

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Joel S. Ario,  
Insurance Commissioner of the  
Commonwealth of Pennsylvania,  
Plaintiff

v.

Reliance Insurance Company,  
Defendant

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No. 269 M.D. 2001

***RE: Proof of Claim No. 2158537- Acumen Re Management Corporation***

**ORDER**

AND NOW, this 17th day of August, 2009, upon consideration of the Referee's Report and Recommendation to overrule the Objection by Acumen Re Management Corporation challenging the Liquidator's Notice of Determination, assigning the claim a priority level (g), and in the absence of any exceptions thereto, the Report and Recommendation attached hereto as Exhibit A is accepted and approved. Accordingly, the Objection of Acumen Re Management Corporation to the Notice of Determination is hereby OVERRULED and the Notice of Determination is hereby APPROVED.

The Liquidator shall serve a copy of this Order on the Objector and its counsel and notify the Court that service has been effectuated.



**BONNIE BRIGANCE LEADBETTER**  
President Judge

**Certified from the Record**

AUG 17 2009

and Order Exit

**Russell M. Nigro**  
(Retired Justice)

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June 25, 2009

Honorable Bonnie Brigance Leadbetter  
President Judge  
610 Sentry Park, Suite 210  
Blue Bell, PA 19422

Re: Acumen Re Mgmt. Corp. vs Reliance Ins. Co.  
Proof of Claim # 2158537

Dear Judge Leadbetter:

As Your Honor is aware, on December 12, 2007, I was appointed as a referee in the above-captioned matter by Order of then Judge James G. Collins.

Subsequently, I scheduled a conference with Mr. Gawlas, counsel for the Liquidator, and Mr. Betoni, principal for the claimant (Acumen) for March 25, 2008. During that conference, Mr. Betoni requested an opportunity to obtain representation and that request was granted without objection. Mr. Avedissian was thereafter retained to represent Acumen.

Following several calls with the parties, the parties ultimately agreed that two threshold legal issues needed to be addressed and decided before a decision on the validity of the underlying claim could be made. Each side submitted a memo brief on those two issues. After reviewing those briefs, I make the following recommendation to the Court.

**Issue #1**

Whether the Liquidator properly assigned level (g) status to Acumen's proof of claim (POC) because that POC was an unexcused, untimely-filed claim?

**Recommended Answer: Yes.**

Although both parties agree that Acumen's POC was untimely filed by over two and one-half years, Acumen essentially argues that it should not be penalized for the late filing because it was due to the negligence of its previous legal counsel. Specifically, Acumen argues that it was unaware that its counsel had not filed a POC on its behalf until June of 2006, nearly two and one-half years after the December, 2003 deadline to do so. The Liquidator counters that he may only allow a late filing to share in distribution, as if it were not late, if, *inter alia*, good cause for the late filing has been shown. According to the Liquidator, no such showing of good cause has been made here.

The Insurance Department Act ("Act") generally requires "claims filed late" to receive a claim priority of level (g). See 40 P.S. s 221.44 (g)(2). However, under the Act, the Liquidator may permit a claimant making a late filing to share in the distribution as if he were not late if such distribution would not prejudice the orderly

*Exhibit A*

administration of the liquidation<sup>1</sup> and upon a showing of good cause. See 40 P.S. s 221.37 (b). The Act lists non-exhaustive examples, none of which are argued to be applicable in the instant matter, of what would constitute good cause. Id.

Here, both sides agree that no Pennsylvania case law exists which articulates how good cause shown should be determined in the context of insurance insolvency. The Liquidator cites to cases refusing to grant the reinstatement of a party's rights after counsel has submitted untimely filings. Meanwhile, Acumen, without offering a clear tie-in to the facts of this case, cites to several cases that granted an extension of time to creditors in bankruptcy proceedings either upon a showing of "excusable neglect" or lack of prejudice.

While there may be no cases directly on point, Pennsylvania law in general supports the Liquidator's position that no late filing relief should be granted on account of attorney negligence. The Pennsylvania Supreme Court has specifically stated that "where an appellant, an appellant's counsel or an agent of appellant's counsel has failed to file a notice of appeal on time due to **non-negligent** circumstances, the appellant should not lose his day in court. ... The exception for allowance of appeal *nunc pro tunc* in non-negligent circumstances is meant to apply only in unique and compelling cases in which the appellant has clearly established that she attempted to file an appeal, but unforeseeable and unavoidable events precluded her from actually doing so." Criss v. Wise, 781 A.2d 1156, 1159 (Pa. 2001) (emphasis added). Of course, such a standard is not remotely applicable to the instant case, where Acumen's prior attorney could not be said to have engaged in non-negligent conduct as he simply failed to file the POC despite assurances that he would do so.

## **Issue #2**

If timely filed, would Acumen's POC have been entitled to priority level (a) status?

**Recommended answer: No.**

Acumen argues that had its POC been timely filed, it would have been entitled to priority level (a) status. I disagree.

The priority level of claims against the estate of an insurer in liquidation is prescribed by Section 544 of the Act, which establishes classes (a) through (i). Section 221.44(a), the Section Acumen contends is applicable here, applies to "the costs and expenses of administration." Specifically, Section (a) states:

(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.

40 P.S. s221.44(a).

Acumen asserts that it should be granted priority level (a) because it provided millions of dollars of premium revenue to Reliance and that premium revenue became part of the post-rehabilitation estate of Reliance. According to Acumen, Reliance has been improperly holding and categorizing funds as reserves and it would therefore be "inappropriate to permit Acumen to be denied an "A"

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<sup>1</sup> The Liquidator concedes that no prejudice would occur here.

classification while others who enjoy this classification are paid by the very dollars Acumen brought to Reliance." Acumen Brief at 15.

In the end, Acumen has simply not demonstrated that it is entitled to priority level (a) status. Section (a) is clearly applicable only to the costs and expenses of administering the Reliance Estate. However, as the Liquidator points out in its brief, the unpaid profit commissions sought by Acumen are based on facultative certificates underwritten by Acumen prior to Reliance's rehabilitation, and therefore prior to the existence of any Reliance "estate" and the corresponding costs that go with administering such an estate. In short, Acumen's claim involves commissions for pre-rehabilitation services only and thus, cannot be said to fit into the "costs and expenses of administration" contemplated by Section (a).

Rather, Acumen's claim for unpaid commissions arising out of a claimed breach of its Underwriting Agency Agreement with Reliance falls squarely within Section 221.44(e), which applies to claims of general creditors. As the Liquidator argues, granting Acumen priority level (a) status, thereby elevating a creditor's claim for unpaid commissions ahead of policyholder claims, would subvert the clear order of distribution established by the Legislature. Under the Act, policyholders are paid next after the costs of the administration have been paid, in an attempt to give policyholders as much as possible of the insurance protection they purchased. Claims of general creditors for fees from pre-rehabilitation services, such as that made by Acumen here, are properly given a lower priority than policyholders' claims for their policy benefits. See Grode v. Mutual Fire Marine and Inland Ins. Co., 572 A.2d 789, 801 n.5 (Pa. Cmwith. 1990) ("the equitable purpose of rehabilitation and liquidation is to protect *first of all* consumers of insurance") (emphasis in original).

As such, I do not believe that Acumen has established that it would have been entitled to priority level (a) status had its attorney filed its POC on time.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Russell M. Nigro

cc: Robert N. Gawlas, Jr., Esquire  
David A. Avedissian, Esquire