

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

ORDER

AND NOW, this day of , 2002, it is hereby ORDERED that
the Petition of Vitas Healthcare Corporation, Vitas Holdings Corporation and Vitas
Healthcare of Texas, L.P. for Reconsideration is DENIED.

BY THE COURT:

By: _____ J.

RECEIVED AND FILED
PAUL J. BROWN
COMMONWEALTH COURT
OF PENNSYLVANIA
JAN 24 1 36 PM '02

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.

**RESPONSE OF M. DIANE KOKEN IN OPPOSITION
TO VITAS HEALTHCARE CORPORATION, VITAS HOLDING
CORPORATION AND VITAS HEALTHCARE OF TEXAS, L.P.'S
PETITION FOR RECONSIDERATION**

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

("Liquidator"), by her undersigned counsel, opposes¹ the Petition of Vitas Healthcare Corporation, Vitas Holdings Corporation and Vitas Healthcare of Texas, L.P. (collectively "Vitas") for Reconsideration. Vitas does not state any compelling reasons to warrant reconsideration of this Court's January 3, 2002 Order. Instead, Vitas has simply restated arguments already presented to the Court. The Pennsylvania Rules of Appellate Procedure, which governs all matters brought before an appellate court within its original jurisdiction, such as this matter, states that "[r]eargument before an appellate court is not a matter of right, but of sound judicial discretion." See Pa. R.A.P. §§ 2543, 106. Reargument is allowed "only when there are compelling reasons" that warrant it. See *id.* Vitas' Petition for Reconsideration fails to present any compelling reasons that warrant reconsideration of this Court's January 3, 2002 Order. Accordingly, the Liquidator opposes Vitas' Petition for Reconsideration. The Liquidator responds to Vitas' allegations as follows:

1. Admitted.
2. Admitted.
3. Admitted in part and denied in part. It is admitted that all persons who had negotiated settlements approved by the Rehabilitator, for which payment had been released, have received payment. However, those settlement checks were not returned to Reliance after liquidation had commenced. Thus, Vitas' attempt to equate its settlement to those of

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.

other parties is misplaced. As stated in the Liquidator's Response in Opposition to Vitas' Petition for Review in the Nature of Declaratory Judgment, 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. See Response to Petition for Review in the Nature of Declaratory Judgment at ¶ 48. The check issued to Vitas, in the amount of \$1 million, was mailed and returned, unlike any other settlement check Reliance has issued, via the postal service to the Liquidator after liquidation proceedings had commenced. The remaining allegations contained in paragraph 3 are denied as the Liquidator lacks knowledge or information sufficient to form a belief regarding the truth of those averments.

4. Denied. Contrary to Vitas' contention, a court ordered funding of the settlement outside of the proof of claim process would not only open the floodgates for similar claims against the Liquidator, but would contravene the statutory scheme of the Pennsylvania Insurance Department Act, 40 P.S. § 221.1 et seq. Specifically, the transfer of the Settlement Funds would constitute a payment of monies from Reliance's estate outside the distribution procedure and priorities established by statute. See 40 P.S. § 221.44.

5. Denied.

6. Admitted in part and denied in part. It is admitted that Vitas has sought to compel Reliance (in Liquidation) to pay the settlement of \$3.6 million, which was approved by the Rehabilitator prior to liquidation. It is specifically denied that checks were cut and

prepared for mailing, but never properly mailed. Only one check in the amount of \$1 million was cut and mailed. That check was returned via the postal service to Reliance after liquidation had commenced.

7. Admitted.

8. Admitted.

9. Admitted.

10. It is admitted that Vitas petitioned this Court on December 24, 2001 for a document discovery and a hearing. The Liquidator lacks knowledge or information sufficient to form a belief regarding the truth of the remaining averments contained in Paragraph 10, which are therefore denied.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18. Admitted.

19. Admitted. It is admitted that the Rehabilitator attempted to transfer \$1 million of the Settlement Funds to Vitas, but those funds were returned via the postal service after the commencement of liquidation.

20. Admitted.

21. Admitted.

22. Denied as conclusions of law.

23. Denied as conclusions of law. By way of further response, the Liquidator states that payment of the Settlement Funds is contrary to the order of distribution procedure and priorities set forth in the Pennsylvania Insurance Department Act, 40 P.S. § 221.1 *et seq.* Specifically, 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. *See* 40 P.S. § 221.44. In addition, the requested payment would violate the distribution priority under Pennsylvania law, because it would improperly elevate Vitas' claim to a priority equal to or higher than administrative expenses. *See id.*; 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). Furthermore, because the General Assembly of

Pennsylvania have provided a comprehensive statutory scheme governing the distribution of assets from a liquidated insurer's estate, relief different from that provided by statute, such as relief premised on equitable estoppel, 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).

24. Denied as conclusions of law. By way of further response, the Liquidator admits only that all persons whose settlements were approved by the Rehabilitator, for which payment had been released, have received payment. The Liquidator denies that Vitas is one of those parties or that it should receive payment. Unlike other settlement checks issued by Reliance, Vitas' check for \$1 million was returned to Reliance after liquidation had commenced. Furthermore, contrary to Vitas' allegations, the immediate payment of the Settlement Fund 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. Instead, Vitas, like all other claimants, must file a proof of claim. The Liquidator began mailing proof of claims forms on January 11, 2002 and expects to complete mailing all forms by or before the end of February of 2002.

25. Denied as conclusions of law. The Liquidator's response to paragraph 24 is incorporated herein by reference.

26. Denied as conclusions of law. The Liquidator's response to paragraph 24 is incorporated herein by reference.

27. Admitted.

28. Denied as conclusions of law.

29. Admitted.

30. Admitted.

31. Denied. It is specifically denied that, prior to liquidation, the Rehabilitator refused to transfer payment. As stated in the Liquidator's Response in Opposition to Vitas' Petition for Review in the Nature of Declaratory Judgment, the completion of the transfer was frustrated when the payment was returned via the postal service after liquidation proceedings had commenced. See Response to Petition for Review in the Nature of Declaratory Judgment at ¶ 33.

32. Denied. The Liquidator lacks knowledge or information sufficient to form a belief regarding the truth of the averments contained in Paragraph 32, which are therefore denied.

33. Denied as conclusions of law.

34. Admitted.

35. Denied. By way of further response, the Liquidator reiterates that her office began mailing of proof of claims forms on January 11, 2002 and expects to complete mailing all forms by or before the end of February of 2002.

36. Denied as conclusions of law.

37. Denied as conclusions of law.

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 Reconsideration of this Court's January 3, 2002 Order.

Respectfully submitted,

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Dated: January 24, 2002

CERTIFICATE OF SERVICE

I, ALPHONSO DAVID, 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. for Reconsideration was served on all persons listed on the attached Master Service List by facsimile and U.S. Mail, postage prepaid.



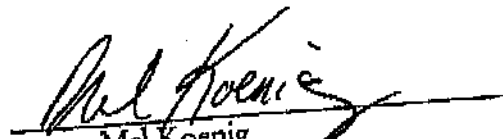
ALPHONSO DAVID

Dated: January 24, 2002

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: January 23, 2002



Mel Koenig
First Vice President
Reliance Insurance Company (in Liquidation)

114582.00600/10983205v1

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Reliance Insurance Company

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

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