IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. DIANE KOKEN, Insurance Commissioner of the Commonwealth of Pennsylvania, Plaintiff,	:	
v.	:	DOCKET NO. 269 MD 2001
RELIANCE INSURANCE COMPANY, Defendant.	:	

LIQUIDATOR'S RESPONSE TO OBJECTION OF DELOITTE & TOUCHE LLP AND JAN A. LOMMELE TO THE PETITION TO APPROVE SETTLEMENT AGREEMENT OF RELIANCE DIRECTOR AND OFFICER LITIGATION

PRELIMINARY STATEMENT

Plaintiff M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, in her capacity as Liquidator of Reliance Insurance Company, hereby files her Response to the objection of Defendants Deloitte & Touche LLP and Jan A. Lommele ("Deloitte"), to the Liquidator's Petition to Approve Settlement Agreement of Reliance Director and Officer Litigation, *Koken v. Steinberg, et al.*, 421 M.D. 2002 (the "D&O Action"). For the reasons set forth below and in the Liquidator's Petition seeking the Court's approval of the Settlement Agreement, Deloitte's objection should be overruled.

The settlement to which Deloitte objects was negotiated over many months by and between the Liquidator and the Defendants in the D&O Action under the auspices of a Court-appointed mediator, who helped the parties strike a legally enforceable agreement consistent with Pennsylvania law. Under it, the Liquidator will provide the Director and Officer ("D&O") Defendants with a release consistent with settled Pennsylvania case law, as interpreted by *Griffin*

v. United States, 500 F.2d 1059 (3d Cir. 1974) and *Charles v. Giant Eagle Markets*, 522 A.2d 1 (1987). A bargained-for benefit of this release provides the Liquidator with the opportunity to collect from Deloitte a sum representing its *pro rata* share of liability, as determined by the jury, even if the amount of Deloitte's *pro rata* liability as determined by the jury is in a dollar amount less than the amount paid by the D&O Defendants pursuant to the Settlement Agreement with the Liquidator. Deloitte's Objection seeks to preserve the "right" to strip away this bargained-for benefit, thereby interjecting an unexpected element of uncertainty into the settlement and potentially undermining the Liquidator's ability to collect sums for policyholders. Deloitte's objection should be overruled.

DELOITTE ADMITS THAT IT SEEKS REVIEW OF A MATTER NOT RIPE FOR ADJUDICATION

1. Deloitte admits that the issue raised by its objection is "not ripe" for review and that it would only become ripe, if at all, after trial. It further admits that the issue may never become ripe. *See* Deloitte Objection, ¶ 8. This dooms the objection. Courts cannot consider requests for opinions or rulings of hypothetical matters not ripe for adjudication. "It is impermissible for courts to render purely advisory opinions." *Erie Ins. Exch. v. Claypoole,* 673 A.2d 348, 352 (Pa. Super. 1996). Instead, a case or controversy must exist before a court can adjudicate a claim. *See Borough of Marcus Hook v. Pennsylvania Mun. Retirement Bd.,* 720 A.2d 803, 804 (Pa. Commw. 1998") ([T]he courts of this Commonwealth may not exercise jurisdiction to decide issues that do not determine the resolution of an actual case or controversy."). Since Deloitte admits that its objection "is not ripe," the objection should be overruled on this basis alone.

IN ANY EVENT, DELOITTE SHOULD NOT BE PERMITTED TO UNDERMINE THE FINALITY OF THE SETTLEMENT REACHED AFTER A COURT-SPONSORED MEDIATION

2. The respective obligations of the parties to a lawsuit can be finally determined either by way of a bona fide settlement or through trial. The Commonwealth has a strong public policy which favors settlement. *See, e.g., Charles*, 552 A.2d 1 (Pa. 1987).

3. "The inducements for a defendant to settle are the certainty of the agreed-upon obligation and the avoidance of the vagaries of trial." *Charles, supra*, 552 A.2d at 3.

4. Through its objection, Deloitte seeks to preserve a legally unsupportable benefit arising out of the D&O settlement. It seeks to be excused from paying the full amount that a jury may determine **it** should pay as a result of **its own wrong**.

5. Deloitte's objection, bottomed on the concern that it may have to pay a so-called "windfall" to the Liquidator, should be rejected as it is unabashedly inconsistent with established Pennsylvania law under *Charles*. Deloitte admits this. With respect to its obligations under the joint tortfeasor release, Deloitte seeks to "preserve" its "right to challenge the *Charles* holding" at a future date.[1] Deloitte's Objection, ¶8. Deloitte's objection – if ultimately accepted – would permit it to pay an amount **less than** that attributed to it by the jury. Such a position is inconsistent with Pennsylvania public policy as it would discourage recalcitrant defendants from settling.

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[1] Deloitte apparently seeks the right to challenge the Supreme Court's decision in *Charles* while, at the same time, reaping the substantial benefits of *Charles* and the *pro rata* set-off contemplated by the Settlement Agreement in the event its challenge is unsuccessful. Deloitte should not be permitted to preserve an attack on *Charles* while, at the same time, reap its benefits.

6. Deloitte's argument is based upon a fundamentally flawed premise. It assumes that the jury verdict in its case more accurately measures the tortfeasor's obligation than that which is agreed upon between the parties by way of settlement. But there is no basis to conclude that a jury verdict must serve as a cap on the total recovery that a plaintiff may receive.

The Court in *Charles* provided the following illustration:

> There is no precise measure of the amount of wrong. Even if the trial is as to damages only, successive juries would rarely make the identical appraisal. Nor is there reason to suppose that the jury's evaluation of losses is more accurate than the evaluation made by the parties to the settlement. Surely where liability is contested, the verdict may not reflect the exact worth of the injuries. When the cost of litigation is taken into account, it becomes still more difficult to say that enforcement of the judgment debtor's *pro rata* liability would enrich the plaintiff.

Id. at 3 (citing *Theobald v. Angelos,* 208 A.2d 129, 135 (N.J. 1965)).

7. Holding Deloitte liable for its full proportionate share advances Pennsylvania's strong policy of favoring settlements by refusing to reward a recalcitrant non-settling defendant who holds out the hope that it will be able to characterize the verdict as a "windfall" and thereby pay less than the full amount owed. *See Charles*, 522 A.2d at 3. Deloitte should not be permitted to interject needless uncertainty into the legal interpretation of the settlement reached by the Liquidator and the D&O Defendants. Deloitte's objection to the Settlement Agreement should be overruled.

DELOITTE'S OBJECTION IS NOT SUPPORTED BY PENNSYLVANIA STATUTES

8. Deloitte argues that the Uniform Contribution Among Tortfeasors Act ("UCATA") 42 Pa. C.S.A. § 8231, *et seq.*, supports its objection to the Settlement Agreement. This is not true. Deloitte's analysis is incomplete – it improperly focuses on a single aspect of

Pennsylvania's statutory scheme and ignores the courts' interpretation and application of the overall scheme.

9. Pennsylvania's Comparative Negligence statute directs that all defendants shall be liable for their portion of damages as determined at trial. See 42 Pa. C.S. § 7102. The version of the Comparative Negligence statute applicable to causes of action that accrued prior to August 19, 2002 (such as those at issue in the actions against Deloitte and the D&O Defendants) provides that joint tortfeasors shall be held jointly and severally liable:

> Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The Plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution.

42 Pa. C.S. § 7102(b) (subsequently amended for actions accruing on or after 8/19/02).[2]

10. Prior to the Comparative Negligence Act, the portion or percentage of liability of each tortfeasor was, as a matter of equity, equal in proportion to the number of tortfeasors. Under the comparative negligence statute, the liability of each tortfeasor is fixed by law and depends on a question of fact determined by an apportionment of the causal negligence attributable to all the tortfeasors. Where a defendant and plaintiff enter into a release, such as the one executed by the

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[2] The General Assembly amended Pennsylvania's Comparative Negligence statute two years ago, resulting in the deletion of subsection (b), with an effective date of August 19, 2002. *See* Act of June 19, 2002, P.L. 394, No. 57 (effective in 60 days). As the claims underlying these actions occurred prior to the effective date of this amendment, the prior version of § 7102 is applicable here. The amendments are not relevant to *Deloitte* case.

Liquidator and the D&O Defendants, the release should operate to satisfy only that percentage of the judgment plaintiff ultimately recovers as the settling tortfeasor's causal negligence bears to all the causal negligence of all the tortfeasors.

11. Pennsylvania's statutory scheme, properly interpreted, rebuts Deloitte's arguments in support of its Objection. Section 8326 of the UCATA provides:

> A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides, but reduces the claim against the other tort-feasors in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid.

42 Pa.C.S. § 8326. Based on the facts in *Charles*, the Court explained that this section "affords the parties to the release an option to determine the amount or proportion by which the total claim shall be reduced provided that the total claim is greater than the consideration paid." *Charles*, 522 A.2d at 4-5. Subsequent case law and statutory analysis make clear that the same analysis and policy considerations apply, regardless of the amount of the jury's verdict, *i.e.*, the non-settling defendants receive the benefit of a *pro rata* set-off for the percentage amount of liability the jury attributes to the settling defendants. *See Walton v. Avco Corp.*, 610 A.2d 454 (Pa. 1992) (non-settling tortfeasor remains liable for full proportionate share of the damage award regardless of the amount paid by settling defendant). A non-settling defendant, such as Deloitte here, remains liable for its *pro rata* share of the verdict. See 42 Pa. C.S. § 7102; *Walton*, 610 A.2d at 457.

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12. The D&O Defendants' release will satisfy that percentage amount of the case for which liability is found to be attributable to them by the jury – the dollar amount of the jury's award is irrelevant with respect to this issue. As explained in the concurring opinion in *Charles*:

> The argument that Appellant is receiving a $3900.00 windfall is misplaced and wrongly endorsed by the [lower courts]. Giant Eagle did not condition its payment to Appellant on the basis that if it overpaid its liability it could seek a refund from Appellant. In this regard the terms of the release are controlling. The only party who had a legal right to complain about the amount it paid for the release chose to waive its right of complaint. The release does not transfer any such right to Stanley. Stanley could only complain of windfall if it were being compelled to pay more than its 40% of causal negligence.

522 A.2d at 5 (Papadakos, J., concurring). The concurring opinion further explained that the *Charles* decision awarded the Appellant the benefit of his bargain with Giant Eagle ($22,500.00) and the amount awarded to him by the verdict against Stanley ($12,400.00) for a total of $34,900.00. This is so even though the full verdict was for $31,000.00. Importantly, if the settlement with Giant Eagle had been for less than $18,600.00, Appellant would have borne the loss and received a total recovery of less than the verdict of $31,000.00.

13. Deloitte ignores this analysis and, instead, improperly focuses on a purported "windfall" that *could possibly* occur in the future, depending upon the jury award should the case with Deloitte go to trial and verdict.

THERE IS NO SUPPORT FOR DELOITTE'S ASSERTION THAT THE PENNSYLVANIA SUPREME COURT HAS EXPRESSED AN INTENT TO REVISIT THE HOLDING OF *CHARLES V. GIANT EAGLE MARKETS*

14. Deloitte's argument is premised on an incorrect interpretation and application of Pennsylvania law and the viability of well-established case law. An accurate review of Pennsylvania Supreme Court decisions undermines Deloitte's argument regarding the viability of

Charles. In the first place, *Charles* was decided by our Supreme Court more than 18 years ago and remains good law today.[3] While the *Charles* decision has been *distinguished* by cases with different facts or held not to apply in certain circumstances, it plainly remains good law. Contrary to Deloitte's suggestion, the Supreme Court repeatedly has cited *Charles* over the past 18 years to support its analyses and decisions in other cases. There is no support for Deloitte's speculative assertion that the Supreme Court has expressed an intent to "revisit" *Charles*. In fact, in *Walton v. Avco Corp.*, 610 A.2d 454, 461 (Pa. 1992), the Court specifically stated that it "remain[s] committed to promoting the policies that fueled our decision in [*Charles*]." Rather than question *Charles*, the Pennsylvania Supreme Court continues to apply its pirnciples. *See, e.g., Taylor v. Solberg,* 778 A.2d 664 (Pa. 2001). This Court also has applied the principles of *Charles*, without mention of pending reversal or "revisit" by the Supreme Court. *See, e.g., Hanselman v. Consolidated Rail Corp.*, 632 A.2d 607 (Pa. Commw. 1993).

15. Federal courts also recognize the continuing viability of *Charles* and have regularly applied it as controlling on issues of Pennsylvania law. For example, in *Montgomery County v. Microvote Corp.*, 320 F.3d 440 (3d Cir. 2003), the Third Circuit cited *Charles* in denying the non-settling defendants arguments regarding set-off of settlement proceeds, stating that "[u]nder Pennsylvania law, a 'non-settling tortfeasor is required to pay his full pro-rata share.'" *Microvote*, 320 F.3d at 450 (quoting *Charles v. Giant Eagle Markets*, 522 A.2d 1, 2 (Pa. 1987)). *See also Weber v. GAF Corp.*, 15 F.3d 35 (3d Cir. 1994) (citing *Charles* in rejecting

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[3] Justice Zappala dissented in *Charles*, but the remaining members of the Court agreed with the portion of the decision at issue here. Justice Papadakos filed a concurring opinion, joined by Justice Larsen, which actually added analysis regarding the relationship between joint

non-settling defendants' claim that delay damages were an impermissible "windfall"); *Koppers Co., Inc. v Aetna Casualty & Surety Co.*, 98 F.3d 1440, 1453 (citing Pennsylvania law as determined in *Charles*).

16. In addition to ignoring the history and precedential value of *Charles*, Deloitte supports its objection with the following claim: "The *Charles* holding has been questioned, and the Supreme Court has itself suggested that it might be willing to revisit that holding in a proper case." Deloitte Objection, ¶ 7 (citing *Baker v. AC&S*, 755 A.2d 664, 671 n.6 (Pa. 2000)). With respect to the first part of this assertion, that the *Charles* holding "has been questioned," Deloitte fails to provide any meaningful support for this claim.

17. Finally, putting aside Deloitte's fallacious argument with regard to the dicta in footnote 6 of *Baker*, since the *Baker* decision in 2000, the Supreme Court has clearly acknowledged the continuing validity of *Charles*. *See Taylor v. Solberg*, 778 A.2d 664 (Pa. 2001). Thus, even assuming that a prior composition of the Court indicated that it might revisit *Charles*, cases since the *Baker* decision in 2000 have established the continuing validity of *Charles*.

CONCLUSION

For the reasons set forth above, the Liquidator respectfully requests that this Court enter an Order overruling Deloitte's objection to the Settlement Agreement entered into by the Liquidator and the D&O Defendants. The Court should not create for Deloitte rights that do not

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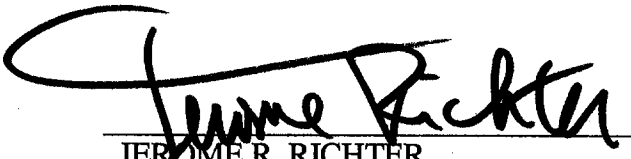
tortfeasors under Pennsylvania statutory provisions. Thus, 6 members of the Court joined Chief Justice Nix's majority opinion, with only Justice Zappala dissenting.

otherwise exist. Deloitte is attempting to obtain and preserve appellate rights unavailable to other parties, based upon its incorrect and incomplete application of Pennsylvania statutes and case law. Contrary to Deloitte's argument, *Charles v. Giant Eagle* remains good law more than 18 years after it was decided by the Pennsylvania Supreme Court. Deloitte's objection to the Settlement Agreement should be overruled.

Respectfully submitted,



JEROME R. RICHTER
GEORGE J. KRUEGER
ERIC D. STRAND
BLANK ROME, LLP
One Logan Square
Philadelphia, PA 19103-6998
(215) 569-5500

Counsel for Plaintiff, M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, in her Capacity as the Liquidator of Reliance Insurance Company.

CERTIFICATE OF SERVICE

I, George J. Krueger, hereby certify that on or about this day, pursuant to the Court's Order of April 1, 2004, service of the foregoing Liquidator's Response to Objection of Deloitte & Touche LLP and Jan A. Lommele to the Petition to Approve Settlement Agreement of Reliance Director and Officer Litigation was made on the attached Master Service List and the individuals, if any, listed below through the transmission of a Notice of Filing and through posting of a true and correct copy in PDF file format on the Reliance Documents website (www.reliancedocuments.com).

Dated: March 23, 2005

GEORGE J. KRUEGER

Master Service List
M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania
v.
Reliance Insurance Company
No. 269 M.D. 2001 (Commonwealth Court of Pennsylvania)

Jerome R. Richter
Ann B. Laupheimer
Blank Rome LLP
One Logan Square
Philadelphia, PA 19103
(215) 569-5500
(Attorneys for M. Diane Koken,
Insurance Commissioner of the
Commonwealth of Pennsylvania)

Steven B. Davis, Esquire
Chief Counsel
Pennsylvania Insurance Department
1341 Strawberry Square
Harrisburg PA 17120
(717) 783-1975
(Attorneys for the Pennsylvania Insurance Department)

Amy L. Weber, Esquire
Deputy Chief Counsel
Preston M. Buckman, Esquire
Special Funds Counsel
Commonwealth of Pennsylvania
Insurance Department
Office of the Chief Counsel
Capitol Associates Building
901 North 7th Street
Harrisburg, PA 17102
(717) 787-6009
(Attorneys for the Pennsylvania
Insurance Department)

Marilyn K. Kincaid, Esquire
Reliance Insurance Company
(in Liquidation)
Three Parkway
Philadelphia, PA 19102
(215) 864-4205

(Attorney for Reliance Insurance
Company (in Liquidation))

Joseph C. Crawford
Wolf, Block, Schorr & Solis-Cohen LLP
1650 Arch Street
22nd Floor
Philadelphia, PA 19103
Phone: (215) 977-2293
Fax: (215) 405-3893
(Attorneys for M. Diane Koken,
Insurance Commissioner of the
Commonwealth of Pennsylvania)

Hillary C. Steinberg
James Michael Matour
Hangley Aronchick Segal & Pudlin, P.C.
One Logan Square
Philadelphia, PA 19103
(215) 568-6200
(Attorneys for Reliance Group
Holdings, Inc.)

Jeffrey B. Rotwitt
Obermayer Rebmann Maxwell & Hippel
1 Penn Center, 19th Floor
Philadelphia, PA 19103-1895
(215) 665-3000
(Attorneys for M. Diane Koken,
Insurance Commissioner of the
Commonwealth of Pennsylvania)

Edward A. Perell
Debevoise & Plimpton
919 Third Avenue
New York, NY 10022
(212) 909-6000
(Attorneys for Reliance Group
Holdings, Inc.)

William Charles Bensley
George Whittaker Howard
Edward M. Nass
Howard Brenner & Nass, P.C.

1608 Walnut Street, Suite 1700
Philadelphia, PA 19103
(215) 546-8200
(Attorneys for Francine and Ted Forman)

Brad S. Karp
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000
(Attorneys for Reliance Group
Holdings, Inc.)

Robert H. Levin
Adelman Lavine Gold & Levin, P. C.
1900 Two Penn Center Plaza
Philadelphia, PA 19102
(215) 568-7515
(Attorneys for Committee of Policyholders)

David Carl Franceski
Mark Jason Dorval
Stradley, Ronon, Stevens & Young, LLP
2600 One Commerce Square
Philadelphia, PA 19103-7098
(215) 564-8109
(Attorneys for Citicorp North America, Inc.)

Richard D. Batchelder, Jr.
Ropes & Gray
One International Place
Boston, MA 02110-2624
(617) 951-7000
(Attorneys for Miami Cruiseline
Holdings LLC)

Frank F. McGinn
Bartlett Hackett Feinberg, P.C.
Suite 920
10 High Street
Boston, MA 02110
(617) 422-0200
(Attorneys for Flatley Company)

James W. Creenan
Francis X. McTiernan
Wayman, Irvin & McAuley
1624 Frick Building
Pittsburgh, PA 15219
(412) 566-2970
(Attorneys for Consolidated Freightways)

Janet S. Baer
Kirkland & Ellis
200 East Randolph Drive, Suite 6500
Chicago, IL 60601
(312) 861-2200
(Attorneys for AmeriServe Food Dist.)

Robert A. Kaufman
Michael L. Browne
Reed Smith Shaw & McClay LLP
2500 One Liberty Place
Philadelphia, PA 19103
(215) 851-8262
(Attorneys for Vitas Healthcare Corp.
and Various State Guaranty Assocs.)

Thomas J. Madigan
Christopher A. Coppula
Cohen & Grigsby, P.C.
11 Stanwix Street, 15th Floor
Pittsburgh, PA 15222
(412) 297-4900
(Attorneys for O'Brien-Kreitzberg
& Associates, Inc.)

Stephen C. Becker
Becker Law Office
P.O. Box 192991
San Francisco, CA 94119-2991
(415) 434-8000
(Attorneys for Great Western Collection
Bureau)

Terence R. Savage
Employment Development Department
State of California
800 Capitol Mall, Legal Office
Sacramento, CA 95814
(916) 654-8410
(Attorneys for Employment Development Department, State of California)

Peter J. Boyer
R. Nicholas Gimbel
McCarter & English, LLP
Mellon Bank Center
1735 Market Street
Suite 700
Philadelphia, PA 19103
Phone: (215) 979-3800
Fax: (215) 979-3899
(Attorneys for Brand Scaffold Services, Inc., Magellan Ins. Co. Ltd., and Sun Life Assurance Company of Canada)

Philip J. Goodman
Chadbourne & Parke LLP
120 New Hampshire Avenue, NW
Washington, DC 20036
(202) 974-5600
(Attorneys for 1741 Ivar LLC)

John Norig Ellison
Timothy Patrick Law
Anderson, Kill & Olick P.C.
1600 Market Street, 32nd Floor
Philadelphia, PA 19103
(215) 568-4202
-and-
Marvin L. Wilenzik
Elliott Reihner Siedzikowski & Egan, P.C.
925 Harvest Drive
P.O. Box 3010
Blue Bell, PA 19422
(215) 977-1050
(Attorneys for Synagro Technologies, Inc.)

Jeremy Harwood, Esquire
Healy & Baillie, LLP
61 Broadway, 32 Floor
New York, NY 10006-2834
(212) 943-3980
-and-
Joseph M. Donley, Esquire
William E. Cox, Esquire
Kittredge, Donley, Elson, Fullem & Embick
421 Chestnut Street, 5th Floor
Philadelphia, PA 19106
(215-829-9900)
(Attorneys for Steamship Mutual Underwriting Association (Bermuda) Ltd.)

Thomas V. White, Esquire
Joseph P. Rusnak, Esquire
Tune, Entrekin & White, P.C.
AmSouth Center, 21st Floor
315 Deaderick Street
Nashville, TN 37238
(615) 244-2770
(Attorneys for Home Builders Association of Tennessee Self-Insured Trust)

Michele Smolin, Esquire
McDonald, Hopkins, Burke & Haber
600 Superior Avenue E
Cleveland, OH 44114-2653
(216) 348-5400
(Attorneys for United Church of Christ Insurance Board)

Lise Luborsky, Esquire
Britt, Hankins, Schaible & Moughan
Two Penn Center Plaza, Suite 515
1500 John F. Kennedy Blvd.
Philadelphia, PA 19102-1888
(215) 569-6918
(Attorneys for the Pennsylvania Property and Casualty Insurance Guaranty Association)

Frederick P. Santarelli, Esquire
Elliott Reihner Siedzikowski & Egan, P.C.
925 Harvest Drive
P.O. Box 3010

Blue Bell, PA 19422
(215) 977-1050
(Attorneys for Estate of Leo Frances Tenczynski)

Janice Marie Savinis, Esquire
Suite 3626, Gulf Tower
707 Grant St.
Pittsburgh, PA 15219
(Attorney for Harold W. Thomas)

Francine L. Semaya, Esquire
Joseph James Bellew, Esquire
Jay M. Levin, Esquire
Cozen O'Connor
45 Broadway, 16th Floor
New York, NY 10006
(212-908-1270)
(Attorneys for Allied Holdings and Client Assurance Pool)

Kathleen S. McGrath, Esquire
Marshall, Dennehey, Warner,
Coleman & Goggin
One Montgomery Plaza, Suite 1002
Norristown, PA 19401
(610-292-4440)
(Attorneys for Pottstown Memorial Medical Center)

Richard F. McMenamin, Esquire
David L. Harbaugh, Esquire
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
(215-963-5596)
(Attorneys for Fuji Bank Limited and The Tribune Company)

Eric P. Wilenzik, Esquire
Elliott Reihner Siedzikowski & Egan, P.C.
925 Harvest Drive

Blue Bell, PA 19422
(215-977-1000)
(Attorneys for Brandywine Realty Trust)

Michael Novak, Esquire
Freeborn & Peters
311 South Wacker Drive, Suite 3000
Chicago , IL 60606
(312-360-6000)
(Attorneys for Carolyn Corporation)

Charles T. Locke, Esquire
Locke & Herbert
Citigroup Center
153 East 53rd Street, Suite 2900
New York, NY 10022
(212-935-8787)
(Attorneys for Citicorp USA Inc.)

Charles S. Greene, III, Esquire
Hogan & Hartson, LLP
555 13th Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5797
(Attorneys for National Structured Settlements Trade Association, General Electric Capital Assurance Co., First Colony Life Ins. Co., Federal Home Life Ins. Co., and GE Life and Annuity Assurance Co.)

David W. Cranshaw, Esquire
Morris, Manning & Martin, LLP
1600 Atlanta Financial Center
3343 Peachtree Road, N.E.
Atlanta, GA 30326
(404-233-7000)
(Attorneys for ChoicePoint and its division ChoicePoint Commercial Specialist)

P. Kevin Brobson, Esquire
Buchanan Ingersoll

One South Market Square
213 Market Street, 3rd Floor
Harrisburg, PA 17101
(717-237-4800)
(Attorneys for Magellan Reinsurance Company, Ltd. and RBH Reinsurance Ltd.)

John J. Gallagher, Esquire
Carl R. Shultz, Esquire
LeBoeuf, Lamb, Greene & MacRae, LLP
200 North Third Street, Suite 300
P.O. Box 12105
Harrisburg, PA 17108-2105
(717-232-8199)
(Attorneys for CSX Insurance Company)

Bruce R. Hoffman, Esquire
Law Office of Bruce R. Hoffman, LLC
574 Sea Island Parkway
Saint Helena Island, SC 29920-4205
(843-838-5290)
(Pro Se)

R. Jane Lynch, Esquire
Cox, Castle & Nicholson LLP
2049 Century Park East, Suite 2800
Los Angeles, CA 90067
(310-277-4222)
(310-277-7889) fax
(Attorneys for Lake at Las Vegas Joint Venture)

Maria Jose Morinigo, Esquire
Vaira & Riley, P.C.
1600 Market Street, Suite 2650
Philadelphia, PA 19103-7226
(215-751-2700)
(215-751-9420) fax
(Attorneys for Debbie Stephens)

Francis Patrick Newell, Esquire
Montgomery, McCracken, Walker & Rhoads LLP
123 South Broad Street
Philadelphia, PA 19109
(215-772-1500)
-and-
Kevin E. Wolff, Esquire
Robert J. Re, Esquire
McElroy, Deutsch & Mulvaney, LLP
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, NJ 07962-2075
(973-425-8717)
(Attorneys for Celanese Americas Corporation, Elwood Insurance Limited, and Celwood Insurance Company (f/k/a Hoechst Celanese Insurance Company, Ltd.)

Michael B. Dubin, Esquire
Semanoff, Ormsby, Greenberg & Torchia
Suite 200 Jenkins Court
610 Old York Road
Jenkintown, PA 19046
(215-887-0200)
(215-887-5356) fax
(Attorneys for Integrated Health Services, Inc.)

Deborah Fuchs Cohen, Esquire
Eric Jonathan Rothschild, Esquire
Pepper Hamilton LLP
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 981-4470
(Attorney for M. Diane Koken,
Insurance Commissioner of the
Commonwealth of Pennsylvania)

Leonard P. Goldberger, Esquire
Amy Elizabeth Vulpio, Esquire
White and Williams LLP
1800 One Liberty Place

Philadelphia, PA 19103-7395
(215) 864-6376
(Attorneys for Insurance Company
of North America)

Harold S. Horwich, Esquire
Bingham McCutchen
One State Street
Hartford, CT 06103
(860) 240-2700
(Attorneys for St. Joseph's Medical Center)

Michael Joseph Cawley, Esquire
Margolis Edelstein
Independence Square West, Fourth Floor
601 Walnut Street
Philadelphia, PA 19106
(215) 922-1100
(Attorneys for Phoenix Assurance PLC, Commercial Union Assurance Co., The British Aviation Insurance Company, Ltd., Marine Insurance Company Ltd., and The Yorkshire Insurance Company)

Susan J. Guerrieri, Esquire
Stephen C. Baker, Esquire
John B. Dempsey, Esquire
Drinker Biddle & Reath LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996
(215) 988-2700
(Attorneys for Mawson & Mawson, Inc.)

Joseph F. Orso, III, Esquire
Casale & Bonner, P.C.
Suite 202
33 West Third Street
Williamsport, PA 17701
(570) 326-7044
(Attorneys for Richard Ruhl)

Arthur Makadon, Esquire
Geoffrey A. Kahn, Esquire
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 665-8500
(Attorneys for Deloitte & Touche LLP)

Douglas Y. Christian, Esquire
Reed Smith
2500 One Liberty Place
1650 Market Street
Philadelphia, PA 19103-7301
(215) 851-8256
(Attorneys for American Longshore Mutual Association)

Lisa M. Salazar, Esquire
McCarter & English LLP
Mellon Bank Center, Suite 700
1735 Market Street
Philadelphia, PA 19103-7501
(215) 979-3800
(Attorneys for Robert M. Steinberg)

Robert E. Kelly, Jr., Esquire
Anthony W. Parker, Esquire
Kelly Hoffman & Goduto LLP
Commerce Towers
300 North Second Street, 10th Floor
P.O. Box 62003
Harrisburg, PA 17106-2003
(717) 920-8100
(Attorneys for Petitioner South Carolina School Boards Insurance Trust)

Joseph M. Hennelly, Jr., Esquire
Hennelly & Steadman, PLC
Goldworthy House
322 West Roosevelt
Phoenix, AZ 85003
(602) 230-7000
(Attorneys for Mark D. Tharp as Arizona's Special Ancillary Receiver of Reliance)

Rowe W. Snider, Esquire
Steven T. Whitmer, Esquire
Julie L. Young, Esquire
Lord, Bissell & Brook
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0700
(Attorneys for NCIGF)

Paul G. Witko, Deputy Attorney General
State of New Jersey
Office of the Attorney General
Department of Law and Public Safety
Division of Law
Station Plaza #4, 2nd Floor
22 South Clinton Ave.
P.O. Box 117
Trenton, NJ 08625-0117
(609) 777-3512
(Attorney for New Jersey Workers Compensation Bureau)
Malcolm C. Lindquist, Esquire
Lane Powell Spears Lubersky
1420 Fifth Ave.
Suite 4100
Seattle, WA 98101
(206) 223-7101
(Attorney for Labor Ready, Inc.)

James W. Kutz, Esquire
Diane M. Tokarsky, Esquire
Kimberly M. Colonna, Esquire
McNees Wallace & Nurick, LLC
100 Pine St, P.O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000
(Attorneys for Earth Tech, Inc.)

Guy A. Cellucci, Esquire
Laura M. Spear, Esquire
White and Williams LLP

1800 One Liberty Place
Philadelphia, PA 19103-7395
(215) 864-7000
(Attorneys for Hartford Fire Insurance Co., Hartford Specialty Co., and the Hartford Financial Services Group, Inc.)

Brian T. Guthrie, Esquire
Daniel W. Krane, Esquire
Drinker Biddle & Reath LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996
(215) 988-2700
(Attorneys for Lexington Insurance Co.)

Edward G. Biester, Esquire
Duane Morris LLP
One Liberty Place
1650 Market Street
Philadelphia, PA 19103
215 979-1000
(Attorneys for Florida Workers' Compensation Insurance Guaranty Association Incorp.)

Christine G. Russell, Esquire
White and Williams LLP
1800 One Liberty Place
Philadelphia, PA 19103
(215) 864-6301
Fax: (215) 789-7598
-and-
Lawrence Licitra
Julie Pollack
Swiss Reinsurance America Corporation
175 King Street
Armonk, NY 10504
(Attorneys for Swiss Reinsurance America Corp.)

Daryn E. Rush, Esquire
Kimberly M. Dolan, Esquire
Leonard P. Goldberger, Esquire
White and Williams LLP
1800 One Liberty Place

Philadelphia, PA 19103-7395
(215) 864-7000
(Attorneys for Travelers Casualty and Surety Co.)

John C. Connell, Esq.
Jerrold S. Kulback, Esq.
Archer & Greiner, PC
One Centennial Square
Haddonfield, NJ 08033
(856) 795-2121
(Attorneys for New Mexico Mutual Casualty Company and Southwest Casualty Company)

Kevin F. Brady, Esq.
Skadden, Arps, Slate, Meagher & Flom, LLP
One Rodney Square
Wilmington, DE 19801
(302) 651-3001
(Attorneys for Zenith Insurance Company)

James J. Keightley
Jeffrey B. Cohen
John Menke
Virginia E. Neiswender
Brenda A. Bachman
Pension Benefit Guaranty Corporation
Office of the General Counsel
1200 K Street, N.W.
Washington, D.C. 20005
(Attorneys for Pension Benefit Guaranty Corporation)

Timothy P. Law, Esquire
Anderson Kill & Olick, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(Attorney for Harlem River Park Houses, Inc.)

Francis Patrick Newell
Montgomery, McCracken, Walker & Rhoads, LLP
123 South Broad Street
Philadelphia, PA 19109
(Attorneys for Celanese and the Celanese Reinsurers)

M. Diane Koken v. Saul P. Steinberg, *et al.*,
Docket No. 421 M.D. 2002 (Pa. Commw. Ct.)
-and-
M. Diane Koken v. Deloitte & Touche LLP, *et al.*,
Docket No. 734 M.D. 2002 (Pa. Commw. Ct.)

Consolidated Service List

Michael Lieberman, Esquire
Lubna Mian, Esquire
Hangley Aronchick Segal & Pudlin, P.C.
One Logan Square, 27th Floor
Philadelphia, PA 19103
Telephone: (215) 568-6200
Fax: (215) 568-0300

-and-

Sanford M. Litvack
Joanna R. Swomley
Quinn Emanuel Uruhart Oliver & Hedges
335 Madison Avenue, 17th Floor
New York, NY 10017
Telephone: (212) 702-8100
Fax: (212) 702-8200

Attorneys for George E. Bello, Lowell C. Freiberg, Howard E. Steinberg, James E. Yacobucci and Paul W. Zeller

John G. Harkins, Jr., Esquire
David J. Creagan, Esquire
David W. Engstrom, Esquire
Harkins Cunningham
2800 One Commerce Square
2005 Market Street
Philadelphia, PA 19103-7042
Telephone: (215) 851-6700
Fax: (215) 851-6710

-and-

Francis J. Menton, Jr., Esquire
Willkie Farr & Gallagher
787 Seventh Avenue
New York, NY 10019-3099
Telephone: (212) 728-8000
Fax: (212) 728-8111

Attorneys for Jewell Jackson McCabe, Irving Schneider, Bernard L. Schwartz and Richard E. Snyder

Lee M. Epstein, Esquire
Linda J. Karpel, Esquire
Fried, Epstein & Rettig LLP
Constitution Place
325 Chestnut Street, Suite 900
Philadelphia, PA 19106
Telephone: (215) 625-0123
Fax: (215) 625-0764

-and-

Steven B. Fierson, Esquire
Michael E. Baughman, Esquire
Dechert Price & Rhoads
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793
Telephone: (215) 994-4000
Fax: (215) 994-2222

-and-

Steven E. Obus, Esquire
Lisa Bauer, Esquire
Proskauer Rose LLP
1585 Broadway
New York, NY 10036-8299
Telephone: (212) 969-3660
Fax: (212) 969-2900

Attorneys for Saul P. Steinberg

James J. Rohn, Esquire
Nicholas M. Centrella, Esquire
Kelly Huller, Esquire
Conrad O'Brien Gellman & Rohn, P.C.
1515 Market Street, 16th Floor
Philadelphia, PA 19102-1916
Telephone: (215) 864-8074
Fax: (215) 864-9620

Attorneys for Linda S. Kaiser

William K. Dodds, Esquire
Dechert Price & Rhoads
30 Rockefeller Plaza
New York, NY 10112-2200
Telephone: (212) 698-3500
Fax: (212) 698-3599

Attorneys for Thomas P. Gerrity and Bruce E. Spivey

Jeffrey S. Saltz, Esquire
Law Office of Jeffrey S. Saltz, P.C.
1515 Market Street, Suite 1000
Philadelphia, PA 19102
Telephone: (215) 523-5317
Fax: (215) 523-5339

-and-

Blair C. Fensterstock, Esquire
Clifford James, Esquire
Fensterstock & Partners, LLP
30 Wall Street
New York, NY 10005
Telephone: (212) 785-4100 x234
Fax: (212) 785-4040

Attorneys for Dennis A. Busti

Richard F. McMenamin, Esquire
Jay H. Calvert, Jr., Esquire
David W. Marston, Jr., Esquire
Morgan Lewis & Bockius
1701 Market Street
Philadelphia, PA 19103-2921
Telephone: (215) 963-5000
Fax: (215) 963-5299

Attorneys for Kenneth R. Frohlich

Edward D. Rogers, Esquire
Geoffrey A. Kahn, Esquire

Alexander Kerr, Esquire
McCarter & English, LLP
Mellon Bank Center
1735 Market Street
Suite 700
Philadelphia, PA 19103-7501
Telephone: (215) 979-3800
Fax: (215) 979-3899

Attorneys for Robert M. Steinberg

Michael D. Epstein, Esquire
Richard Scheff, Esquire

Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street
Philadelphia, PA 19103-7599
Telephone: (215) 864-8219
Fax: (215) 864-9750

Attorneys for Deloitte & Touche LLP and Jan A. Lommele

Mark Beckman, Esquire
Jane W. Parver, Esquire
Phillip A. Geraci, Esquire
Kaye Scholer LLP
425 Park Avenue
New York, NY 10022-3598
Telephone: (212) 836-8000
Fax: (212) 836-7159

Attorneys for George R. Baker

Montgomery McCracken Walker & Rhoads
123 South Broad Street, 24th Floor
Philadelphia, PA 19109
Telephone: (215) 772-7502
Fax: (215) 772-7620

Attorneys for Stewart J. Gerson