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FILED

JAN 30 2006

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN

And

CARL MILLER, individually and on behalf
of others similarly situated,

Petitioners,

v.

MONTANA STATE FUND,

Respondent/Insurer

And

LIBERTY NORTHWEST INSURANCE
COMPANY,

Intervenor.

WCC No. 2000-0222

**BRIEF OF RELIANCE INSURANCE
COMPANY (IN LIQUIDATION) SEEKING
DISMISSAL OF RELIANCE, AS A
LIQUIDATING INSURER, FROM THE
COMMON FUND ACTIONS**

Reliance Insurance Company (In Liquidation) ("Reliance"), through its undersigned counsel, hereby files the following brief in support of the dismissal of Reliance, as a liquidating insurer from the Common Fund Actions.

I. Procedural History

1. On October 3, 2001, M. Diane Koken, Pennsylvania's Insurance Commissioner, (the "Pennsylvania Commissioner"), obtained an order from the Commonwealth Court of Pennsylvania placing Reliance in liquidation and appointing

DOCKET ITEM NO. 4/41

her, pursuant to Pennsylvania law,¹ as Statutory Liquidator. Pursuant to the Liquidation Order, the Commonwealth Court has exclusive jurisdiction over all determinations of the validity and amount of claims against Reliance and over the determination of the distribution priority of all claims against Reliance. Ex. "A", Liquidation Order ¶ 5 (Oct. 3, 2001). This is the largest property casualty insurance liquidation in the history of the United States. Given the enormity and complexity of this Estate there is a particular need for consistency and centralization, to ensure fair and equitable apportionment of the limited assets available in the interest of all claimants, as required by Pennsylvania law.

In recognition of this exclusive claims procedure, the Liquidation Order provides for a stay of all actions "at law or equity" against Reliance:

Unless the Liquidator consents thereto in writing, no action at law or equity, or arbitration or mediation, shall be brought against Reliance or the Liquidator, whether in this Commonwealth or elsewhere, nor shall any such existing action be maintained or further prosecuted after the date of this Order. All actions, including arbitrations and mediations, currently pending against Reliance in the courts of the Commonwealth of Pennsylvania or elsewhere are hereby stayed. All actions, arbitrations and mediations, against Reliance or the Liquidator shall be submitted and considered as claims in the liquidation proceeding.

Ex. "A", Liquidation Order ¶ 22.

Since its Liquidation, Reliance has been named in several of the Common Fund Actions.² In the two matters in which Reliance received service of the Summons or

¹ 40 Pa. Stat. Ann. § 221.20(c) vests the Pennsylvania Insurance Commissioner, as liquidator, "by operation of law with the title to all of the property, contracts and rights of action and all of the books and records of the insurer ordered liquidated, wherever located, as of the date of the filing of the petition for liquidation."

² Reliance Insurance Company (In Liquidation) encompasses the following entities: Reliance Insurance Company, Reliance National Indemnity Company, Reliance National Insurance Company, United Pacific Insurance Company, Reliance Direct Company, Reliance Surety Company, Reliance Universal Insurance Company, United Pacific Insurance Company of New York, and Reliance Insurance Company of Illinois. See Ex. "A", Liquidation Order ¶ 27. One or more of these entities has been named in the following Common Fund Actions: Flynn and Miller v. Montana State Fund,

Amended Summons, Flynn and Reesor, Reliance filed responses asserting its position that, as a liquidating insurer, the claims against Reliance in the Common Fund litigation must be dismissed or stayed and the Plaintiffs' claims must be pursued by way of Proofs of Claim in the Reliance liquidation proceedings.³

A hearing was held before the Court in July 2005, at which Reliance participated by phone, for the limited purpose of outlining its position that, as a liquidating insurer, the claims against it must be dismissed or stayed, and that Plaintiffs must pursue their claims against Reliance in the Pennsylvania liquidation proceeding. When the Court inquired as to the basis of that position, without waiver of its jurisdictional position, Reliance agreed to address that issue, and to address the extent to which it was prepared to voluntarily identify, to the extent possible, claimants whose claims potentially meet the criteria at issue in the Common Fund Actions, to allow Plaintiffs to file Proofs of Claim in the liquidation.

Before that response could be compiled and submitted, there was a transition in the Court. An Order was ultimately entered on December 6, 2005, specifying procedures and a briefing schedule to be followed in addressing the liquidation issues. This brief is filed in further support of, and without waiver of, Reliance's position that this Court lacks jurisdiction to consider the claims against Reliance, as a foreign liquidating insurer, and that these claims against Reliance in the Common Fund Actions should be dismissed.

Reesor v. Montana State Fund, Schmill v. Liberty Nw. Ins. Corp., Hiett v. Montana Schs. Group Ins. Auth., Rausch v. Montana State Fund, and Satterlee v. Montana State Fund. These six actions are collectively referred to in this Brief as the "Common Fund Actions". It does not appear that Reliance was served in any of the Common Fund Actions other than Flynn, Reesor, and very recently Schmill. Without waiver of its position that service was not properly made in the other Common Fund Actions, this brief is filed in support of Reliance's position that the claims against Reliance in any and all of the Common Fund Actions in which it has been named, or may be named, should be dismissed or, in the alternative, stayed.

³ Since receipt of this Court's December 6, 2005 Order, Reliance has also been served with an Amended Summons in the Schmill action. Reliance has now filed Affidavits in each of the Common Fund Actions known as Flynn, Rausch, Reesor and Schmill in which Reliance was named, whether or not it was served, asserting its position that the Reliance entities named in the Common Fund Actions should be dismissed due to Reliance's liquidation and the Court's lack of jurisdiction.

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II. Summary of Argument

Under the Insurers Supervision, Rehabilitation and Liquidation Model Act (hereafter "The Model Act"), as adopted by Montana Code Annotated §§ 33-2-1301 – 1394. Pennsylvania is a reciprocal state. The Supreme Court of Montana has so recognized in Hicklin v. CSC Logic, Inc. (1997), 283 Mont. 298, 940 P.2d 447. A Montana plaintiff seeking to pursue claims against an insolvent insurer from a reciprocal state has two choices under The Model Act. If an ancillary receiver has been appointed in Montana, he can pursue his claims with the ancillary receiver. (An ancillary receiver is a receiver appointed outside of the insolvent insurer's state and who is granted certain rights with respect to claims and limited assets in the ancillary receiver's state.) If, as here, an ancillary receiver has not been appointed in Montana, the plaintiff is required to file his claim against the insolvent insurer in its domiciliary state. See Mont. Code Ann. § 33-2-1385. Pennsylvania is Reliance's state of incorporation and domicile. Because Pennsylvania is a reciprocal state, courts in Montana, including this Court, must grant the request of the Pennsylvania Liquidator to dismiss or, in the alternative, to stay all proceedings against Reliance in the Common Fund Actions.

Further, on grounds of full faith and credit and comity, this Court should dismiss or stay the Common Fund Actions against Reliance based on the Pennsylvania Liquidation Order. As set forth below, Plaintiffs have a forum in which to pursue their claims by way of Proofs of Claim filed in the Reliance Liquidation proceedings.

III. Argument

A. **Under The Model Act, Montana Defers to Liquidation Proceedings Conducted by a Reciprocal State.**

The Pennsylvania Commonwealth Court's Liquidation Order was issued pursuant to Pennsylvania's Insurance Department Act, a multi-jurisdictional statutory scheme to regulate the interstate activities of insurance companies. See 40 Pa. Stat. Ann. § 221.1. The statute confers on the Pennsylvania Commonwealth Court the authority, upon the request of the Pennsylvania Insurance Commissioner, to order an insurer into liquidation and to take necessary action, including actions with respect to pending litigation. 40 Pa. Stat. Ann. § 221.20.

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The Model Act affords the same relief as that provided by Pennsylvania's Insurance Department Act.⁴ Both states' Acts derive from the Insurers Supervision, Rehabilitation and Liquidation Model Act promulgated by the National Association of Insurance Commissioners in 1977. In 1979, Montana became one of the majority of states, like Pennsylvania, to adopt, in substance and effect, The Model Act.

The purpose of The Model Act is to assure uniformity, efficiency, and fairness in the liquidation of insolvent insurers. See Mont. Code Ann. § 33-2-1302 (purpose of the Act is to provide efficiency, and economy of liquidation; facilitate cooperation between states in liquidation proceedings and minimize legal uncertainty and litigation). The Model Act achieves this goal by requiring that all states that have approved the Act (so-called "reciprocal states") give effect to rehabilitation or liquidation orders issued by a court in the domiciliary state of the insolvent insurer.

The applicable provision of The Model Act, as adopted and codified in Montana's Liquidation Act, requires priority to be conferred on liquidation proceedings pending in the "domiciliary state" of an insolvent insurer if it is a "reciprocal state." Mont. Code Ann. §§ 33-2-1381, 1385. A "reciprocal state" is defined as another state which has adopted "in substance and effect" The Model Act. Mont. Code Ann. § 33-2-1303(15). When "delinquency proceedings" (specifically defined as including liquidation proceedings in Mont. Code Ann. § 33-2-1303(4)) are pending in a reciprocal state, the Montana Liquidation Act decrees as follows:

During the pendency in this or any other state of a liquidation proceeding, whether called by that name or not, no action or proceeding in the nature of an attachment, garnishment, or levy of execution may be commenced or maintained in this state against the delinquent insurer or its assets.

⁴ See e.g. Mont. Code Ann. § 33-2-1322 (authorizing the Montana Insurance Commissioner to obtain a court order for the seizure of an insurer); Mont. Code Ann. §§ 33-2-1331, 1332 and Mont. Code Ann. §§ 33-2-1341, 1342 (authorizing the Montana Insurance Commissioner, with court permission, to enter into the rehabilitation or liquidation of an insolvent insurer); Mont. Code Ann. § 33-2-1309 (authorizing the issuance of "such restraining orders, preliminary and permanent injunctions, and other orders as may be necessary to prevent: . . . [i]nterference with the receiver or with a proceeding," the "[w]aste of the insurer's assets," the "institution or further prosecution of any actions or proceedings," or the "obtaining of preferences, judgments, attachments, garnishments, or other liens" against the insurer).

Mont. Code Ann. § 33-2-1386. A Montana plaintiff seeking to pursue claims against an insolvent insurer from another state has two choices. If an ancillary receiver has been appointed in Montana, he can pursue his claims with the ancillary receiver. If an ancillary receiver has not been appointed in Montana, the plaintiff is required to file his claim against the insolvent insurer in its domiciliary state. Mont. Code Ann. § 33-2-1385.

Thus, the Montana Liquidation Act makes clear that the courts of this state defer to liquidation proceedings conducted by a reciprocal state over an insurer domiciled in the reciprocal state, and precludes any enforcement action in Montana against an insurer while such proceedings are pending.

B. Pennsylvania is a Reciprocal State Under Montana Law.

The question of whether Pennsylvania is a reciprocal state under Montana's Liquidation Act has been previously answered at both the trial court and Supreme Court in Montana.

In Hicklin, the trial court correctly concluded that, pursuant to the provisions of each state's Liquidation Acts, Montana and Pennsylvania are "reciprocal" states.

The order of liquidation directed [the state guaranty fund] to proceed with the liquidation of [the insolvent Pennsylvania insurer] pursuant to Article V of the Insurance Department Act (40 P.S. Secs. 221.1-221.63). Section 221.58(b) states in pertinent part:

Claims belonging to claimants residing in reciprocal states may be proved either in the liquidation proceeding in this Commonwealth as provided in this article, or in ancillary proceedings, if any, in the reciprocal state.

Montana is a reciprocal state as that term is defined in both Montana and the Pennsylvania codes. See Section 33-2-1303(15) MCA, and 40 P.S. Sec. 221.3.

Ex. "B", Memo. & Order, Hicklin v. CSC Logic, Inc., No. CDV-94-1199, slip op. at 3-4 (D.C. Mont. July 19, 1996).

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The trial court also considered whether it had any jurisdiction over the insolvent insurer given that Pennsylvania was a reciprocal state. The court concluded that it did not.

Further, an ancillary receiver has not been appointed in Montana. Therefore, it is apparent that Hicklin is required to file his claim in the Commonwealth of Pennsylvania. See Integrity Insurance Co. v. Ruth, 769 P.2d 69 (Nev. 1989). Therefore, the Court lacks the requisite subject matter jurisdiction over the issues in this case.

Ex. "B", Hicklin, slip op. at 4. Because the trial court lacked subject matter jurisdiction, the court reversed the default judgment it had previously entered against the defendant guaranty association.

On appeal, the Montana Supreme Court reversed the trial court's decision on other grounds, concluding that the particular claims at issue in the Hicklin case were for unfair claims practices against the guaranty association rather than a claim against the insolvent insurer. Because the suit did not involve a claim against the insolvent insurer, the Court correctly concluded that the action could proceed. Hicklin, 283 Mont. at 303, 940 P.2d at 450-451. However, in reaching its decision, the Supreme Court left untouched, and therefore implicitly adopted, the trial court's conclusion that Montana and Pennsylvania are reciprocal states and that where, as here, an ancillary receiver has not been appointed, the plaintiff is required to file claims which involve the Estate or its assets and property in Pennsylvania's liquidation proceeding.

In the Common Fund Actions, the Plaintiffs' claims are for recovery of damages against the insolvent insurer's (Reliance's) Estate and necessarily seek distribution of Estate assets to satisfy their claims. Therefore, pursuant to statute and the holding in Hicklin, this Court lacks subject matter jurisdiction over the claims against Reliance and they must be dismissed. Plaintiffs must pursue their claims against the Liquidation Estate by filing Proofs of Claim in the Reliance Liquidation Proceedings in Pennsylvania.

C. A Statutory Comparison of Pennsylvania's and Montana's Liquidation Acts Establishes That They are Equivalent in Substance and Effect.

A comparison of the Montana and Pennsylvania liquidation laws reveals not only a substantial similarity but, in many cases, virtually identical – word for word – statutes. A comparison of the two states' Acts confirms the correctness of the trial court's

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determination in Hicklin that Pennsylvania and Montana are reciprocal states, a determination which was untouched by the Montana Supreme Court on appeal. The Montana Liquidation Act defines a reciprocal state as:

“Reciprocal state” means any state other than this state in which in substance and effect 33-2-1342(1), 33-2-1381, 33-2-1382, and 33-2-1384 through 33-2-1386 are in force and in which provisions are in force requiring that the commissioner or equivalent official be the receiver of a delinquent insurer and in which some provision exists for the avoidance of fraudulent conveyances and preferential transfers.

Mont. Code Ann. § 33-2-1303(15). An examination of the provisions of each state’s Act establishes that Pennsylvania has adopted in substance and effect each of the provisions outlined above, making it a reciprocal state under Montana law.

(1) Liquidation Orders

Mont. Code Ann. § 33-2-1342(1) and 40 Pa. Stat. Ann. § 221.20(c)

Both Acts provide for appointment of the Insurance Commissioner as receiver/liquidator of a domestic insurer, and provide that the liquidator is vested with all of the property, contracts and rights of action of the liquidated company.

(2) Vesting of Title by Operation of Law

Mont. Code Ann. § 33-2-1381 and 40 Pa. Stat. Ann. § 221.55

Montana and Pennsylvania both provide that the liquidator in a reciprocal state is vested “by operation of law” with the title to all of the property, contracts, rights of action, and books and records of the liquidated insurer domiciled in their respective states. Mont. Code Ann. § 33-2-1381; 40 Pa. Stat. Ann. § 221.55. Both states also provide that where the liquidated insurer is *not* domiciled in a reciprocal state, the domiciliary state’s insurance commissioner is vested with the title to all of the property, contracts, rights of action, books and records of the liquidated insurer *located* in their state and that the commissioner may petition for a conservation or liquidation order for an ancillary receiver, or transfer title to the domiciliary liquidator in the interest of justice and upon order of the district court.

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In other words, as to this key power, the statutes are the same in substance.

(3) Ancillary Formal Proceedings

Mont. Code Ann. § 33-2-1382 and 40 Pa. Stat. Ann. § 221.56

Both Montana and Pennsylvania provide that an ancillary receiver can be appointed in the non-domiciliary state by petition, and further provide that an ancillary receiver so appointed will assist the domiciliary liquidator in recovering assets of the insurer located in the ancillary receiver's state and shall promptly liquidate and return to the domiciliary liquidator any assets remaining after special deposit and secured claims are allowed and proved in the ancillary receivership proceedings. In both states, ancillary receivers appointed in the non-domiciliary state have the same rights, responsibilities and powers. Mont. Code Ann. § 33-2-1382; 40 Pa. Stat. Ann. § 221.56.

Again each state's provisions are virtually identical.

(4) Claims of Nonresidents Against Domestic Insurers

Mont. Code Ann. § 33-2-1384 and 40 Pa. Stat. Ann. § 221.58

Both Montana's and Pennsylvania's liquidation statutes govern the procedure for presenting claims of nonresidents against domestic insurers in domiciliary liquidation proceedings. Both give residents of reciprocal states the option of presenting their claims with the domiciliary receiver or with the ancillary receiver, if any, in the reciprocal state. Both provide identical procedures for proving controverted claims and provide that proof in the ancillary proceeding of the reciprocal state shall be accepted in the domiciliary state as conclusive, if allowed, as to amount and to priority against special deposits and security (but not general assets) located in the reciprocal state, if the domiciliary receiver is given notice of the claim and an opportunity to be heard.

(5) Claims Against Foreign Insurers

Mont. Code Ann. § 33-2-1385 and 40 Pa. Stat. Ann. § 221.59

Nearly identical statutes exist in Montana and Pennsylvania for claims of residents against foreign insurers. Both statutes govern the claims of residents against defunct insurers domiciled in reciprocal states. Both give resident claimants the option of filing claims with the domiciliary receiver in the reciprocal state or with the ancillary receiver, if one has been appointed, in the non-domiciliary state. Both provide that final allowance of controverted claims filed in the ancillary proceedings must be accepted as conclusive as to amount and priority, if any, "against special deposits or other security

located in this state," provided the domiciliary receiver has been given an opportunity to appear and contest the claim.

(6) Attachment and Garnishment of Assets
Mont. Code Ann. § 33-2-1386 and 40 Pa. Stat. Ann. § 221.60

Montana and Pennsylvania both provide, in substantially similar language, that during the pendency of a delinquency proceeding in this or any other state "no action or proceeding in the nature of an attachment, garnishment, or levy of execution may be commenced or maintained in this state against the delinquent insurer or its assets."

(7) Commissioner as Receiver
Mont. Code Ann. § 33-2-1342(1) and 40 Pa. Stat. Ann. § 221.20(a)

Both states have provisions requiring the Insurance Commissioner to be the receiver of a liquidated insurance company, satisfying this requirement of the definition of "reciprocal state."

(8) Provisions for Avoidance of Fraudulent Transfers or Preferential Transfers
Mont. Code Ann. §§ 33-2-1351-1353 and 40 Pa. Stat. Ann. §§ 221.28-30

Finally, both states satisfy the requirement that a reciprocal state have in effect provisions for avoiding fraudulent conveyances and preferential transfers. Both states authorize the liquidator to avoid fraudulent transfers made within one year of the filing of a successful petition for rehabilitation or liquidation; and both states have adopted nearly identical provisions for the treatment of good faith transfers of the insurer's real property after the rehabilitation or liquidation and for voiding preferential transfers.

D. Principles of Full Faith and Credit and Comity Require Deference to the Pennsylvania Liquidation Proceedings.

Apart from the question of this Court's subject matter jurisdiction over the claims against Reliance in the Common Fund Actions, the Liquidation Order and its stay of all "actions at law or equity" against Reliance is entitled to full faith and credit under Article IV, § 1 of the United States Constitution and enforcement under the principle of comity.

Under Montana law, courts of this State must give full faith and credit to injunctions against the continuation of actions against the liquidator or the insolvent

company when such injunctions are contained in an order to liquidate an insurer issued in other states. Mont. Code Ann. § 33-2-1348(1). Because Montana law provides that title to the assets of Reliance vests in the Pennsylvania Liquidator, the Pennsylvania Insurance Commissioner, in her capacity as Statutory Liquidator, must be afforded all rights to the assets of Reliance that are granted under both Pennsylvania and Montana law.

Second, comity is a principle under which the courts of one state give effect to the laws and judicial pronouncements of another state, not as a rule of law, but rather out of deference or respect to promote justice and to further the deferring state's own policies.⁵ Because comity is grounded in cooperation and mutuality and encourages amiable and respectful relations among the states, Montana should extend comity by recognizing the laws and judicial decision of other states unless: 1) the foreign state declines to extend comity to Montana or sister states under the same or similar circumstances; or 2) the foreign law produces a result in violation of Montana's own legitimate public policy. Neither exception applies here.

As a matter of reciprocal state law and policy, Pennsylvania and Montana both have an interest in preserving assets of their insolvent domestic insurers in order to fulfill the purpose of the uniform liquidation laws to distribute those assets on a rational, equitable and non-preferential basis among resident and non-resident claimants. Both states have nearly identical provisions for the allowance and priority of claims. The power to stay proceedings and to void attachments, garnishments or liens (under Mont. Code Ann. § 33-2-1386 in Montana and under 40 Pa. Stat. Ann. § 221.60 in Pennsylvania) are vital to the administration of the liquidation proceedings.

Further, Montana and Pennsylvania have identical policies toward liquidating insolvent insurers and issuing stay orders. Montana courts, with jurisdiction over liquidation proceedings initiated against insolvent Montana insurers, are empowered to issue:

such other injunctions or enter such other orders as may be deemed necessary to prevent interference with the proceedings, or with the commissioner of insurance's possession and control or title, rights, or

⁵ See generally Columbia Falls Aluminum Co. v. Hindin/Owne/Engelke, Inc. (1986), 224 Mont. 202, 206, 728 P.2d 1342, 1345 (comity is not a rule of law but is an expression of one state's voluntary decision to defer to the policy of another to promote uniformity, harmony or reciprocity) (quoting Simmons v. State (1983), 206 Mont. 264, 670 P.2d 1372, 1385).

interests as herein provided . . . and may issue such other injunctions or enter such other orders as may be deemed necessary to prevent waste of assets or the obtaining of preferences, judgments, attachments or other like liens

Mont. Code Ann. § 33-2-1309. Pennsylvania has a similar law in 40 Pa. Stat. Ann. § 221.26.

Montana, by adopting The Model Act has acknowledged and promoted as its public policy, the principle that it is beneficial to adjudicate and resolve claims against an insolvent insurer in a single forum. Given the existence of equivalent Pennsylvania legislation, principles of comity are appropriately applied here.

The stay of any action against Reliance is thus a lawful exercise of jurisdiction by the Commonwealth Court of Pennsylvania, and the stay order represents a rational attempt to avoid inconsistent decisions and unnecessary waste of Reliance's assets by having Reliance defend such actions outside of the domiciliary liquidation proceedings instituted in Pennsylvania. Allowing the Common Fund Actions to proceed against Reliance thus undermines Pennsylvania's statutory scheme for the orderly resolution of claims and distribution of assets.

Thus, as a matter of comity between sister states, the anti-suit provision of the liquidation order ought to be enforced. A Montana domiciliary receiver would expect a Pennsylvania court to respect and accommodate domiciliary receivership proceedings commenced here. Montana courts should make like accommodation to Pennsylvania, as states with identical interests.

E. Plaintiffs Can Pursue Their Claims Through the Proof of Claim Process in the Liquidation.

The Common Fund Action plaintiffs are not without a forum to pursue their claims against the Reliance Estate. Pursuant to the Commonwealth Court of Pennsylvania's Order of September 9, 2002, there are detailed procedures set forth for the filing of Proofs of Claim and the resolution of disputes arising out of Notices of Determination issued as to those Proofs of Claim. Ex. "C", Order (Sept. 9, 2002).

Although the December 31, 2003 deadline for filing Proofs of Claim has passed, the Liquidator has agreed that for any Proofs of Claim filed with regard to the Common Fund Actions by May 1, 2006, good cause exists for the late filing and Reliance will proceed to evaluate and handle them accordingly. See Ex. "D", Aff. David S. Brietling,

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Chief Liquidation Operating Officer of the Pennsylvania Insurance Department, Office of Liquidations, Rehabilitations and Special Funds (Jan. 25, 2006).

At the July 2005 hearing, Plaintiffs' counsel expressed concern that he does not know on whose behalf, if anyone's, he is entitled to file Proofs of Claim until and unless Reliance identifies from its closed files any potentially applicable claimants. In order to address this concern, the Liquidator has further agreed that Plaintiffs' counsel may file a Contingent Proof of Claim for each of the Common Fund Actions, thereby preserving the claim of each individual claimant who has a claim under the Common Fund Actions. Ex. "D", Aff. Brietling.

Further, and without wavier of its jurisdictional position, Reliance has made a reasonable search of its records to determine which, if any, workers' compensation claim files involving Montana claimants could potentially meet the criteria at issue in the Common Fund Actions, so that they can file a claim against the Estate. Initially, a broad computer search was performed to identify claims by a Montana claimant or involving a Montana workers' compensation benefit, other than a medical only payment, which does not appear to be at issue in the Common Fund Actions. A total of 382 files were identified. Some of the files identified are maintained through Reliance's Philadelphia office and some are maintained through its New York office.

As set forth in the Affidavit of Dan Johns, Exhibit "F" to this Brief, Reliance's Philadelphia office identified 136 of the total files which met the initial search criteria. Six of these files are open claims which are with the Western Guaranty Fund. The remaining 130 files were closed files. Reliance was able to retrieve 122 of them from storage. Eight files identified by the Philadelphia office are missing. Of the 122 files which were located and retrieved, all were reviewed to determine if any of the criteria at issue in the Common Fund Actions, as set forth on the spreadsheet attached to the Affidavit of Dan Johns, Exhibit "F" to this Brief, were met. It was determined that only 3 files identified and reviewed by the Philadelphia Office potentially meet the criteria at issue in the Common Fund Actions.

In its search of their claims system computer records, the New York office identified 246 files that met the initial search criteria. See Ex. "F", Aff. Kenneth V. Parker (Jan. 25, 2006). Unlike the Philadelphia office, the New York Office handled its workers' compensation claims through third party administrators. Thus, of the 246 total files identified by the New York office, only 57 are in the direct possession and control of Reliance's New York office. Of those, only 3 files potentially meet the criteria at issue in the Common Fund Actions. The remaining files were determined to be in the

possession or control of third party administrators or insureds, in the case of excess policies.

In many instances, the third party administrators have refused to provide these files to Reliance or have advised Reliance the files are destroyed or lost.

In those cases where the third party administrators shipped the files back to Reliance's New York Office, Reliance has reviewed them to determine if they potentially meet the Common Fund Action criteria and, as set forth on the attached Affidavit of Kenneth V. Parker, only 3 such files have been identified.

These 3 files will be shipped to the Western Guaranty Fund.⁶ The Fund has agreed to accept for handling any files identified by Reliance which potentially meet the Common Fund Action criteria. These claims will be considered open claims by the Fund, and will be evaluated by the Fund, as appropriate, in light of the Court's requirements and Orders issued in the Common Fund Actions. When the Fund completes its handling and deems the file closed from its standpoint, it will be returned to Reliance for evaluation and issuance of a Notice of Determination (hereafter "NOD"), assuming a Proof of Claim has been filed with respect to that claim.

Once a NOD issues, the procedures for resolution of any dispute with regard to that claim are set forth in the September 9, 2002 Order of the Commonwealth Court apply. See Ex. "D", Order ¶ 10.

Thus, Plaintiffs have a forum in which to pursue their claims – a forum to which deference must be given by this Court, under Montana law.

⁶ Once an insurer is in liquidation, various states, including Montana, have a state guaranty fund which assumes responsibility for handling and, if appropriate, paying claims which the Fund determines are covered under the Reliance policy and the Fund's guaranty fund act. In this case, the fund administering Montana workers' compensation claims under Reliance policies is the Western Guaranty Fund. In the ordinary course, upon the liquidation of an insurer, the guaranty fund is sent the insolvent insurer's open claim files. The guaranty fund makes its claim determination and the claim file is returned to Reliance only after the fund has completed its handling. At that time, if there is a claim in excess of the applicable guaranty fund cap, if any, or if the file is denied by the Fund, Reliance will evaluate the claim and issue its Notice of Determination.

IV. Conclusion

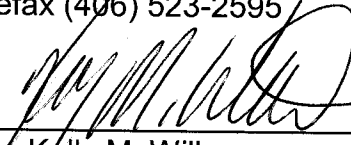
For the foregoing reasons, the claims against Reliance in the Common Fund Litigation should be dismissed, or in the alternative stayed, and the Liquidation Order of October 3, 2001, be given full faith and credit and enforcement.

DATED this 30th day of January, 2006.

Attorneys for Reliance Insurance Company

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By



Kelly M. Wills

CERTIFICATE OF SERVICE

The undersigned, a representative of GARLINGTON, LOHN & ROBINSON, PLLP, hereby certifies that on the 30 day of January, 2006, a true and correct copy of the foregoing BRIEF OF RELIANCE INSURANCE COMPANY (IN LIQUIDATION) SEEKING DISMISSAL OF RELIANCE, AS A LIQUIDATING INSURER, FROM THE COMMON FUND ACTIONS was mailed, postage prepaid, to the following:

Rex L. Palmer, Esq.
301 W. Spruce
Missoula, MT 59802



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