IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Insurance Information Bureau, Inc., Plaintiff	:	
v.	:	
Joel S. Ario, acting Insurance Commissioner of the Commonwealth of Pennsylvania, in his official capacity as Statutory Liquidator Reliance Insurance Company, Defendant	:	No. 125 M.D. 2005

Re: *Exceptions of Insurance Information Bureau to the Decision of Referee G. Alan Bailey*

MEMORANDUM OPINION AND ORDER

The Court has reviewed the Findings and Recommendation of Referee G. Alan Bailey in the captioned matter and the objections of Plaintiff Insurance Information Bureau (IIB) to those Findings and Recommendations and, finding no error on the part of the Referee, approves and adopts his Report attached hereto and marked "Referee Decision Exhibit A."

This matter arose from a contract by which IIB agreed to collect specified past due accounts for the Liquidator. Subsequently, the Liquidator terminated the IIB collection contract and a dispute arose over certain commissions IIB claimed to have earned. IIB filed a complaint in this Court seeking in excess of $165,000.00 in consequential damages. The Liquidator disputed the averments in the complaint; the matter was set before Referee G. Alan Bailey.

Following a hearing, at which both sides presented evidence, Referee Bailey issued a decision setting forth his findings and recommendations. IIB's objections to the decision, relate only to the Referee's Findings and Recommendation regarding the monies collected from J.W. McClenahan Company (McClenahan II) and the Village of Melrose Park (Melrose Park), so we will restrict our discussion to those accounts, adopting the Referees' Findings and Recommendations regarding the remainder of the accounts by reference.

McClenahan II

The uncontested finding is that the Liquidator terminated its contract with IIB. The issue is whether Reliance owes a commission on funds collected post termination of a collection contract.

The Referee found that Reliance engaged IIB to collect an overdue account designated as McClenahan II. In 2004, Reliance terminated its collection agreement with IIB. The Referee found that under the terms of the collection agreement, McClenahan was entitled to a 20% commission for all "sums collected" without the use of counsel, and a 35% commission (which includes all counsel fees) for all "sums collected" where the claim is resolved through the use of an attorney. In construing the term "sums collected", the Referee defined the contract terms in favor of Reliance, as IIB was the contract drafter. Relying on *Insurance Adjustment Bureau, Inc. v. Allstate Ins. Co.*, 588 Pa. 70, 480-81, 905 A.2d 462, 468 (2006), the Referee conclude that the term "sums collected," m eant that IIB was to be compensated where "the collection company did substantially all the work necessary to complete the recovery."

The Referee found that IIB did preliminary work on the contract, *i.e.*, set up the file, contacted debtor, etc. The Referee found that in the McClenahan II matter, Reliance hired and paid a commission to another collection agency. Based on the above facts, the Referee concluded that collection of the McClenahan II account did not occur as a result of the sole efforts of IIB. In challenging the findings and conclusions, IIB disagrees with the Referee's findings. There is no merit to the argument, as the record supports the Referee's findings.

Melrose Park

In 2003, prior to the termination of the IIB collection contract, IIB, with the assistance of the law firm of Popper & Wisniewski, settled the account designated as Melrose Park. In 2004, the Liquidator terminated its collection contract with IIB. Subsequently, Melrose Park defaulted on its settlement payments. The Referee found that Reliance received $27,695.46 and that IIB was entitled to a 20% commission, $5,539.09. The Referee also found that IIB is not entitled to future commissions. IIB argues that it is entitled to future commissions because no company has been hired to replace IIB. There is no merit to the argument.

The facts are that Reliance terminated its contract with IIB; and, Melrose Park defaulted on its obligation to Reliance. Mere association with the account does not tether the Melrose Park account to IIB. If Reliance is able to collect the balance due on the Melrose Park account, IIB is due no commission, as the collection will not have occurred through the efforts of IIB.

Finding no error in the decision issued by Referee Bailey, we enter the following,

ORDER

AND NOW, this 19th day of June, 2008, upon consideration of the Findings and Recommendation of Referee Alan G. Bailey in this matter, the Findings and recommendations are approved in total and adopted by reference as the Order of this Court.

James G. Colins

JAMES GARDNER COLINS, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joel S. Ario, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, Plaintiff	:	
V.	:	
Reliance Insurance Company, Defendant	:	No. 269 M.D. 2001

Insurance Information Bureau, Inc. v. M. Diane Koken as Liquidator of Reliance Insurance Company No. 125-MD-2005
Referee Findings and Recommendations

G. Alan Bailey, Esquire, duly appointed Referee in Insurance Information Bureau, Inc. v. M. Diane Koken as Liquidator of Reliance Insurance Company, No. 125-MD-2005 hereby recommends to the Honorable James Gardner Colins, Judge of the Commonwealth Court of Pennsylvania the following:

BACKGROUND

1. By Order of the Commonwealth Court of Pennsylvania ("Court") dated October 3, 2001 ("Liquidation Order"), Reliance Insurance Company ("Reliance") was found to be insolvent and placed into liquidation. M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania ("Liquidator") was appointed Liquidator of Reliance.[1]

2. By Order of the Court dated September 9, 2002 ("Claims Filing Order") the Honorable James Gardner Colins, established claims filing procedures, claims' filing deadlines and dispute resolution procedures for claims against the Reliance.

3. On March 14, 2006 Insurance Information Bureau, Inc. (referred to herein as "IIB" or "Plaintiff"), commenced an action by the filing of a Complaint in the Court, Docket Number 125-MD-2005, against the Liquidator for breach of contract, unjust enrichment, quantum meruit and declaratory judgment.

[1] Joel S. Ario has been appointed by the Governor to serve as Insurance Commissioner, and, as such, replaces Ms. Koken as the statutory Liquidator.

"Referee Decision Exhibit 1"

4. IIB seeks in excess of $165,000.00 consequential damages under a Professional Services Agreement it entered with Reliance on February 1, 2003 (the "Agreement"). Pursuant to the Agreement, which includes three appendices, IIB agreed to provide debt collection and recovery services to Reliance.

5. On or about April 29, 2005 the Liquidator filed Preliminary Objections to IIB's Complaint.

6. On February 16, 2007 the Court denied the Liquidator's Preliminary Objections.

7. The Liquidator, on March 8, 2007 filed an Answer to the Complaint, New Matter and a Counterclaim seeking reimbursement of funds withheld by IIB.

8. On April 16, 2007 IIB filed an answer to the Liquidator's New Matter and Counterclaim and asserted New Matter to the Counterclaim.

9. On April 16, 2007 the Liquidator filed a Reply to IIB's New Matter.

10. On April 25, 2007 IIB filed an Application for Court to Approve Proposed Discovery Scheduling Order.

11. By Order of the Court dated June 28, 2007 the undersigned was appointed Referee to provide findings of fact and recommendations to the Court regarding issues raised in the Complaint and Counterclaim.

THE CONFERENCES

12. Pursuant to duly issued notice to counsel for the parties a conference, via telephone, was held July 19, 2007 involving counsel for the Liquidator (Mr. Troum, Ms. Rocco and Mr. Stutzman), counsel for the Claimant (Mr. Dormont) and the undersigned.

13. Counsel for the parties presented their respective client's positions. Claimant contended that the Liquidator owed fees for collection work provided by Claimant under the Agreement. To counter the Liquidator argued that no additional fees were due under the Agreement, and in fact, Claimant had collected monies due Reliance and continued to wrongfully withhold those balances.

14. The parties agreed that discovery was necessary particularly an exchange of documents and an accounting which was to be completed by September 7, 2007. As well, the parties agreed that by September 7, 2007 a written stipulation would be submitted to the Referee to include

agreed facts, witness lists, collection account itemization with dollar amounts at issue, and a proposed schedule for remaining discovery (depositions), briefing and hearings.

15. At the request of IIB's counsel a second conference was held August 31, 2007, in order to address certain concerns regarding the progress of discovery.

16. A third conference was held September 11, 2007 at which time the parties agreed upon a final discovery schedule and initial trial date.

17. The parties, on September 21, 2007, submitted Stipulations of Undisputed Facts ("Stipulations"). These Stipulations have been filed with the Court.

18. On December 10, 2007 a pre-trial conference was held, and on December 12, 2007 trial of this matter commenced.

STIPULATION OF UNDISPUTED FACTS

19. IIB and Reliance, on February 1, 2003, entered into a Professional Services Agreement (Exhibit A of the Stipulations). The Professional Services Agreement contained three Appendices: A "Scope of Services": B Schedule of "Charges": and, C Service Purchase Contract (the Professional Services Agreement with the three appendices are herein collectively referred to as the "Agreement"). Pursuant to the Agreement

a. Reliance referred accounts to IIB for collection.

b. All claims referred to IIB for collection were to be reconciled by Reliance prior to assignment to IIB (Agreement Appendix A)

c. IIB was entitled to a flat 20% contingency fee for all sums collected by IIB without utilization of counsel. (Agreement Appendix B)

d. If IIB referred any Reliance account to an attorney, IIB was entitled to a flat 35% contingency fee for "all sums collected thereafter" which contingent fee included all attorney's fees, but did not include costs incurred. (Agreement Appendix B)

e. IIB was required to provide Reliance with monthly reports summarizing the debtors' names referred for collection, the amounts referred for collection, the balance collected to date, commissions withheld and accounts assigned to legal counsel and to promptly deposit all payments received in connection with accounts referred to IIB for collection and to remit, twice a month, all sums collected less IIB's fee as provided in the Agreement. (Agreement Appendix C)

20. The following accounts were referred by Reliance to IIB under the Agreement:

a. All My Sons Moving & Storage of Maryland, Inc. ("All My Sons")

b. Archway Programs, Inc. ("Archway Programs")

c. Doall Industrial Supply Corp. ("Doall")

d. J.W. McClenahan Company ("McClenahan")[2]

e. Village of Melrose Park ("Melrose Park")

f. Coreslab

g. Zantop International Airlines ("Zanetop")

(Stipulations #11)

21. As part of its collection efforts, IIB referred the following assigned accounts to law firms:

a. All My Sons

b. Archway Programs

c. Doall

d. McClenahan

e. Melrose Park

(Stipulations #11)

22. By written correspondence from Reliance counsel Doris Chew, Reliance terminated the Agreement on July 14, 2004 ("Termination"), however after the Termination, IIB continued to receive payments from certain accounts, and, as well, Reliance received payments on several of the accounts previously referred to IIB. (Stipulations #13 and #14)

23. IIB had $12,957.60 in collections, after legal fees, received post-Termination from Archway, of which it deducted 15%, or $2,429.55. The remaining $10,528.05 is held by IIB in a special interest-bearing escrow account. Reliance contends the entire $12,957.60 is due Reliance. (See Chart - Attachment A[3] hereto)

24. IIB had $15,000 in collections received post-Termination from Zantop, from which it deducted 20%, or $3,000. The remaining $12,000 is held by IIB in a special interest-bearing escrow account. Reliance contends the entire $15,000 is due Reliance. (See Attachment A)

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[2] This collection assignment involves two separate disputes, and as detailed below, will be referenced McClenahan I and McClenahan II.

[3] Due to minor math miscalculations in the Stipulations, Attachment A was prepared by the Referee using the Stipulations as the reference. This chart was provided to counsel for the parties who confirmed the Chart's accuracy.

25. IIB held $33,423.71 from the Coreslab collection which it attributed to the commission IIB claimed due on the disputed $167,118.53 March 2003 collection of the McClenahan account. (See Attachment A)

26. Reliance has gross Post-Termination Collections of $438,774.90 from the All My Sons, Doall, McClenahan and Village of Melrose Park matters and net collections of $354,345.46 from such accounts. (See Attachment A).

CONTENTIONS - ISSUES

27. IIB contends that of the $185,000 paid to Reliance directly under the All My Sons account, IIB is due a 20% commission of $37,000. (See Attachment A)

28. In the Doall matter, IIB contends that of the $110,000 paid to Reliance directly, IIB is due a 20% commission of $22,000. (See Attachment A)

29. IIB contends that, in the Village of Melrose Park assignment, of the $33,774.90 paid directly to Reliance, IIB is due a commission of $7,430.48. (See Attachment A). IIB further argues that the Village of Melrose Park still owes, and has made periodic payments upon, a remaining settlement balance due of $35,090. As such Reliance is obligated to pay IIB additional commissions of $7,018.

30. In the McClenahan matter, IIB raises two issues.

a. First, IIB claims it is due a commission of $33,423.71 on a $167,118.53 payment to Reliance, made by McClenahan to Reliance prior to IIB receiving the collection assignment, since the initial assignment to IIB included the $167,118.53 debt (accounting) without credit for the payment. Therefore, IIB argues, Reliance did not provide a reconciled account as required by the contract, causing IIB to perform unnecessary work. This will be referred to as McClenahan I.

b. As indicated above in paragraph 25, IIB has used self-help, or setoff, in the Coreslab matter to collect the $33,423.71 commission, thus Reliance's argues that IIB owes Reliance that $33,423.71.

c. Second, IIB contends that, of the $110,000 collection paid directly to Reliance, IIB is due a 20% commission of $22,000 because the collection resulted from IIB's efforts. (See Attachment A). This will be referred to as McClenahan II.

31. Reliance counters that:

a. The terms of the Agreement are clear, IIB receives commission only from proceeds collected by IIB.

b. Although Reliance concedes it was required to provide reconciled accounts, there is no penalty where it mistakenly sent IIB an overstated account. Further, in the McClenahan I matter, at worst IIB's reliance upon the original accounting was for only four to five hours before IIB realized Reliance's error.

c. IIB's expert was not sufficiently qualified to provide an expert opinion.

d. Even assuming the testimony of IIB's expert witness is admissible and accepted, it has no effect upon the contract interpretation since Appendix C paragraph 28 of the Agreement is an integration clause that prohibits any modification or change in the Agreement by application of custom and usage.

THE TRIAL

32. Trial of this matter commenced before the Referee on December 12, 2007. As noted previously, the parties provided Stipulations that included various documents. Counsel also provided deposition designations of two witnesses that did not appear at trial: Doris Chew an attorney with Reliance; and, Julie Germano a former Reliance employee in the Philadelphia office.

33. Testimony of Jack Flanagan

a. Mr. Flanagan, President and 51% owner of IIB, testified that he had twenty years experience in the insurance collection business. IIB, started by Mr. Flanagan in 1997, provides the insurance industry with collections and technology services.

b. IIB is a collection company, receiving collection assignments from various clients in the insurance industry. In the event IIB is unable to collect the debt, it retains counsel from a network of attorneys IIB has developed over time.

c. IIB was initially retained by Reliance, pre-insolvency, in the late 1990s to collect audit and retrospective premium. Although there was no written contract initially,

IIB was paid a 20% commission on all collections it made directly and a 35% commission on all matters IIB referred to legal counsel for litigation. IIB, upon referral to counsel, would continue in a supervisory role and would be responsible for all legal fees from its 35% commission.

d. Mr. Flanagan confirmed that, after Reliance's insolvency, IIB and Reliance, on February 1, 2003, entered into the Agreement. IIB was responsible for the drafting of the Professional Services section of the Agreement (what Mr. Flanagan referred to as the preamble), Appendix A and Appendix B. Reliance was responsible for the drafting of Appendix C.

e. Mr. Flanagan stated that receiving properly reconciled accounts from a client (i.e. Reliance) was critical to IIB's credibility and success in collecting balances due. However, Mr. Flanagan acknowledged that payment, in IIB's collection business, was contingent upon collecting monies from clients' debtors: "we would not get paid if nothing was collected."

f. Mr. Flanagan confirmed that the Agreement was terminated by Reliance on July 14, 2004 (see Exhibit B to the Stipulations) however he strongly contested Reliance's assertion that the justification for the Termination was cause and argued that this was a termination of convenience.

g. Regarding the disputed commissions due IIB, Mr. Flanagan indicated that Reliance owed IIB $93,860.03 (see Plaintiff's Exhibit 1). He stated that monies were due from Reliance to IIB for two separate reasons:

   i. Post Termination, Reliance received collection payments of $469,971.90 (see Trial Plaintiff's Exhibit 1) through work performed by IIB and, in fact since Reliance did not pay the commissions, Reliance received a "bonus".

   ii. Regarding the McClenahan I matter, when it provided the supposedly reconciled account to IIB on July 21, 2003, Reliance failed to account for a $167,118 collection Reliance had received (in-house) in March, 2003. As such the McClenahan account was overstated when IIB initiated its collection efforts.

h. Mr. Flanagan testified it was collection industry practice to receive commissions on monies previously collected by a client where the client failed to properly

reconcile its records as in the McClenahan I matter. However, Mr. Flanagan could provide no specific examples of where commissions were actually paid due to client reconciliation error.

i. Mr. Flanagan further testified that he contacted Reliance employee Julie Germano, of the Philadelphia office regarding the McClenahan I overstatement. Mr. Flanagan stated that Ms. Germano advised that he was entitled to the commission on the $167,118 McClenahan payment.

j. According to Mr. Flanagan, IIB in its July 31, 2003 statement to Reliance (Plaintiff Exhibit 12), assessed the $33,423.71 commission against the $167,118 McClenahan payment.

k. On cross examination Mr. Flanagan acknowledged that:

i. IIB did not maintain any records of hourly work and he could not quantify the amount of work/time IIB provided in each collection assignment.

ii. The file on the McClenahan collection assignment was opened by IIB the morning of July 24, 2003 and by the end of business that same day IIB was aware of the Reliance accounting error. Mr. Flanagan estimated that IIB had sent approximately four hours on this part of the McClenahan collection.

iii. The Agreement did not contain any language allowing for hourly compensation of IIB.

iv. Generally, collection companies do not get a fee unless there is a collection made and, as to IIB, there were occasions IIB did significant work for clients but never received a fee because no collection was made.

v. Once Reliance Terminated the Agreement, IIB did nothing further to collect the debts on the various assignments.

vi. Julie Germano was not assigned to the McClenahan matter as that assignment came form Reliance's New York offices. He contacted Reliance employee Ms. Germano, of the Philadelphia office regarding the McClenahan I overstatement because he had prior deals with her and trusted her.

34. Testimony of Claimant's collection expert Hollis Tozier:

a. Over the objection of Reliance's counsel, Mr. Tozier was deemed qualified to testify as an expert on insurance collections and specifically collection of audit and retrospective premium.[4]

b. Mr. Tozier indicated that he spent an hour or two reviewing various records regarding this dispute and thereafter prepared a written report. (see Plaintiff's Exhibit 22, Mr. Tozier's report and resume).

c. Mr. Tozier stated that, industry practice provides a collection agent the right to commissions on previously collected amounts if the account was turned over by a client to the collection agent improperly reconciled. Specifically, Mr. Tozier stated that it was his opinion IIB was entitled to a full commission on the $167,118.53 even though IIB had done nothing to collect that amount because Reliance assigned the account that was improperly reconciled.

d. Mr. Tozier acknowledged that, while working for Wausau Insurance Company as an accounts credit manager, Wausau never paid a commission unless monies were collected by the assigned collection agency.

e. Mr. Tozier also admitted that entitlement to commissions is governed by the collection agreement and he was not aware of any contract that would allow payment of a commission where a collection agency did not collect the money.

35. Testimony of Reliance Witness Jacqueline Cartagena:

a. Ms. Cartagena is a program accounting manager for Reliance.

b. She confirmed that Reliance had received the McClenahan I payment of $167,118.53 on or about March 31, 2003 and applied this amount to McClenahan's account as of April 2, 2003.

36. Testimony of Reliance Witness Joseph C. Manus:

a. Mr. Manus has been an underwriter for Reliance during the past fifteen years working out of the Reliance New York office. Prior thereto he served as an underwriter for various insurers since the 1960s.

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[4] Mr. Tozier has over forty years employment/experience in the insurance and collections industries, but has been retired, and inactive in these fields, since 2000. We accepted Mr. Tozier as an insurance collections' expert and found him sincere in his testimony, but his dearth of current experience either through employment or industry associations diminished the weight we afforded his testimony.

b. Mr. Manus first became involved in the McClenahan account in 2000. He was the individual that audited the McClenahan account and determined a premium delinquency of $374,518. This audit was performed prior to McClenahan's payment of the $167,118.53.

c. Mr. Manus negotiated the $167,118.53 payment to Reliance in January 2003 and ultimately received that payment on or about March 28, 2003.[5]

d. Mr. Manus claims that documentation regarding the $167,118.53 McClenahan I payment to Reliance was provided, in the documents given to IIB with the initial assignment, however Mr. Manus acknowledges that the amount designated for collection was the $374,518 which was in fact incorrect.

37. Deposition testimony of Julie Germano:

a. Ms. Germano was a former employee of Reliance, in its Philadelphia office, serving as a premium accounting analyst for approximately eighteen years. Included in Ms. Germano's duties was dealing with collection agencies.

b. Ms. Germano had various dealings with IIB during her employment with Reliance.

c. Ms. Germano assigned several collection accounts to IIB, however indicated that the McClenahan matter was not her account – it was a New York account. She stated she never had any significant problems with IIB's work.

d. Ms. Germano acknowledged she had a conversation with Mr. Flanagan regarding the McClenahan account.

38. Deposition testimony of Doris Chew:

a. At relevant times hereto, Ms. Chew was an in-house counsel for Reliance in its New York office, having served eighteen years representing the large accounts and the commercial divisions.

b. Ms. Chew selected IIB for collection services and assigned IIB the McClenahan matter on July 21, 2003. (See Letter from Chew to Flanagan, Stipulations Exhibit N). Ms. Chew's July 21, 2003 letter assigning the McClenahan matter for collection, contained the $374,518 amount as "outstanding final audit premium".

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[5] McClenahan originally sent this payment in February, 2003 however the check face contained stipulations unacceptable to Reliance. As a result, Mr. Manus returned the initial $167,118.53 check to McClenahan.

c. By email to Mr. Flanagan dated July 14, 2004 Ms Chew terminated the Agreement. (See Stipulation 12 and Exhibit B to Stipulations).

d. No reference is made in the email indicating that the Termination of IIB's services was for cause or convenience, however Ms. Chew testified that she believed the Termination was for cause, indicating the dispute regarding the McClenahan I commission "had a large part to [do with] its termination". Ms. Chew further stated that IIB's retention of Coreslabs recoveries as offsets against the McClenahan commissions ("Well, they were stealing from Reliance because they took commission on a check that was received and cashed by Reliance prior to transferring files to IIB") was a second basis for IIB's termination for cause.

THE PROFESSIONAL SERVICES AGREEMENT

39. The following are the significant sections of the Agreement regarding this dispute:

a. Paragraph 10 Contract Documents (in relevant part) - "To the extent the standard contract terms contained in Appendix C are inconsistent with any other provision of the contract, the provisions of Appendix C control." (Exhibit A of the Stipulations page 2)

b. Appendix A, section A Purchaser's Obligations – "Purchaser [Reliance] will forward all claims designated by Purchaser in its sole discretion for collection to Vendor [IIB]. The claims will have been reconciled by Purchaser before assignment to Vendor." (Exhibit A of the Stipulations page 3)

c. Appendix B, first and second paragraphs:

i. "All sums collected by Vendor, without utilization of counsel, shall be subject to a flat 20% contingency fee." (Exhibit A of the Stipulations page 4)

ii. "If vendor refers any claim referred to it for collection to an attorney, all sums collected thereafter shall be subject to a flat 35% contingency fee, which shall include counsel fees, unless otherwise agreed upon by Purchaser in writing. Court costs, if any, shall be the Purchaser's responsibility." (Exhibit A of the Stipulations page 4)

d. Appendix C, section 17.a Default (in relevant part) – "The Statutory Liquidator may. ….declare Contractor in default by written notice thereof to the Contractor, and terminate (as provided in Paragraph 19, Termination Provisions) ….for any of the following reasons: 3) Unsatisfactory performance of work; … ." (Exhibit A of the Stipulations page 7)

e. Appendix C, section 19 Termination Provisions – "The Statutory Liquidator has the right to terminate this Contract for any of the following reasons. Termination shall be effective upon written notice to Contractor.

a) TERMINATION FOR CONVENIENCE: The Statutory Liquidator shall have the right to terminate the Contract for its convenience if the Statutory Liquidator determines termination to be in its best interest. The Contractor shall be paid for work satisfactorily completed prior to the effective date of the Termination, but in no event shall the Contractor be entitled to recover lost profits.

b) TERMINATION FOR CAUSE: The Statutory Liquidator shall have the right to terminate the Contract for Contractor default under paragraph 17, Default, upon written notice to the Contractor. The Statutory Liquidator shall also have the right, upon written notice to the Contractor, to terminate the Contractor for other cause as specified in this Contract or by law. If it is later determined that the Statutory Liquidator erred in terminating the Contract for cause, then, at the Statutory Liquidator's discretion, the Contract shall be deemed to have been terminated for convenience under paragraph 19a."

(Exhibit A of the Stipulations page 9)

DISCUSSION

We believe there are two distinct issues in this dispute: 1) The McClenahan I funds - Is IIB entitled to a commission on funds collected by Reliance prior to IIB receiving the collection assignment because Reliance erroneously included those collected funds in the "reconciled" accounting provided to IIB at assignment; and. 2) Is IIB entitled to commissions on funds collected (on IIB collection assignments) after Reliance terminated the Agreement? An

underlying query to this second issue is whether the Agreement was terminated for cause or convenience. Unfortunately, the Agreement language does not provide specific or direct guidance for either question.

McClenahan I Commission

As to the McClenahan I commission, there is little dispute regarding the salient facts. Reliance did audit McClenahan's records and determined that there was a premium delinquency of $374,518. Resulting from Mr. Manus' efforts, McClenahan paid Reliance $167,118.53 of the premium delinquency in March, 2003. The $167,118.53 was applied to McClenahan's account, by Reliance's accounting department, as of April 2, 2003. By letter dated July 21, 2003, Reliance's counsel, Ms. Chew, assigned IIB the McClenahan matter. Ms. Chew, in her letter, advised IIB "McClenahan has an outstanding final audit premium of $374,518." Mr. Manus, in his testimony, agreed that this information was incorrect and overstated by $167,118.53. Mr. Flanagan, on behalf of IIB, opened a file on the McClenahan matter in the morning of July 24, 2003. IIB acknowledged that by the end of business that same day IIB was aware of the Reliance accounting error. Mr. Flanagan estimated that IIB had sent approximately four hours on this part of the McClenahan (McClenahan I) collection.

Appendix A of the Agreement, section A "Purchaser's Obligations" explicitly requires Reliance to reconcile all accounts before forwarding the assignment to IIB. The Agreement does not provide any sanction for a Reliance breach and, more specifically, does not offer a remedy where Reliance failed its obligation to provide IIB with a reconciled account.

Mr. Flanagan and IIB's expert Mr. Tozier both testified that the collection industry practice is to allow commissions to the collection agency where the client failed to provide adequately reconciled accounts. However, neither could provide even one specific example of this practice occurring during their collective sixty plus years of industry experience. Further if this commission entitlement was usual and customary in the collection industry, Mr. Flanagan, as drafter of Appendix A of the Agreement, should have included this remedy for the benefit of IIB.

Assuming arguendo that we accept the testimony regarding collection industry practice allowing for a commission payment to IIB for the erroneous reconciliation, Appendix C of the Agreement unambiguously prohibits such application to the Agreement. As Reliance correctly

argues, paragraph 28 "Integration" of Appendix C prohibits any modification of the Agreement through application of custom and usage.

We reject IIB's argument that the statements of Julie Germano some how confirm that IIB is entitled to a commission on the $167,118.53 reconciliation error. There is no evidence Ms. Germano had any authority or knowledge about the McClenahan matter. Further, allowing Ms. Germano's to confirm Mr. Flanagan's request for commissions on the $167,118.53 reconciliation error, would be tantamount to allowing an oral contract modification, a clear violation of the Integration clause of Appendix C of the Agreement.

There is no contractual foundation to award IIB commissions for the McClenahan I $167,118.53 reconciliation error. Further, we find no equitable justification to allow such commissions. There is no evidence that indicates IIB suffered any real loss due to the Reliance reconciliation error. The four hours Mr. Flanagan testified he spent setting up the IIB file, reviewing the McClenahan materials and contacting McClenahan representatives would no doubt have been incurred if the McClenahan account was properly reconciled. Having a correct reconciliation changes little - IIB would still be required to set up its collection file, review the documentation and initiate contact with McClenahan. The one difference, IIB would be seeking $207,400 instead of $374,518. As well, there was no evidence presented by IIB that established IIB's credibility was somehow tarnished by the Reliance error.

Therefore, we conclude that IIB is not entitled to any commission on the $167,118.53. In addition, for all the reasons set forth above, IIB was not entitled to withhold the $33,423.71 from the Coreslab collection as setoff for the commission claimed on the $167,118.53 March 2003 Reliance collection of the McClenahan account. IIB should be directed to return the $33,423.71 Coreslab setoff to Reliance.

Post Termination Commissions

The second overarching issue in this litigation is how much, if any, Post-Termination collections are due to IIB. In order to determine if IIB is owed any Post-Termination commissions, we must first decide if the Agreement was terminated for cause or convenience.

It appears that the Liquidator was satisfied with IIB's performance prior to the date the parties entered the written Agreement - February 1, 2003, as IIB had provided services to Reliance since the late 1990s. It also appears there were little problems or concerns, under the

Agreement, regarding IIB's performance until IIB claimed entitlement to a commission for the McClenahan I collection. It is also unchallenged that the Liquidator had a right to end the Agreement under Appendix C, section 19 Termination Provisions and that the basis for the Termination was the McClenahan I dispute. Unfortunately, the Liquidator's written termination of IIB is less clear, and clumsy at best.

By written correspondence from Reliance counsel Doris Chew, Reliance terminated the Agreement on July 14, 2004. (See Reliance Trial Exhibit 27 "Termination Email"). Although there was testimony from several Reliance witnesses that indicated there were performance concerns regarding IIB, these were general in nature and unspecified. As well, Ms. Chew in her Termination Email referenced only the McClenahan I dispute. The written termination language (the Agreement requires "Termination shall be effective upon written notice to the Contractor." See Stipulations Exhibit A, Appendix C section 19) from Reliance to IIB in Ms. Chew's Termination Email was the following:

> "Please be advised that the Professional Services Agreement between Reliance Insurance Company (In Liquidation) and Insurance Information Bureau is hereby terminated."

There is no direct reference to the grounds for termination, although the first paragraph of the Termination Email does discuss the McClenahan I issue; no reference is made to IIB's performance.

Also curious are the written comments by Ms. Chew, in her Termination Email, following the termination language. She stated:

> "Further, per your [Mr. Flanagan's] 3/3/04 email, any file over $50,000 will be handled by IIB at a rate of 15% and any file over $200,000 will be handled by IIB at 10%. Please submit a full accounting of all matters handled by IIB for RIL."
> (See Reliance Trial Exhibit 27 "Termination Email")

Unfortunately, no additional explanation was provided by either party during the trial, however such language does not indicate an intention to terminate IIB for cause with the intent to withhold further payment. To the contrary, this appears to be a solicitation for a final invoice. Mr. Manus' and Ms. Chew's testimony suggest termination was for cause however since the Agreement requires a written termination we do not accept this parole evidence.

In sum, we conclude that the Liquidator failed to provide sufficient evidence to justify IIB's Termination for cause. Therefore, we conclude that the Termination was for convenience.

The Agreement does provide some guidance for Post Termination payment when there is a termination for convenience, indicating "The Contractor shall be paid for work satisfactorily completed prior to the effective date of the Termination, but in no event shall the Contractor be entitled to recover lost profits."[6] (See Stipulations Exhibit A, Appendix C section 19.a). IIB has not sought lost profits, and Reliance never challenged commission payments to IIB based upon this lost profits language. We therefore determine that, if IIB otherwise qualifies for commissions under the Agreement, the Termination does not allow the Liquidator to withhold such payments. It is evident that the intention of the parties under this Agreement is clear, at termination Reliance would pay IIB for those commissions earned as of the Termination. See East Crossroads Center, Inc. v. Mellon-Stuart Co., 416 Pa. 229, 230-31, 205 A.2d 865, 866 (1965).

The determinative language in the Agreement regarding when commissions are due IIB is found at Appendix B of the Agreement, the first and second paragraphs:

i. "All **sums collected** by Vendor, without utilization of counsel, shall be subject to a flat 20% contingency fee." (Exhibit A of the Stipulations page 4)
ii. "If vendor refers any claim referred to it for collection to an attorney, all **sums collected** thereafter shall be subject to a flat 35% contingency fee, which shall include counsel fees, unless otherwise agreed upon by Purchaser in writing. Court costs, if any, shall be the Purchaser's responsibility." (Exhibit A of the Stipulations page 4)
(Emphasis added)

We agree with, and adopt the law regarding general rules of contract construction as cited by the Liquidator in its Proposed Findings of Fact and Conclusions of Law. As the drafter of the relevant portions of the Agreement, Appendix B, the Agreement is construed against the drafter, i.e. Mr. Flanagan. Insurance Adjustment Bureau, Inc. v. Allstate Ins. Co., 588 Pa 470, 480-81, 905 A2d. 462, 468 (2006). We do not interpret "sums collected" to mean sums literally physically collected by IIB but that IIB did substantially all the work necessary to complete the recovery.

Accepting the foregoing, we must determine, applying the Stipulations, testimony and documentation, which collection assignments resulted in collections due to IIB's efforts, regardless of when the monies were actually paid. During his testimony, Mr. Flanagan provided

[6] Additionally, the Agreement does specify, under Appendix C section 17, Termination for Cause, that payment for work may be made by the Liquidator, but the Liquidator may withhold amounts due to Contractor to protect Reliance against loss. (See Stipulations Exhibit A, Appendix C section 19.b).

a description of the work performed by IIB for each collection matter assigned. He indicated that for each assignment, IIB set up a file, contacted and negotiated with the debtor, where necessary retained collection counsel from IIB's attorney network and monitored counsel to the date of Termination. Reliance did not provide any evidence to contradict this part of Mr. Flanagan's testimony. Nor did Reliance indicate what additional efforts it made to obtain the balances due, other than the McClenahan II collection.

Reliance did not appoint a collection firm, after terminating IIB, for All My Sons, Archway Programs, Doall, Village of Melrose Park or Zantop. Reliance did hire, and ultimately paid a commission to another collection agency in the McClenahan II matter. Post Termination of IIB, Reliance continued to use the various counsel originally retained by IIB for All My Sons, Archway Programs, Doall, McClenahan, and Melrose Park. Therefore, we conclude that IIB is entitled to commissions received on collection payments made by All My Sons, Archway Programs, Doall, Melrose Park and Zantop. Because there is evidence that IIB's sole efforts did not result in a collection from the McClenahan II matter and, in fact, Reliance hired and paid another collection agency, IIB is not entitled to any commissions from the McClenahan II matter.

Administrative Claim

The parties did not address the issue, either in the testimony or post trial recommendations, regarding the Class of claim to be designated for any payments due IIB. We believe that a reading of both the Court's Liquidation order (Paragraph 20) and the Liquidation Statute, it is clear IIB's Claim is a Class A claim. 40 P.S. § 221.44 Order of Distribution provides in relevant part:

> "The order of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is herein set forth. Every claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment. No subclasses shall be established within any class.
>
> (a) The costs and expenses of administration, including but not limited to the following; the actual and necessary costs of preserving or recovering the assets of the insurer; compensation for all services rendered in the liquidation; any necessary filing fees; the fees and mileage payable to witnesses; reasonable attorney's fees; the expenses of a guaranty association in handling claims."

We therefore determine that IIB's Claim should be designated as a Class A claim

CONCLUSIONS

For the foregoing reasons we find the following:

- With respect to the collection assignment identified as McClenahan I, IIB did nothing to collect the McClenahan I proceeds. IIB is not entitled to any commission on the McClenahan I collection of $167,118.53. IIB must return the McClenahan I setoff of $33,423.71 from the Coreslab collection to Reliance.
- Reliance's Termination of IIB was for convenience.
- IIB is entitled to commissions on collection assignments it collected.
- IIB's efforts on the collection assignments of All My Sons, Archway Programs, Doall, Village of Melrose Park and Zantop resulted in the collection payments in these matters.
- It was not IIB's sole efforts that resulted in a collection from the McClenahan II matter. Reliance retained another collection agency subsequent to IIB's Termination. IIB is not entitled to any commissions under the McClenahan II matter.
- All My Sons - Reliance collected, using counsel provided by IIB, $185,000 between February 22, 2005 and October 31, 2005. A 15% commission was paid to counsel. A 20% commission, **$37,000, is due to IIB**
- Archway Programs – IIB, through counsel collected $16,197; payment received by IIB June 8, 2004. Attorneys were paid a 20% commission. IIB is entitled to the 15% commission, **$2,429.55**. The remainder held by IIB, **$10,528.05 is due to Reliance.**
- Doall Industrial - Reliance collected, using counsel provided by IIB, $110,000 on May 1, 2006. A 15% commission was paid to attorneys. A 20%, **$22,000, is due to IIB**.
- McClenahan I – IIB is **not** entitled to any commission on the $167,118.53 collected by Reliance prior to assignment.
- Coreslab - Since IIB is **not** entitled to the McClenahan I commission, IIB must release the **$33,423.71 to Reliance**
- McClenahan II – After Termination, Reliance retained another collection agency ostensibly to continue using counsel originally retained by IIB. IIB is **not** entitled to commissions. The $110,000 collection in February 2006 occurred after the replacement collection agency was retained.

- Melrose Park – Of the $68,865 settlement amount, Reliance has received $27,695.46. A 20% commission, **$5,539.09, is due to IIB.** IIB is **not** entitled to any commissions on future payments
- Zantop – This matter was settled for $89,000 of which $74,000 was collected prior to Termination. There is no dispute on that collection amount or commissions due IIB. Post-Termination, IIB collected the remaining $15,000 took a $3,000 commission and holds $12,000 in escrow. IIB, having done all the work to settle this matter has earned the commission and may retain the $3,000. **IIB must turn over to Reliance the $12,000.**
- The total due from IIB to Reliance is **$55,951.76** and the total due from Reliance to IIB is **$64,539.09.**[7]
- IIB's Claim should be designated as a Class A claim
- Neither party is entitled to interest.

WHEREFORE, For the reasons set forth above, it is recommended that the Referee's Conclusions be ADOPTED, and that the Court find in favor of Reliance in the amount of **$55,951.76** and in favor of IIB in the amount of **$64,539.09**. It is further recommended that the Claim of IIB, in the amount of $64,539.09 be classified as a Class A claim.

Respectfully Submitted,

G. Alan Bailey, Referee

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	$ to Reliance	$ to IIB
All My Sons	---	$37,000.00
Archway Programs	$10,528.05	$2,429.55 (IIB retained)
Doall Industrial	---	$22,000
McClenahan I	---	$0
Coreslab	$33,423.71	---
McClenahan II	---	$0
Melrose Park	---	$5,539.09
Zantop	$12,000	$3,000 (IIB retained)
Total	**$55,951.76 due Reliance**	**$64,539.09 due IIB**

	Referral Date	Ref to Legal	Total Collections	$ Pd to Reliance	$Pd to IIB	Com Retained by IIB	Disputed $ Due to Rel/IIB
All My Sons	9/28/2001	Yes $7,800 $19,950	2/22/05 $52,000* 10/31/05 $133,000*	Total $157,250	0	0	$37,000 com (20%) due IIB
Archway Programs	11/15/1999	Yes $3,239.40	6/8/04 $16,197	0	$16,197 15% com	$2,429.55	$12,957.60 due Rel. ($10,528.05 in escrow)
Doall	3/15/2001	Yes $19,800	5/1/06 $110,000*	$90,200	0	0	$22,000 com (20%) due IIB
McClenahan	7/21/2003	Yes	2/03 $167,118.53[1] 3/26/03 $167,118.53	$167,118.53	0	$33,423.71 See Coreslab-IIB retained balances due Rel in Coreslab as com here	See Coreslab-IIB retained balances due Rel in Coreslab as com here
McClenahan II	Collected by Continental Group	Yes $30,800	2/06 $110,000*	$79,200	0	0	$22,000 com due IIB
Coreslab		No	3/04 $80,790	$31,208.29	$80,790	$16,158	$33,423.71 due Rel - IIB retained as com for McClenahan
Village Melrose Park	8/7/2003	Yes $4,390.71 plus $1,688.73 costs	Settlement, post 7/14/04 amt $68,865; collected $33,774.90*	$27,695.46	0	0	$7,430.48 com (22%) due IIB plus commissions on future collections of the settlement balance remaining.
Zantop	9/10/2001	No	$89,000 $74,000 pre-term[2] $15,000 post-term	0	$15,000 collected 8/23/04 to 10/07/05	$3,000 Rel. argues No com post term. of Agreement	$15,000 due Rel. ($12,000 in escrow)

Collection Agreement entered 2/1/2003. Agreement terminated 7/14/2004
*Post Termination Collections.

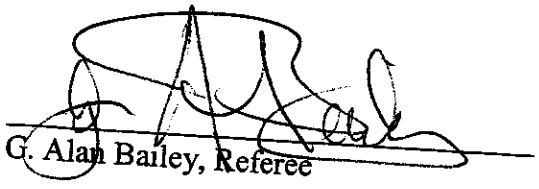
[1] This check was returned by Reliance due to unacceptable stipulations on check face.
[2] Payments to Rel and commission to IIB not disputed.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joel S. Ario, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, Plaintiff	:	
VI.	:	
Reliance Insurance Company, Defendant	:	No. 269 M.D. 2001

NOTICE TO PARTIES

As set forth in the Commonwealth Court Claims Filing Order of September 9, 2002, exceptions, if any, to the Referee's recommendations shall be filed with the Commonwealth Court of Pennsylvania within fifteen (15) days after service of the Referee's recommendations. Exceptions should be accompanied by a supporting memorandum of law. Failure to file timely exceptions to the Referee's recommendations shall be deemed a waiver of any and all exceptions and bar claimants from raising any issues which could have been raised as exceptions.



G. Alan Bailey, Referee

5. IIB is not entitled to any commissions under the collection assignment identified as the McClenahan II matter.

6. With respect to the collection assignment identified as All My Sons - Reliance collected, using counsel provided by IIB, $185,000 between February 22, 2005 and October 31, 2005. A 15% commission was paid to counsel. As such, a 20% commission, $37,000, is due to IIB.

7. With respect to the collection assignment identified as Archway Programs – IIB, through counsel collected $16,197; payment was received by IIB June 8, 2004. Attorneys were paid a 20% commission. IIB is entitled to a 15% commission of $2,429.55. The remainder held by IIB, $10,528.05 is due to Reliance.

8. With respect to the collection assignment identified as Doall Industrial - Reliance collected, using counsel provided by IIB, $110,000 on May 1, 2006. A 15% commission was paid to attorneys. Therefore, a 20% of $22,000 is due to IIB.

9. With respect to the collection assignment identified as Coreslab - As IIB is not entitled to the McClenahan I commission, IIB must release the $33,423.71 to Reliance.

10. With respect to the collection assignment identified as McClenahan II – IIB not entitled to commissions in this collection assignment.

11. With respect to the collection assignment identified as Melrose Park – Of the $68,865 settlement amount, Reliance has received $27,695.46. A 20% commission of $5,539.09 is due to IIB. IIB is not entitled to any commissions on future payments.

12. With respect to the collection assignment identified as Zantop – This matter was settled for $89,000 of which $74,000 was collected prior to Termination. Post-

Termination, IIB collected the remaining $15,000. IIB is entitled to and may retain the $3,000 commission. IIB must release to Reliance the remaining $12,000.

13. The total due from IIB to Reliance is $55,951.76.

14. total due from Reliance to IIB is $64,539.09.

15. IIB's Claim in the Reliance Liquidation is designated as a Class A claim.

16. Neither party is entitled to interest.

BY THE COURT:

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J.