign main proceeding" or a "foreign nonmain" proceeding. If the order recognizes a foreign main proceeding, the automatic stay applies immediately with respect to the debtor and property of the debtor that is located within the territorial jurisdiction of the United States.⁷⁵ This is a major departure from the prior practice under Section 304, which required a court order for the imposition of a stay.⁷⁶

A foreign main proceeding is defined as "a foreign proceeding pending in the country where the debtor has the center of its main interests."⁷⁷ The debtor's center of main interests is presumed to be where its registered office is located.⁷⁸ Therefore, the court should issue an order recognizing a foreign main proceeding if the foreign proceeding is pending in the country where the debtor's registered office located.⁷⁹

In a foreign main proceeding, Bankruptcy Code Sections 363 (sale, use or lease of property of the estate), 549 (postpetition transactions) and 552 (postpetition

⁶⁷House Report, pt. 1, at 112.

⁶⁸11 U.S.C. §1515(b).

⁶⁹11 U.S.C. §1516(b).

⁷⁰11 U.S.C. §1517(c).

⁷¹11 U.S.C. §1506.

⁷²11 U.S.C. §1519(a).

⁷³11 U.S.C. §1519(e).

⁷⁴11 U.S.C. §1519(b).

⁷⁵11 U.S.C. §1520(a)(1).

⁷⁶See *In re ARTIMM*, 335 B.R. at 159.

⁷⁷11 U.S.C. §1502(4).

⁷⁸11 U.S.C. §1516(c).

⁷⁹See 11 U.S.C. §1517(b)(2).

security interests) govern any transfer of the debtor's interest in property within the territorial jurisdiction of the United States to the same extent those sections would apply to property of a domestic bankruptcy estate.⁸⁰ Unless the court orders otherwise, the foreign representative may operate the debtor's business and exercise the rights and powers of a trustee.⁸¹ In addition, the foreign representative in a foreign main proceeding may request the court to grant the discretionary relief described below in connection with foreign nonmain proceedings.

Foreign Nonmain Proceedings

The court must enter an order recognizing a foreign proceeding as a nonmain proceeding if it is pending in a country where the debtor has an "establishment," *i.e.* "any place country where the debtor carries out nontransitory economic activity."⁸² In both main and nonmain proceedings, the court is authorized to grant a wide variety of discretionary relief on request of the foreign representative, if such relief is necessary to effectuate the purpose of chapter 15 and to protect the debtor's assets or the creditors' interests.⁸³ This relief includes, *inter alia*, staying commencement or continuation of an individual action concerning the debtor's assets; entrusting the distribution of the debtor's assets in the United States to the foreign representative; and continuing the interim relief granted while the petition for recognition was pending.⁸⁴ However, before granting such relief in a foreign nonmain proceeding, "the court must be satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding."⁸⁵

Additional Assistance

Chapter 15 also authorizes the court to grant unspecified additional assistance to the foreign representative, consistent with principles of comity, upon consideration of the same factors relevant to relief under Section 304.⁸⁶ The legislative history of chapter 15 underscores the relevance of case law under Section 304 to such relief.

While section 304 is repealed and replaced by chapter 15, access to the jurisprudence which developed under section 304 is preserved in the context of new section 1507. On deciding whether to grant the additional assistance contemplated by section 1507, the court must consider the same factors specified in former section 304.

Comity and Cooperation

Consistent with its international origin, chapter 15 requires the court to cooperate "to the maximum extent possible" with a foreign court or representative, either directly or through any domestic trustee.⁸⁸ The court is authorized to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative, subject to the rights of a party in interest

⁸⁰11 U.S.C. §1520(a)(2).

⁸¹11 U.S.C. §1520(a)(2).

⁸²11 U.S.C. §1502(2).

⁸³11 U.S.C. §1521(a).

⁸⁴*Id.*

⁸⁵11 U.S.C. §1521(c).

⁸⁶11 U.S.C. §1507.

⁸⁷House Report, pt. 1, at 119.

⁸⁸11 U.S.C. §1525(a).

⁸⁹11 U.S.C. §1525(b).

to notice and participation.⁸⁹ A domestic trustee or examiner is subject to the same obligations of communication and cooperation.⁹⁰ Such cooperation may be implemented by various procedures aimed at coordinating the concurrent foreign and domestic proceedings.⁹¹ The interpreting its provisions, the court is required to consider the need to promote an application of chapter 15 that is consistent with the application of similar statutes adopted by foreign jurisdictions.⁹²

Insurer Receivership Model Act

At its Winter National Meeting in Chicago last December, the National Association of Insurance Commissioners ("NAIC") adopted its Insurer Receivership Model Act ("IRMA"). IRMA is the culmination of an intensive, four-year drafting process, in which the Working Group consulted with numerous insurance companies and industry organizations. These organizations included the National Organization of Life & Health Insurance Guaranty Associations, National Conferences of Insurance Guaranty Funds, Reinsurance Association of America, American Counsel of Life Insurers, American Insurance Association, Property Casualty Insurers Association of America, State Farm Insurance Company and representatives of the Home Insurance Company in Liquidation.

IRMA represents a major revision to the NAIC's 1978 Insurer's Rehabilitation in Liquidation Model Act. Notable provisions include the following:

Jurisdiction

IRMA vests the receivership court with exclusive jurisdiction of all the insured's property, whether located inside or outside the state where the receivership court sits.⁹³

Notwithstanding the broad scope of the receivership court's jurisdiction, IRMA expressly preserves the contractual rights of reinsurers to arbitrate disputes with the estate:

Except as to claims against the estate and in regard to any contracts rejected by the receiver under Section 114, nothing in this Act shall deprive a reinsurer of any contractual right to pursue arbitration. A party in arbitration may bring a claim or counterclaim against the estate, but the claim or counterclaim shall be subject to this Act.⁹⁴

This represents a major departure from previous practice, in which receivers routinely litigated with their reinsurers over the nature and extent of their arbitration rights.

IRMA provides three alternative formulations for states to choose in determining whether guaranty funds should have a right to intervene in receivership proceedings. State receivership laws may: (i) remain silent on this issue; (ii) grant intervention only upon application to and approval by the receivership court;

⁹⁰11 U.S.C. §1526.

⁹¹11 U.S.C. §1527.

⁹²11 U.S.C. §1508.

⁹³IRMA, at §105.C.

⁹⁴IRMA, at §105.E.

“IRMA is the culmination of an intensive, four-year drafting process, in which the Working Group consulted with numerous insurance companies and industry organizations.”

or (iii) allow intervention by the Guaranty Association is a matter of right.⁹⁵

Adoption of an "English Rule"

IRMA authorizes the award of costs to the receiver under certain circumstances when a party unsuccessfully objects to the receiver's application to the court:

If an objection is timely filed, the receivership court may hold a hearing. If the receivership court approves the application and, upon a motion by the receiver, determines that the objection was frivolous or filed merely for delay or for other improper purpose, the receivership court shall order the objecting party to pay the receiver's reasonable costs and fees of defending the action.⁹⁶

It is unclear what this provision adds to the relief already available to any litigant, under existing court rules in virtually every state, by which the litigant can recover costs and fees when an opponent asserts a frivolous position. However, it should be noted that relief under those court rules is reciprocal, whereas IRMA only allows the receiver to recover costs and fees.

Conservation

Article III of IRMA provides for the initiation of conservation proceedings. Upon entry of an order, the conservator is required to conduct an analysis of the business and the financial condition of the insurer to determine whether it will be possible to restore the insurer to private management and normal operations. Within 180 days of entry of the order of conservation, the conservator must ask the receivership court to: (i) release the insurer from conservation; (ii) place the insurer into rehabilitation; or (iii) place the insured into liquidation.⁹⁷ The conservator may move for an extension of the time to seek the foregoing relief for one additional period of 180 days.⁹⁸ The NAIC describes the purpose of Article III as follows:

To provide for a type of delinquency proceeding where it is not clear if the insurer can be rehabilitated. The intent is to avoid rehabilitation proceedings conducted merely for the purpose of preparing the estate for the entry of a liquidation order.⁹⁹

Claimant Incentives, Administrative Expenses and Priorities

Among the more controversial provisions of IRMA is that which expressly allows the liquidator "[t]o pay Class 1 administrative costs of the estate, at the liquidator's sole discretion and upon approval of the receivership court, where the payments assist or result in the collection or recovery of property of the insurer that provides a net benefit to creditors of the estate."¹⁰⁰ As an example of the circumstances under which this provision might appropriately be applied, the drafters described the situation "where a claimant of the estate is not going to prosecute a claim, but if the claim were pursued, the estate would realize a recovery of property."¹⁰¹ The incentives authorized by this statute are precisely those implicated in the liquidation of the Home Insurance Company, described above.

⁹⁵IRMA, at §105.I.

⁹⁶IRMA, at §107.B(5).

⁹⁷IRMA, at §302.A.

⁹⁸IRMA, at §302.B.

⁹⁹Project History: Insurer Receivership Model Act, at 2 (Dec. 4, 2005).

¹⁰⁰IRMA, at §504.A(3)(b).

¹⁰¹Project History, *supra*, at 2.

Noting that many regulators believe that liquidators have inherent power to thus incentivize the filing of claims, the drafters inserted a drafting note to the text accompanying the priority provision of IRMA. The drafting note provides as follows:

Implicit in the powers of the liquidator under this Act, see Section 504A(3), is the right, subject to approval by the receivership court, to make payments as Class 1 administrative costs to claimants in lower priority classes where those payments assist or result in the collection or recovery of assets or property, including debts, moneys due or claims belonging to the insurer, for the benefit of claimants in higher priority classes. These payments do not constitute distributions so as to circumvent priority classes or establish subclasses within a class.¹⁰²

As noted above, this drafting note has proved to be a matter of some interest in the proceedings before the New Hampshire Supreme Court involving the Home Insurance Company.

Commutations

IRMA authorizes the liquidator to petition the receivership court to compel arbitration to recover reinsurance receivables if 75% of the insurer's actuarially estimated liability has been settled or if the reinsurers Risk Based Capital is less than 250% of its Authorized Control Level.¹⁰³ IRMA goes on to mandate various procedures to be followed in the arbitration which may or may not be found in the reinsurance contracts.¹⁰⁴ Reinsurers have voiced vehement objections to such "forced commutations."

Contingent and Unliquidated Claims

IRMA defines "contingent" and "unliquidated" claims as follows:

A claim is contingent if the accident, casualty, disaster, loss, event or occurrence insured, reinsured or bonded against occurred on or before [the date the order of liquidation is entered], but the act or event triggering the company's obligation to pay has not occurred by that date.

A claim is unliquidated if the insurer's obligation to pay has been established, but the amount of the claim has not been determined.¹⁰⁵

A contingent claim may be allowed if: (i) the claimant has presented satisfactory proof of the insurer's obligation to pay; (ii) the claim is based on a claim against an insured and it may be reasonably inferred from "suitable proof" that the claimant would be able to obtain a judgment.¹⁰⁶

An unliquidated claim may be allowed if its amount has been determined or:

If the amount of an unliquidated claim . . . remains undetermined, the

¹⁰²IRMA, Drafting Note at §801.A.

¹⁰³IRMA, at §614.B.

¹⁰⁴IRMA, at §614.E-J.

¹⁰⁵IRMA, at §705.A.

¹⁰⁶IRMA, at §705.B.

valuation of the unliquidated claim may be made by estimate whenever the liquidator determines that either liquidation of the claim would unduly delay administration of the liquidation proceeding or that the administrative expense of processing and adjudicating the claim or group of claims of a similar type would be unduly excessive when compared with the property that is estimated to be available for distribution with respect to the claim. Any estimate shall be based on an accepted method of valuing claims with reasonable certainty at their present value, such as actuarial evaluation.¹⁰⁷

“...minimum accreditation standards ‘should focus on two areas: 1) provisions that are necessary for effective management of multi-state receiverships; and 2) provisions that must be present to have a functioning receivership system.’ ”

IRMA authorizes the liquidator to set a date certain for all contingent and unliquidated claims to become final.¹⁰⁸ The liquidator is authorized to compel payment of claims thus allowed by reinsurers of the estate.¹⁰⁹ These provisions effectively codify the provisions of the Final Dividend Plan proposed in the Liquidation of Integrity Insurance Company and resemble a statutory scheme already in effect in Rhode Island.

Prospects for Adoption by the States

Only Texas thus far has adopted a version of IRMA. The Receivership Law and Intergovernmental Working Group is currently drafting requirements for states to adopt certain “key elements” of IRMA as a condition of meeting NAIC’s financial accreditation standards. To ascertain the criteria for selecting these “key elements” of IRMA, the Working Group has solicited guidance from the NAIC’s Financial Regulations Standards and Accreditation Committee. On June 7, 2006, Commissioner Cogswell of Connecticut responded on behalf of the Committee that the minimum accreditation standards “should focus on two areas: 1) provisions that are necessary

for effective management of multi-state receiverships; and 2) provisions that must be present to have a functioning receivership system.” The Working Group has scheduled conference calls on accreditation and will, doubtlessly, continue to address this issue at the Fall meetings in St. Louis.

¹⁰⁷ IRMA, at §705.C.

¹⁰⁸ IRMA, at §705.F.

¹⁰⁹ IRMA, at §611.I.



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