

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. Diane Koken,  
Insurance Commissioner of the  
Commonwealth of Pennsylvania  
Plaintiff

v.

Reliance Insurance Company,  
Defendant

No. 269 M.D. 2001

-----  
Vitas Healthcare Corporation, Vitas Holdings  
Corporation, and Vitas Healthcare of Texas, L.P.,  
Petitioners,

v.

M. Diane Koken  
Respondent.

**ORDER**

AND NOW this \_\_\_\_\_ day of \_\_\_\_\_, 2002, upon consideration of the Liquidator's Preliminary Objections to Petition for Review in the Nature of Equity and Mandamus filed by Intervenors Vitas Healthcare Corporation, Vitas Holdings Corporation, and Vitas Healthcare of Texas, L.P., it is hereby ORDERED that the preliminary objections are SUSTAINED and the Petition for Review is DISMISSED.

\_\_\_\_\_  
JAMES GARDNER COLINS, J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. Diane Koken, :  
Insurance Commissioner of the :  
Commonwealth of Pennsylvania :  
Plaintiff :  
v. : No. 269 M.D. 2001  
Reliance Insurance Company, :  
Defendant :  
----- :  
Vitas Healthcare Corporation, Vitas Holdings :  
Corporation, and Vitas Healthcare of Texas, L.P., :  
Petitioners, :  
v. :  
M. Diane Koken :  
Respondent. :

**PRELIMINARY OBJECTIONS TO PETITION FOR  
REVIEW IN THE NATURE OF EQUITY AND MANDAMUS**

Pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure and Rule 106 of the Pennsylvania Rules of Appellate Procedure, respondent M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, as Liquidator for Reliance Insurance Company ("Liquidator"), by her undersigned counsel, files these preliminary objections to the Petition for Review in the Nature of Equity and Mandamus filed by Intervenors Vitas Healthcare Corporation, Vitas Holdings Corporation, and Vitas Healthcare of Texas, L.P. (collectively, "Vitas"):

## BACKGROUND

1. On October 18, 2001, Vitas, an insured of Reliance, filed with this Court a Petition to Intervene and Petition for Review in the Nature of Declaratory Judgment and to Enforce a Binding Settlement. In its petition, Vitas alleged that the Liquidator, as Rehabilitator of Reliance, had reached a settlement in the amount of \$3.6 million of a litigation pending in Harris County, Texas ("Texas Action") in which Vitas was a defendant. Vitas alleged that prior to the entry of the Liquidation Order dated October 3, 2001, Reliance had mailed to it a check in the amount of \$1 million, representing a portion of the \$3.6 million settlement, but that the check was returned to Reliance due to an incorrect address on the envelope. With respect to the remaining \$2.6 million, Vitas alleged that it was entitled to payment of that sum because Reliance had "issued" a check for that amount prior to the date of the Liquidation Order although the check was never mailed to Vitas. In its petition, Vitas sought an order directing the Liquidator to immediately pay the \$3.6 million.

2. In her Response in Opposition to Vitas' Petition, the Liquidator opposed the relief Vitas was seeking on the ground that there was a mandatory proof of claim procedure which Vitas was required to pursue and that the requested relief would be a distribution outside of the statutory procedures. She also objected on the grounds, *inter alia*, that an immediate payment in full of the settlement would constitute a preference and would violate the distribution priority mandated by the Pennsylvania Insurance Department Act, 40 P.S. § 221.1 *et seq.* ("Pennsylvania Insurance Act").

3. By Order dated February 22, 2002, this Court denied Vitas' Petition and ordered that Vitas may file a proof of claim in the liquidation proceeding.

4. On March 5, 2002, Vitas filed a proof of claim in the amount of \$3.6 million in the liquidation proceeding.

5. On April 3, 2002, the Liquidator issued, on an expedited basis as Vitas requested, a Notice of Determination, a copy of which is attached to Vitas' Petition for Review in the Nature of Equity and Mandamus, valuing Vitas' proof of claim in the amount of \$2.6 million and assigning a claim priority level (b) under 40 P.S. § 221.44. The proof of claim was valued at only \$2.6 million because, as Vitas admits in paragraph 12 its Complaint, the Liquidator agreed to pay Vitas \$1 million to replace the \$1 million check that Reliance had actually placed in the mail and, on April 24, 2002, did pay Vitas the \$1 million. The April 3 Notice of Determination notified Vitas that:

If you accept this determination of your claim, no action is necessary. Written objections to this determination must be filed within 60 days from the date of the notice with the Statutory Liquidator (40 P.S. Section 221.44). If no objection is received within 60 days from the date of this notice, this determination will be considered accepted and binding.

The Notice of Determination also advised that:

Once all assets and liabilities of the Reliance estate are known, the Statutory Liquidator will recommend to the Commonwealth Court of Pennsylvania that its assets be distributed to the claimants with allowed claims. The amount of distribution will be calculated as a percentage of the amounts allowed by the Statutory Liquidator. This percentage applicable to each priority level will not be known until all assets and liabilities are finally identified. You will be notified when the Commonwealth Court is requested to approve distribution of the assets. This process can take years to complete, depending on the complexity of the matters of the estate.

6. Vitas does not and cannot allege in its complaint that it filed objections within sixty days from the date of the April 3 Notice of Determination.

7. On June 20, 2002 – more than 75 days after the April 3 Notice of Determination, Vitas filed a Petition for Review in the Nature of Equity and Mandamus (“Complaint”) seeking an order directing the Liquidator to make immediate payment of \$2.6 million, the value allowed by the Liquidator on Vitas’ proof of claim and the amount representing the portion of the \$3.6 million settlement that still remains unpaid. In the Complaint, Vitas, completely ignoring the fact that Reliance is in liquidation, alleges that since the Liquidator, through her Notice of Determination, has acknowledged the validity of the settlement of the Texas Action and “has admitted that Reliance currently owes the sum of \$2.6 million”, the Liquidator is required to make immediate payment on its proof of claim. Compl. ¶¶ 13, 15, 28.

8. Vitas’ Complaint should be dismissed for several reasons. First, by failing to file objections to the Liquidator’s April 3 Notice of Determination, Vitas has waived its right to object to the Liquidator’s determination on its proof of claim and is precluded from challenging the Liquidator’s determination through its Complaint. Second, the Complaint should be dismissed because Vitas has failed to exhaust its statutory remedy. By failing to timely object to the April 3 Notice of Determination, Vitas has failed to pursue the remedy available under the statute. Even if Vitas had filed timely objections, which it did not do, it would still not have exhausted its statutory remedy. The Liquidator has not completed her assessment of the assets and liabilities of the estate and has not recommended a distribution to the class of creditors to which Vitas belongs. Until the Liquidator has concluded the proof of claim process and has recommended a distribution, Vitas has not exhausted its remedy under the Pennsylvania Insurance Act. Finally, the Complaint should be dismissed

for legal insufficiency because, as a matter of law, Vitas cannot allege facts that would entitle it to the relief it seeks in the Complaint.

### PRELIMINARY OBJECTIONS

#### **A. The Complaint Should be Dismissed because Vitas has Waived its Right to Challenge the Liquidator's April 3 Notice of Determination**

9. The April 3 Notice of Determination clearly stated that Vitas may file written objections within sixty days of the April 3 Notice of Determination or “[the] determination will be considered accepted and binding.”

10. The sixty-day time period for filing objections to the April 3 Notice of Determination expired on June 2, 2002.

11. Vitas does not allege, nor can it, that it filed objections on or before June 2, 2002.

12. By failing to object to the April 3 Notice of Determination, therefore, Vitas has consented to the \$2.6 million valuation of the claim and the class (b) assignment of its claim. It has also agreed to be bound by all terms and conditions set forth in the April 3 Notice of Determination, including but not limited to: 1) the term that the amount of distribution would be calculated as a percentage of the amount allowed by the Liquidator, which percentage would not be known until all assets and liabilities are identified; 2) that a distribution would be in accordance with the claim priority set forth in the Pennsylvania Insurance Act; and 3) that the distribution of assets could take years to complete.

13. By failing to file objections within sixty days of the April 3 Notice of Determination, Vitas has not complied with the statutorily prescribed procedures for objecting to the Liquidator's determination. In addition, by failing to file objections, Vitas

has waived its right to object to the April 3 Notice of Determination and is precluded from challenging the April 3 Notice of Determination through its Complaint. See Department of Environmental Resources v. Williams, 57 Pa. Commw. 8, 12, 425 A.2d 871, 873 (1981) (failure to comply with statute by filing a timely appeal of an order of an administrative body foreclosed challenges in court). Accordingly, Vitas' Complaint should be dismissed in its entirety.

**B. Vitas' Complaint Should be Dismissed Because Vitas has Failed to Exhaust its Statutory Remedy**

14. Additionally, Vitas' Complaint should be dismissed because Vitas, in failing to file objections to the April 3 Notice of Determination, has failed to exhaust its statutory remedy. A party who has not exhausted its statutory remedies is barred from obtaining judicial review. Matestic v. Maleski, 155 Pa. Commw. 154, 624 A. 2d 776 (1993).

15. However, even if Vitas had filed timely objections to the April 3 Notice of Determination, which it did not, Vitas' Complaint must still be dismissed because Vitas has not exhausted the required statutory procedure.

16. The Pennsylvania Insurance Act sets forth a comprehensive procedure for those who have a claim against the Reliance estate and wish to receive a distribution from the estate assets. It provides that such claims be submitted through a "proof of claim." 40 Pa. Stat. §§ 221.37, 221.38. Pursuant to this claims procedure, the Liquidator reviews the claims (40 Pa. Stat. § 221.45(a)) and may deny or allow a claim, in whole or in part. If a claim is denied, the Liquidator is required to provide written notice of the determination to the claimant (40 P.S. § 221.41(a)), and the claimant may file objections to the notice of determination. Id. All disputed claims are resolved by the Commonwealth Court or by a

referee appointed by the Commonwealth Court. 40 Pa. Stat. §221.41(b). If a claim is approved, the claimant is eligible for a pro rata distribution at such time when a distribution to the class of claims to which claimant belongs is recommended by the Liquidator and approved by the Court. The statutory claims process is mandatory and exclusive, and permits an orderly and fair distribution of Reliance assets in accordance with the distribution priority set forth in the Pennsylvania Insurance Act.

17. 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. Williams, 425 A. 2d at 872-873; 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. Cmwlth. 1983).

18. While Vitas has filed a proof of claim and the Liquidator has issued a Notice of Determination, the Liquidator has not yet completed her collection of the assets of the estate. Further, the deadline for filing proofs of claim in the liquidation proceeding is December 31, 2003. No distribution has yet been recommended by the Liquidator or approved by the Court. 40 P.S. §§ 221.45, 221.46. Vitas has not exhausted the statutory procedures and is barred from seeking relief outside of the prescribed procedures.

**C. Vitas' Complaint Should be Dismissed Because, as a Matter of Law, Vitas is Not Entitled to the Relief it Seeks**

**1. The Payment would constitute a Preference by Elevating the Interest of one Class(b) Member over the Interest of Other Class(b) Members and Would violate the Order of Distribution Mandated by Statute**

19. The Liquidation Order, at paragraph 21, expressly prohibits any person from "obtaining of preferences, judgments, attachments . . . against Reliance assets, property . . . ."

20. 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 interests of all policyholders.

21. An immediate payment on the proof of claim valued at \$2.6 million would be a distribution of assets to pay immediately the claim of one policyholder in full outside of the statutory procedures and would constitute an unlawful preference. Vitas would immediately receive a full recovery on its proof of claim while other policyholders would receive a pro rata share of the distribution of Reliance's assets at an unknown future date. 40 P.S. §§ 221.44, 221.46.

22. Additionally, the immediate payment of the \$2.6 million proof of claim would violate the distribution priority mandated by the Pennsylvania Insurance Act and would, in effect, accord higher priority level to Vitas' claim than would be authorized by the Pennsylvania Insurance Act. The Pennsylvania Insurance Act requires that the order of distribution of claims be in accordance with Section 221.44 which provides first priority to "costs and expenses of administration." 40 P.S. § 221.44(a). It then provides next priority to "claims under policies for losses." 40 P.S. § 221.44(b).

23. The immediate and full payment of \$2.6 million would improperly elevate Vitas' claim, a class (b) claim, to the immediate payment accorded to administrative expenses. In Oxedine v. Commissioner of Insurance of North Carolina, 229 Ga. App. 604, 494 S.E. 2d 545 (1998), the Court of Appeals of Georgia held that settlements that were reached during an insurer's rehabilitation proceeding did not constitute administrative costs and expenses in a liquidation proceeding and were not entitled to super priority under a

Georgia statute which provided for a distribution priority similar to that in the Pennsylvania Insurance Act.

24. The Liquidator's immediate and full payment would be violative of the distribution priority mandated by law and, therefore, the relief sought by Vitas is prohibited by law.

**D. Vitas' Complaint Should be Dismissed for Failure to State a Claim for Relief in the Nature of a Mandamus**

25. In its Complaint, Vitas seeks relief in the nature of a mandamus.

26. In Pennsylvania, mandamus is an extraordinary relief that is granted to "compel official performance of [a] ministerial act or mandatory duty where there is clear legal right in plaintiff, corresponding duty in defendant and want of any other appropriate and adequate remedy." Matesic v. Maleski, 155 Pa. Commw. 154, 158, 624 A.2d 776, 778 (1993).

27. Vitas' Complaint fails to state a claim for relief in the nature of a mandamus. Vitas has failed to allege facts that would support its claim that it has a clear legal right to the immediate payment of \$2.6 million. To the contrary, as explained above, Vitas has no such right. Vitas has failed to allege that the Liquidator has a clear duty to immediately pay the funds in full. To the contrary, the Liquidator has a statutory duty to properly recognize the appropriate distribution priorities. The Liquidator has no obligation or duty to immediately pay \$2.6 million in full. Further, Vitas cannot allege that it has no adequate remedy. The Pennsylvania Insurance Act provides a statutory procedure for insureds of an insolvent insurance carrier. Vitas has submitted a proof of claim and must await the conclusion of the statutory claims procedure and the distribution of the estate assets. 40 P.S. § 221.46. Vitas'

Complaint also fails for the reason stated above that Vitas has not exhausted its statutory remedies. See Matesic, 624 A.2d at 778.

E. Vitas' Complaint fails to State a Claim for Injunctive Relief

28. In its Complaint, Vitas also seeks injunctive relief directing the Liquidator to pay it \$2.6 million.

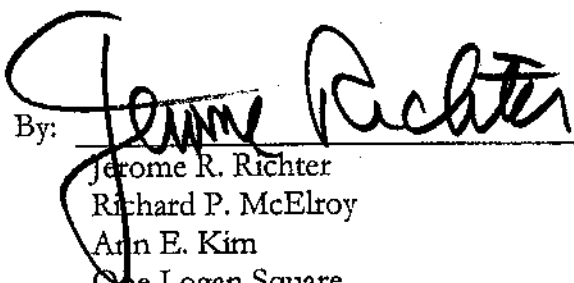
29. In Pennsylvania, injunctive relief may be granted only where the rights of the plaintiff are clear and free from doubt and the harm which the plaintiff sought to be remedied is great and irreparable. See, e.g., Kimmel v. Lower Paxton Township, 159 Pa. Commw. 475, 633 A.2d 1271, 1274 (1993); State Ethics Commission v. Landauer, 91 Pa. Commw. 70, 76, 496 A. 2d 862, 865 (1985).

30. As discussed above, Vitas has not alleged facts that would support its claimed entitlement to injunctive relief. As a matter of law, Vitas has not alleged facts that would support the claim that it has a clear right to an immediate payment of \$2.6 million in full. In contrast, the Liquidator has an obligation to recognize the proper distribution priorities. 40 P.S. §§ 221.44, 221.45, 221.46. It has not alleged facts that would support its claim that it would sustain irreparable harm. Vitas' Complaint is legally insufficient and should be dismissed for failure to state a claim.

WHEREFORE, the Liquidator respectfully requests that this Court enter an order sustaining the Liquidator's preliminary objections and dismissing Vitas' Petition for Review in the Nature of Equity and Mandamus.

Respectfully submitted,

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Dated: July 22, 2002

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the preceding Preliminary Objections to Petition for Review in the Nature of Equity and Mandamus was served this 22nd day of July, 2002, by first class mail, postage prepaid, upon the individuals listed on the Master Service List and upon the following individual by hand delivery:

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