

Application for Review (Petition), it purchased Reliance Insurance of Illinois Policy No. NTF250958705 (Reliance Insurance Policy) from Environmental Compliance Services, Inc. (ECS), which provided Golder with consultants combined professional and environmental liability coverage on a claims-made and reported basis for the period December 31, 1997 to December 31, 2000. Though not specifically plead, it can be inferred from the pleadings that ECS is a claims administrator⁴ and in that capacity acted as the underwriting manager and agent handling the Reliance Insurance. (Application for Relief, ¶3.) In June 1999 ECS was purchased by XL Capital and thereafter ECS became a wholly owned subsidiary of XL Capital. (Petition for Review, ¶¶ 23, 24.)

It is further averred that Golder was advised by ECS that XL Capital was assuming 100% of the risk under the Reliance policy. (Petition for Review, ¶¶29 - 32.) Golder advances the argument that XL Capital's acquisition of ECS rendered Reliance an intermediary between Golder and XL Capital. Based on that premise Golder filed this action seeking direct access to reinsurance proceeds as a result of claims made on three lawsuits that stemmed from one action occurring in the State of Washington.

Golder avers that in 1998 it entered into a Professional Services Agreement with the City of Blaine (City), Washington, wherein Golder agreed to conduct a cultural resources assessment in connection with the City's planned upgrade and expansion of its wastewater treatment plant. In 1999, Golder was retained by the City to be present at the site to observe the excavation related to the expansion and upgrade of the wastewater plant. The excavation site has archeological significance to the Lummi Indian Tribe. Golder's role was to

⁴ Exhibit A appended to the Application for Review is a letter drawn on ECS letterhead wherein ECS identifies itself as a claims administrator.

observe the construction of the wastewater treatment plant by a professional archaeologist until excavation was complete.

In July 2001, the Lummi Indian Tribe filed a complaint against Golder, as did the City and the landowner Freeman (Lummi action), alleging that numerous sets of human remains were discovered during excavation, and that Golder handled the remains in violation of its agreement, and in violation of applicable state and federal laws. Golder submitted to ECS/XL Capital claims related to the Lummi action. ECS/XL Capital paid the claims through June 1, 2001. Reliance was ordered into liquidation on October 1, 2001. As of October 3, 2001 ECS/XL Capital ceased paying Golder's defense costs. (Application for Review, ¶44.)

It is against that backdrop that Golder filed its Petition in this Court, seeking to intervene in the Reliance liquidation proceeding, requesting declaratory relief and seeking direct access to reinsurance proceeds. Golder asserts that this Court should declare that it is a party to the various insurance and reinsurance agreements through novation, and/or a third party beneficiary of the reinsurance procured by Reliance for Golder's benefit. Further, through that association Golder has an interest in ensuring that it has access to the reinsurance. Additionally, Golder contends that there is no entity protecting Golder's interest; therefore, intervention in the liquidation is appropriate.

The Liquidator has correctly argued that Golder has not set forth sufficient facts upon which to reach a conclusion that Golder is party to the insurance agreements. The Liquidator continues that even if those facts were well plead, there is not a cognizable claim here as Golder must comply with this Court's

order regarding the filing of a proof of claim or the April 26, 2002 Order setting forth guidelines for accessing reinsurance proceeds.

In ruling on a demurrer, we must consider as true all well-pleaded material facts set forth in the petition for review and all reasonable inferences that may be drawn from those facts. *Meier*. The Court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Id.* Preliminary objections should be sustained only in cases in which it is clear and free from doubt that the facts plead are legally insufficient to establish a right to relief. *Employers Insurance of Wausau v. Department of Transportation*, 865 A.2d 825 (Pa. 2005).

The purpose of an intervention petition is to allow a person, not otherwise a party to an action, to participate in the action to protect its interests if

- (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
- (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
- (3) such person could have joined as an original party in the action or could have been joined therein; or
- (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa. R.Civ.P. No. 2327. Golder's concern is that the Liquidator may dispose of monies to which Golder has an interest. The Petition is legally insufficient and

must be stricken because Golder has failed to exercise or exhaust a statutory remedy. Pa. R.Civ.P. No. 1028(a)(7). Specifically, Golder has failed to submit a proof of claim to the Liquidator through the claims filing procedure. Additionally, Golder has failed to act pursuant to the April 26, 2002 Direct Access to Reinsurance Guidelines Order.

Section 221.26 of the Insurance Act, 40 P.S. §221.26, directs that no action shall be filed against the Liquidator without the Liquidator's consent. So as to protect the rights of all those who have potential claims against a failed insurance company, Sections 221.37 – 221.45 of the Act, 40 P.S. §221.37 – 22.145, detail procedures that allow for the filing of claims, address third party claims, and address the compromise of claims. This Court published an order setting forth a claims filing procedure. In addition, by order of April 26, 2002 this Court established guidelines providing for direct access to reinsurance proceeds.

The Liquidator is correct that Golder's failure to follow the established claims procedure, as set forth in the Act, ordered by the Court, and communicated to all insureds, which procedure advises as to the manner in which to file a claim or to gain direct access to reinsurance proceeds in this Liquidation constitutes both failure to follow a rule of Court and a failure to exercise a statutory remedy. This procedure was established to ensure that every person or business entity, believing it has a claim against Reliance, was provided with the opportunity to submit a proof of claim to the Liquidator, which claim the Liquidator is required to review and act upon through the issuance of a Notice of Determination wherein the Liquidator accepts, modifies, or rejects the claim. In addition, objections to the Liquidator's Notice of Determination are permitted and, if filed, the contested Notice of Determination is then reviewed by the Court. Accordingly, in view of

the fact that Golder has failed to follow the procedure established to submit a claim in the Liquidation and has failed to seek access to reinsurance proceeds Golder has failed to conform to law or rule of this Court, Pa. R.Civ.P. No. 1028(a)(2), and has failed to exhaust its statutory remedy. Pa. R.Civ.P. No. 1028(a)(7).

Likewise, Golder's contention pursuant to the holding in *Koken v. Legion Insurance Company*, 831 A.2d 1196 (Pa. Cmwlth. 2003), *affirmed*, 879 A.2d 157 (Pa. 2005), is not persuasive for the simple reason that Golder has not sought access to the reinsurance proceeds. Essentially, the petition filed herein, is the means Golder has employed to circumvent the statutorily prescribed claims filing procedure and the Court ordered direct access to reinsurance proceeds procedure. Those procedures were made available to Golder and must be used by Golder if Golder is to protect its interests in the liquidation.

Accordingly, the Court enters the following

O R D E R

AND NOW, this 26th day of July, 2006, the Liquidator's preliminary objections are sustained; Golder's Petition to Intervene and Application for Relief are dismissed with prejudice.

Golder is directed to serve a copy of this Memorandum Opinion and Order upon those listed on the Master Service List and within 5 days of service to file an Affidavit of Service with this Court.


JAMES GARDNER COLINS, President Judge