

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. DIANE KOKEN  
Insurance Commissioner of the  
Commonwealth of Pennsylvania,

Plaintiff,

v.

RELiance INSURANCE COMPANY,

Defendant.

DOCKET NO. 269 MD 2001

2005 FEB -7 P 3:44

RECEIVED AND FILED  
COMMONWEALTH COURT  
OF PA (PHILA)

ORDER

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2005, upon consideration of the  
Petition filed by M. Diane Koken, the Statutory Liquidator of Reliance Insurance Company,  
to Stay Appointment of a Referee, with regard to Proof of Claim Number 2095337 filed by  
Factory Mutual Insurance Company, and any response thereto, it is hereby ORDERED and  
DECREED that the Petition is granted.

\_\_\_\_\_  
JAMES GARDNER COLLINS  
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. DIANE KOKEN,  
Insurance Commissioner of the  
Commonwealth of Pennsylvania,  
in Her Official Capacity as Liquidator of  
Reliance Insurance Company,

Plaintiff

v.

FACTORY MUTUAL INSURANCE  
COMPANY d/b/a FM GLOBAL,

Defendant.

DOCKET NO. 675 MD 2003

2005 FEB - 7 P 3:45

RECEIVED AND FILED  
COMMONWEALTH COURT  
OF PA (PHILA)

M. DIANE KOKEN  
Insurance Commissioner of the  
Commonwealth of Pennsylvania,

Plaintiff

v.

RELiance INSURANCE COMPANY,

Defendant.

DOCKET NO. 269 MD 2001

**THE STATUTORY LIQUIDATOR'S PETITION TO STAY  
APPOINTMENT OF A REFEREE AND ALL FUTURE PROCEEDINGS  
AS TO PROOF OF CLAIM NUMBER 2095337  
FILED BY FACTORY MUTUAL INSURANCE COMPANY**

M. Diane Koken, the Statutory Liquidator of Reliance Insurance Company, (the "Statutory Liquidator") hereby files this petition to stay appointment of a Referee and to stay all further proceedings with regard to Proof of Claim Number 2095337 filed by Factory Mutual Insurance Company ("Factory Mutual"), pending the outcome of the preference action filed by the Statutory Liquidator against Factory Mutual. In support of this Petition, the Statutory Liquidator states the following:

1. Factory Mutual filed Proof of Claim number 2095337 asserting a subrogation claim of \$220,552.500. On October 6, 2004, the Statutory Liquidator issued a Notice of Determination assigning class (g) priority. Factory Mutual has filed an objection asserting that its claim is entitled to class (b) priority.

2. Factory Mutual's Proof of Claim is subject to 40 P.S. section 221.31 regarding claims filed by holders of voidable rights. This section provides that no claim of a creditor receiving a voidable preference shall be allowed unless the preference is surrendered. Section 221.31(a) of the Act provides, in relevant part:

No claims of a creditor who has received or acquired a preference, lien, conveyance, transfer, assignment or encumbrance, voidable under this article, shall be allowed unless he surrenders the preference, lien, conveyance, transfer[,] assignment[,] or encumbrance. If the avoidance is effected by a proceeding in which a final judgment has been entered, the claim shall not be allowed unless the money is paid or the property is delivered to the liquidator within thirty days from the date of the entering of the final judgment, except that the court having jurisdiction over the liquidation may allow further time if there is an appeal or other continuation of the proceeding.

See 40 P.S. § 221.31(a) (emphasis added).

3. Prior to issuing its Notice of Determination, the Statutory Liquidator filed a preference action on October 2, 2003, against Factory Mutual seeking return of this preference, captioned M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, in Her Official Capacity as Liquidator of Reliance Insurance Company, Plaintiff v. Factory Mutual Insurance Company d/b/a FM Global, Defendant (Commonwealth Court Docket No. 675 M.D. 2003).<sup>1</sup> For the reasons set forth in the preference action Complaint filed against Factory

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<sup>1</sup> In an Order dated January 20, 2005, this Court granted a Motion by one of the other preference defendants to withdraw the reference of a preference action to a Referee. At the same time, the Court consolidated 10 of the pending preference actions before the Court. A Motion to Consolidate the Factory Mutual preference action with the other preference actions is now pending.

Mutual, the sum of \$1,895,212.74 paid to Factory Mutual is a preference which must be surrendered to the Statutory Liquidator.

4. Under the plain language of 40 P.S. § 221.31, further proceedings with regard to this Proof of Claim must await resolution of the preference action pending against Factory Mutual and/or the surrender by Factory Mutual of the preference it acquired, as asserted in those proceedings. If there is a judgment against Factory Mutual in the preference action, section 221.31 requires that the preference be paid before Factory Mutual's claim is allowed. Thus, it is necessary for the preference action to be decided before further proceedings on Factory Mutual's subrogation claim take place.

5. Only one reported decision from the Pennsylvania courts discusses section 221.31, Maleski v. Corporate Life Insurance Company, 641 A.2d 7 (Pa. Commw. 1994) ("CLIC"). In CLIC, the Commonwealth Court stated that in the context of the POC process and in response to a creditor's POC, the Statutory Liquidator, even after accepting the claim in full and as secured, could seek to avoid the claim based on the existence of a prior preferential transfer to the creditor by the insolvent insurer. Id. At 11. Once the Liquidator has made a determination that a preference has occurred and the claimant disagrees with that determination, the Court is the appropriate forum to review the Liquidator's preference determination. Specifically, the CLIC court stated:

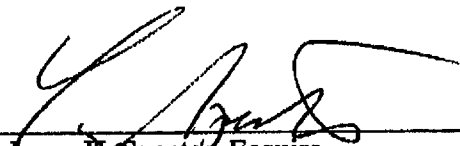
The Statutory Liquidator may accept [the creditor's] claim, or may dispute it as to validity, or reasonableness. Even if the Statutory Liquidator accepts [the creditor's] claim in full and as secured, it may still seek to avoid that claim as a preferential transfer based upon the allegations of [the creditor's] position . . . [The creditor] will have access to this Court to review any of these determinations, but only once they are made. [citing 40 P.S. § 221.31].

CLIC, 641 A.2d at 11 (emphasis supplied; citations and footnote omitted).

6. In this case, unlike Maleski, the Liquidator has made the determination that there is a preference. A preference action has been filed and the issue is joined and is pending before the Court for determination. Under Maleski, this Court is the proper forum for review of the Liquidator's determination that Factory Mutual received a preference. That issue is determinative of, and must precede, further proceedings before a Referee as to whether Factory Mutual's subrogation claim can be allowed.

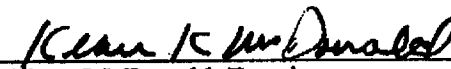
7. For these reasons, further proceedings with regard to this proof of claim must await resolution of the preference action pending against Factory Mutual and/or the surrender by Factory Mutual of the preference it acquired, as asserted in those proceedings. Therefore, the Statutory Liquidator respectfully requests that this Court enter an Order staying appointment of a Referee and further proceedings on Factory Mutual's Proof of Claim, pending the outcome of the preference action.

Dated: February 7, 2005

  
\_\_\_\_\_  
Larry H. Spector, Esquire  
Wolf, Block, Schorr and Solis-Cohen LLP  
1650 Arch Street, 22<sup>nd</sup> Floor  
Philadelphia, PA 19103-2097

Attorney for the Liquidator in the Factory  
Mutual Preference Action

Dated: February 7, 2005

  
\_\_\_\_\_  
Kean McDonald, Esquire  
Fox Rothschild LLP  
2000 Market Street, 10<sup>th</sup> Floor  
Philadelphia, PA 19103-3219

Attorney for the Liquidator in the Factory  
Mutual Proof of Claim Number 2095337.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. DIANE KOKEN  
Insurance Commissioner of the  
Commonwealth of Pennsylvania,

Plaintiff,

v.

RELIANCE INSURANCE COMPANY,

Defendant.

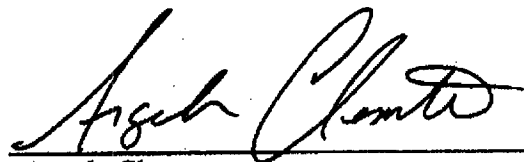
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**VERIFICATION**

I, Angela Clemente, Claims Specialist of Reliance Insurance Company (In Liquidation), hereby state that I am authorized to make this verification on behalf the Statutory Liquidator of Reliance Insurance Company (In Liquidation). I hereby verify that the facts set forth in the foregoing Petition are true and correct to the best of my knowledge, information and belief.

I understand that this Verification is made subject to the penalties of 18 P.S. § 4904 relating to unsworn falsification to authorities.

Dated: February 7, 2005



Angela Clemente  
Claims Specialist  
215-864-4063  
Reliance Insurance Company (In Liquidation)  
Three Parkway  
Philadelphia, PA 19102  
On behalf of the Statutory Liquidator of  
Reliance Insurance Company

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. DIANE KOKEN  
Insurance Commissioner of the  
Commonwealth of Pennsylvania,

Plaintiff,

v.

RELiance INSURANCE COMPANY,

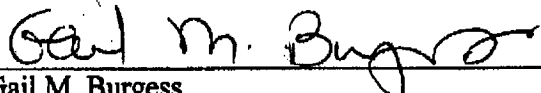
Defendant.

DOCKET NO. 269 MD 2001

**CERTIFICATE OF SERVICE**

I, Gail M. Burgess, Vice President and Associate General Counsel of Reliance Insurance Company (In Liquidation), on behalf of the Statutory Liquidator of Reliance Insurance Company, do hereby certify that in accordance with this Court's Order dated April 1, 2004, a true and correct copy of the foregoing Petition to Stay Appointment of a Referee and All Future Proceedings as to Proof of Claim Number 2095337 was served on the claimant, Factory Mutual Insurance Company, and on claimant's counsel, Thomas S. Brown, Esquire, of Hecker, Brown, Sherry and Johnson LLP, by first class U.S. Mail, postage prepaid on February 7, 2005.

Dated: February 7, 2005



Gail M. Burgess  
Vice President, Associate General Counsel  
Reliance Insurance Company (In Liquidation)  
Three Parkway  
Philadelphia, PA 19102  
Telephone: (215) 864-4000  
Facsimile: (215) 864-4141  
On behalf of the Statutory Liquidator of  
Reliance Insurance Company