

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

VITAS HEALTHCARE CORPORATION,
VITAS HOLDINGS CORPORATION, AND
VITAS HEALTHCARE OF TEXAS, L.P.,

Petitioners,

v.

M. DIANE KOKEN

Respondent.

RECEIVED AND FILED
PHILADELPHIA
COMMONWEALTH COURT
OF PENNSYLVANIA
DEC 6 3 56 PM '01

**RESPONSE OF M. DIANE KOKEN IN OPPOSITION TO
VITAS HEALTHCARE CORPORATION, VITAS HOLDING
CORPORATION AND VITAS HEALTHCARE OF TEXAS, L.P.'S
PETITION FOR REVIEW IN THE NATURE OF DECLARATORY
JUDGMENT AND TO ENFORCE A BINDING SETTLEMENT**

Plaintiff M. Diane Koken, Insurance Commissioner of the Commonwealth of
Pennsylvania ("Commissioner"), as Liquidator of Reliance Insurance Company

("Liquidator"), by her undersigned counsel, hereby answers¹ the Petition of Vitas Healthcare Corporation, Vitas Holdings Corporation and Vitas Healthcare of Texas, L.P., (collectively "Vitas") for Review in the Nature of Declaratory Judgment and to Enforce a Binding Settlement and, in accordance with the numbered paragraphs thereof, states as follows:

1. Admitted in part and denied in part. It is admitted that two checks in the amount of \$2.6 million and \$1 million were issued in Reliance's computer system prior to this Court's Liquidation Order. Of the two checks, Reliance's accounting department released only one check in the amount of \$1 million for mailing. It is also admitted that there were discussion regarding the settlement and the issuance of the checks. The Liquidator lacks knowledge or information sufficient to form a belief regarding the truth of the remaining averments contained in Paragraph 1, which are therefore denied.

2. Admitted.

3. Denied. The Liquidator lacks knowledge or information sufficient to form a belief regarding the truth of the averments contained in Paragraph 3, which are therefore denied.

¹ The Liquidator incorporates by reference the arguments that were raised in her Response in Opposition to Vitas' Petition to Intervene and Petition for Review in the Nature of Declaratory Judgment and to Enforce a Binding Settlement, in this Response.

4. Denied. The Liquidator lacks knowledge or information sufficient to form a belief regarding the truth of the averments contained in Paragraph 4, which are therefore denied.

5. Denied. The Liquidator lacks knowledge or information sufficient to form a belief regarding the truth of the averments contained in Paragraph 5, which are therefore denied.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Denied. The Liquidator lacks knowledge or information sufficient to form a belief regarding the truth of the averments contained in Paragraph 11, which are therefore denied.

12. Denied. The Liquidator lacks knowledge or information sufficient to form a belief regarding the truth of the averments contained in Paragraph 12, which are therefore denied.

13. Admitted.

14. Admitted.

15. Admitted in part and denied in part. It is admitted that a settlement agreement was entered where Reliance agreed to pay a total of \$3.6 million. To the extent that the paragraph 15 alleges Reliance agreed to submit additional payments, such averments are denied.

16. Admitted.

17. It is admitted that Reliance approved of and agreed to a settlement of \$3.6 million.

18. Admitted. It is specifically admitted that Reliance agreed to the settlement during rehabilitation and has not remitted payment since entering liquidation.

19. Denied. The Liquidator lacks knowledge or information sufficient to form a belief regarding the truth of the averments contained in Paragraph 19, which are therefore denied.

20. Admitted.

21. Admitted.

22. Admitted.

23. Admitted.

24. It is admitted that Reliance informed Vitas that remittance of payment of the settlement amount was forthcoming.

25. Admitted.

26. Admitted.

27. Admitted.

28. Admitted.

29. Admitted.

30. Denied as conclusions of law.

31. Admitted in part and denied in part. It is admitted that Reliance approved the Settlement Agreement. The remaining averments in paragraph 31 are denied as conclusions of law.

32. Admitted.

33. Admitted in part and denied in part. It is admitted that prior to the entry of the Liquidation Order, two checks, in the amounts of \$2.6 million and \$1 million, were issued in Reliance's computer system prior to this Court's Liquidation Order. It is denied that the two checks were released for payment. Rather, only one check, in the amount of \$1 million, was released by Reliance's accounting department via mail, which was subsequently returned to Reliance on October 8, 2001 after liquidation proceedings had commenced.

34. It is admitted that, prior to liquidation, Reliance informed Vitas that it would seek authority and approval of the settlement payment.

35. Admitted in part and denied in part. It is admitted that documentation of the checks were forwarded to counsel for Vitas. The Liquidator lacks knowledge or information sufficient to form a belief regarding the truth of the remaining averments contained in Paragraph 35, which are therefore denied.

36. Denied as conclusions of law.

37. Denied as conclusions of law.

38. Denied as conclusions of law.

39. Denied. It is specifically denied that the Liquidator has failed to articulate why payments are being withheld. As stated in the Liquidator's Response in Opposition to Vitas' Petition to Intervene and Petition for Review in the Nature of Declaratory Judgment and to Enforce a Binding Settlement Agreement, there are several reasons why payment is being withheld. First, Vitas' claim is premature as there has been no determination of the validity and amount of its claims against Reliance as required under Pennsylvania law. Second, the requested payment would constitute an unlawful preference. The Liquidation Order, at paragraph 21, expressly prohibits any person from "obtaining of preferences, judgments, attachments . . . against Reliance assets, property . . ." Upon the entry of the Liquidation Order, the Liquidator is required by law to comply with the Pennsylvania Insurance Act and the Liquidation Order, and is charged with the responsibility to protect the interest of all policyholders. She may not, therefore, take any action that favors one policyholder over another, such as permitting a distribution of assets to pay immediately the claim of one policyholder in full. Third, the requested payment would violate the distribution priority required by the Pennsylvania Insurance Act. The immediate funding of the settlement would improperly elevate Vitas' claim to a priority equal to or higher than administrative expenses. See Oxedine v. Commissioner of Insurance of North Carolina, 229 Ga. App. 604, 494 S.E.2d 545 (1998) (holding that settlements that were reached during an insurer's rehabilitation proceeding did not constitute

administrative costs and expenses in a liquidation proceedings and were not entitled to super priority); Foster v. Mutual Fire, Marine & Inland Ins. Co., 531 Pa. 598, 614 A.2d 1086 (1992) (stating that a policyholder who obtains a judgment against an insolvent insurer is not entitled to an elevated priority by virtue of the judgment).

40. Denied as conclusions of law.

41. Denied as conclusions of law.

42. Denied as conclusions of law. To the contrary, the Liquidator has an obligation to treat all policyholders fairly.

43. Denied as conclusions of law.

44. Denied as conclusions of law.

45. Denied as conclusions of law.

46. Denied as conclusions of law.

47. Denied as conclusions of law. By way of further response, the Liquidator asserts that Pennsylvania courts recently opined that pre-liquidation settlements do not have to be paid where payment of the settlement contravenes the governing statutory scheme. See Panea v. Isdaner, 773 A.2d 108, 2001 Pa. Supper. LEXIS 429

(Pa. Super. April 10, 2001); Storms ex rel. v. O'Malley, 779 A.2d 548 (Pa. Super. 2001). The Liquidator is charged with the responsibility of marshaling the maximum asset value for the benefit of the policyholders as a whole. To make an exception and fund a pre-liquidation settlement during liquidation would create a preference, and detrimentally affect the interests of the policyholders as a whole.

48. It is admitted that the Liquidator has not stopped payment on any checks issued and released by Reliance's accounting department prior to the entry of the Liquidation Order that were not subsequently returned to the Liquidator after liquidation had commenced.

49. Admitted.

50. Denied. The Liquidator lacks knowledge or information sufficient to form a belief regarding the truth of the remaining averments contained in Paragraph 50, which are therefore denied.

51. It is admitted that, prior to the issuance of the Liquidation Order, Reliance represented that it would remit the settlement payment.

52. Denied. The Liquidator lacks knowledge or information sufficient to form a belief regarding the truth of the remaining averments contained in Paragraph 52, which are therefore denied.

53. Denied as conclusions of law. By way of further response, the Liquidator asserts that, because the General Assembly of Pennsylvania provided a comprehensive statutory scheme governing the distribution of assets from a liquidated insurer's estate, relief different from that provided by statute is not available. Pennsylvania courts have uniformly held that where a remedy or method of procedure is provided by statute, such as here, the statutory remedy or procedure must be strictly pursued and exclusively applied. See Harcourt v. General Accident Ins. Co., 419 Pa. super. 155, 615 A.2d 71 (1992), appeal denied, 534 Pa. 648, 627 A.2d 179 (1993); Barton v. Northampton County, 19 A.2d 263 (Pa. 1941); Concerned Taxpayers of Beaver County v. Beaver County Bd. of Assessment Appeals, 462 A.2d 347 (Pa. Comwlth. 1983).

54. Denied as conclusions of law.

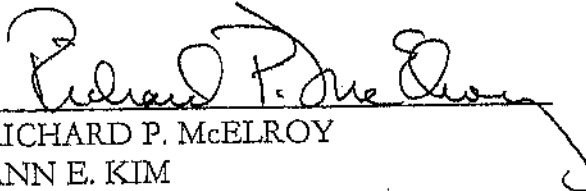
55. Denied as conclusions of law.

56. Denied. The Liquidator lacks knowledge or information sufficient to form a belief regarding the truth of the remaining averments contained in Paragraph 56, which are therefore denied.

WHEREFORE, the Liquidator requests that this Honorable Court deny the Petition of Vitas Healthcare Corporation, Vitas Holdings Corporation and Vitas Healthcare of Texas, L.P., for Review in the Nature of Declaratory Judgment and to Enforce a Binding.

Respectfully submitted,

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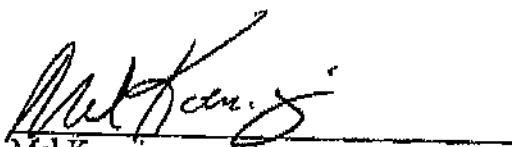
Attorneys for Plaintiff
M. Diane Koken, Insurance Commissioner
of the Commonwealth of Pennsylvania, as
Rehabilitator for Reliance Insurance Company

Dated: December 6, 2001

VERIFICATION

I, Mel Koenig, First Vice President of Reliance Insurance Company (in Liquidation), 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.

Date: December 6, 2001

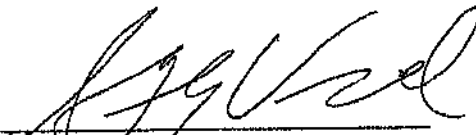


Mel Koenig
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Reliance Insurance Company (in Liquidation)

RECORDED & FILED
PHILADELPHIA
COMMONWEALTH COURT
OF PENNSYLVANIA
DEC 7 1 17 PM '01

CERTIFICATE OF SERVICE

I, ANTHONY VIDOVIK, hereby certify that this day a true and correct copy of the foregoing Response of M. Diane Koken to the Petition of Vitas Healthcare Corporation, Vitas Holdings Corporation and Vitas Healthcare of Texas, L.P., (collectively "Vitas") for Review in the Nature of Declaratory Judgment and to Enforce a Binding Settlement was served on all persons listed on the attached Master Service List by facsimile and U.S. Mail, postage prepaid.



ANTHONY VIDOVIK

Dated: December 6, 2001

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v.

Reliance Insurance Company

No. 269 M.D. 2001 (Commonwealth Court of Pennsylvania)

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and Jason Tarver)