

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

RECEIVED AND FILED
IN THE COMMONWEALTH COURT
OF PENNSYLVANIA
JUL 2 5 11 AM '07

**RESPONSE OF M. DIANE KOKEN IN OPPOSITION
TO INTEGRATED HEALTH SERVICES, INC.'S
PETITION TO INTERVENE FOR PURPOSES OF
FILING AN ACTION FOR DECLARATORY JUDGMENT**

M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, in her capacity as statutory Liquidator of Reliance Insurance Company ("Liquidator"), opposes the Petition of Integrated Health Services, Inc. ("IHS") to intervene ("the Petition"). IHS does not satisfy the standards for intervention. IHS proposes to file an action seeking a declaratory judgment, raising essentially three issues. First, it seeks a declaratory judgment concerning the coverage provided by its insurance policy with Reliance ("the Policy"). The stated purpose for obtaining the proposed coverage determination is to force the Maryland and Florida Guaranty Associations to provide guaranty fund coverage for IHS's claims in those states. However, intervention is clearly not appropriate for this purpose, as the Guaranty Associations are not parties and without the associations as parties

this Court is not the appropriate Court to resolve a dispute between the Guaranty Association and the Reliance insured concerning guaranty fund coverage for the insured in Florida and Maryland.

Second, IHS proposes to assert a claim for declaratory relief concerning the question of whether the aggregate limits of the Policy are \$4.5 million or \$9 million. Resolution of issues of policy coverage as they relate to a claim against Reliance in Liquidation are subject to the exclusive, statutory, proof of claim procedure set forth in 40 P.S. § 221, et seq. Intervention and the filing of a lawsuit should be rejected in favor of the exclusive statutory procedure designed by the Legislature to govern issues such as this.

Third, IHS seeks to force the Liquidator to use certain IHS collateral held by Reliance to pay IHS's claims under the Policy. This portion of IHS's claim is not ripe until the issues relating to Guaranty Association coverage are resolved and/or the Liquidator has notified IHS that it intends to use the collateral in a fashion that would prejudice IHS. Currently, IHS's collateral is maintained and accounted for separate and apart from the general assets of Reliance and there is no case or controversy concerning its disposition. IHS fails each and every test for intervention and its Petition should be denied.

1. The Liquidator has insufficient knowledge or information sufficient to form a belief as to the truth or falsity of the averments contained in paragraph 1 of the Petition, although it is admitted that IHS at one time was a nursing home operator. The remainder of the averments are denied and strict proof is demanded.

2. Admitted.

3. Admitted only that pursuant to 40 P.S. § 221.1 et seq., M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, petitioned this Court for an Order of Liquidation of Reliance Insurance Company (“Reliance”).

4. Admitted.

5. The Petition and Order are documents that speak for themselves and the averments of these paragraphs are denied as characterizations of the contents of a written document. It is admitted that Exhibit A is the Order of Liquidation entered by this Court on October 3, 2001.

6. The averments of paragraph 6 are denied insofar as they are an attempt to characterize the contents of a written document, which speaks for itself. It is admitted that some or all of the Policy is attached to the proposed Complaint as Exhibit B. IHS failed to attach, however, other documents relevant to the Policy and the collateral, including the Program Agreement.

7. Admitted.

8. It is admitted only that many states have enacted statutes which create guaranty associations. These statutes speak for themselves but generally create funds which, under criteria that vary from state to state, may pay policyholders in part or in whole for claims against insolvent insurers. The terms and conditions of these state statutes vary in amounts, claim eligibility, insured eligibility, statutory caps, and other criteria. The

availability of guaranty association coverage depends on the law of the particular state. It is admitted that the Order of Liquidation creates the potential for guaranty association coverage of certain claims against Reliance, depending upon the residence of the insured, the claimant, the type of insurance, the net worth of the insurer, and many other variables which are purely a matter of the law of the applicable state. In some states, the guaranty association statute requires that, in order to qualify for guaranty fund coverage, the claim must be within the policy coverage. The Liquidator is without knowledge or information with respect to the involvement of the Florida or Maryland Guaranty Associations.

9. It is specifically denied that there is any current controversy between IHS and Reliance or the Liquidator with respect to the correct construction of the Policy. Once the Order of Liquidation was entered, all parties became subject to the exclusive statutory procedure for the determination of claims under Reliance policies. This requires that the insured submit a proof of claim form. Thereafter, the Liquidator will determine the claim, with respect to coverage, amount and priority. The statute provides the insured with the right to object. If the insured objects to the Liquidator's claim determination, the issue will ultimately be decided by a special master, referee or the Court. The statute specifically stays actions against the Liquidator or Reliance for precisely this reason. Nor is there a current, ripe controversy concerning the appropriate disposition of the collateral. IHS and Reliance entered into a specific agreement governing the disposition of the collateral Reliance holds to secure IHS's obligations under its policies with Reliance to reimburse Reliance for claims

payments within the deductible of the policies. Collateral may be drawn down by Reliance if (1) Reliance pays all or a portion of a claim within the deductible; and (2) IHS fails to reimburse Reliance for the payments made. In the event that a guaranty association pays a claim that Reliance would otherwise be obligated to pay, these payments may also impact upon the appropriate disposition of the collateral. Accordingly, until there is a final determination as to the nature and extent of payments by the Guaranty Association, it is premature to address the disposition of the collateral.

10. It is specifically denied that the extent of the Guaranty Associations' obligation to provide coverage is measured by the coverage of the Policy. On the contrary, the nature and extent of the Guaranty Association's obligations are governed by the Guaranty Association statutes, some of which include as an element whether the claim is covered under the policy. The controversy between IHS and the Maryland and Florida Guaranty Associations over whether IHS has a valid claim against the Maryland or Florida Guaranty Associations is not appropriately before this Court because the Florida and Maryland Guaranty Associations are not parties to this action. The Liquidator is without knowledge or information sufficient to form a belief as to whether the Florida and Maryland Guaranty Associations would be bound by this Court's decision with respect to the coverage provided by the Maryland and Florida Guaranty Association statutes, or the availability of a defense from those Guaranty Associations. Furthermore, it is not the responsibility of this

Court to address the question of whether the "Debtors are able to administer their bankruptcy estates in an orderly manner."

11. The Liquidator is without knowledge or information as to whether the Guaranty Associations have or have not declined to provide a defense for, or declined to pay losses arising from claims which IHS believes are covered under the Policy. The Liquidator is without knowledge or information sufficient to form a belief as to whether a declaration concerning the right under the Policy as between Reliance and IHS in an action in which the Guaranty Association are not parties would cause the Guaranty Associations to accept coverage under their state statutes and pay claims.

12. The Liquidator is without knowledge or information as to the relative concerns of the Bankruptcy Court and this Court with the proper administration of the estates before those courts. The remainder of the averments contained in this paragraph are conclusions of law, which are denied. It is admitted only that the Commonwealth Court has exclusive jurisdiction over the collateral and the appropriate disposition of the collateral. However, the appropriate disposition of the collateral must await the resolution of Guaranty Association coverage, as well as the resolution of claims by IHS or the submission of claims by IHS to the Liquidator and the determination of those claims and the distributions from the estate. The stay should remain in place as to any action against Reliance, and IHS should follow the statutory procedures designed to address the orderly disposition of the Reliance estate.

13. It is admitted that the proposed Complaint contains five counts. The document speaks for itself and the remaining allegations in this paragraph are denied as characterizations of the Complaint or the Policy, both written documents which speak for themselves. To the extent the remainder of this paragraph is intended to make allegations separate from the characterization of the appended Complaint, the allegations are denied. The obligations of IHS and Reliance are set forth in the Policies and the related agreements, including a Program Agreement that governs the parties' rights in the collateral. Under these agreements and Policy, if Reliance pays claims covered under the Policy, IHS is responsible to reimburse Reliance up to the amount of the deductible. The collateral secures IHS's obligations to Reliance and is not held to "pay claims." The Liquidator denies the allegations concerning the varying positions of the Guaranty Associations and the Liquidator. To the extent the Guaranty Associations have construed the coverage of the statutes in their respective states as applied to a particular claim for Guaranty Association coverage, that is not an issue before the Liquidator, upon which she has "taken a position."

14. To the extent that this paragraph characterizes the allegations in the attached, proposed Complaint, it characterizes a written document which speaks for itself and the allegations are accordingly denied. It is admitted that the Liquidator is holding collateral to secure the obligations of IHS under the Policy and related agreements but it is denied that the amount of the collateral securing IHS's obligations under the Policy exceeds \$12 million. It is denied that the Liquidator has declined to apply the collateral to the satisfaction of the

Debtors' current deductible obligations under the Policy. Current deductible reimbursement obligations which permit Reliance to draw on the collateral arise under the Policy at such time as Reliance pays claims under the Policy. However, IHS is not entitled to have the collateral used to fund its ongoing claims payment obligations. To do so outside the specific parameters of the Policy would cause an unfair and illegal preference for claimants on a first come, first serve basis, where later claimants may well recover less than full payment on similar claims under the same policy. IHS is not entitled to be treated differently than other policyholders. If IHS pays claims and reduces the ultimate exposure of Reliance under the policies, it may be entitled to collateral reductions consistent with the terms of the agreements between IHS and Reliance. The remaining allegations are conclusions of law to which no response is required.

15. To the extent that this paragraph characterizes the allegations in the attached, proposed Complaint, it characterizes a written document which speaks for itself and the allegations are accordingly denied. The allegations of this paragraph are conclusions of law to which no response is required and these allegations are denied. The collateral is held by the Liquidator as security for obligations under agreements between IHS and Reliance. Until those obligations are satisfied, IHS is not entitled to return of collateral. However, to the extent IHS pays claims out of its ongoing operations, it may be entitled to collateral reductions consistent with the agreements between the parties. With respect to the email referred to in this paragraph, it is a writing which speaks for itself.

16. To the extent that this paragraph characterizes the allegations in the attached, proposed Complaint, it characterizes a written document which speaks for itself and the allegations are accordingly denied. Intervention by IHS to assert these claims is not appropriate, as actions such as these are explicitly stayed under the statute. The Insurance Department Act, 40 P.S. § 221.1 et seq., provides an exclusive statutory procedure to resolve questions concerning the coverage, scope and amount of claims. Once the Order of Liquidation was entered, all parties became subject to the exclusive statutory procedure for the determination of claims under Reliance policies. This requires that the insured submit a proof of claim form. Thereafter, the Liquidator will determine the claim, with respect to coverage, amount and priority. The statute provides the insured with the right to object and any objection will ultimately be decided by a special master, referee or the Court, if the insured is not satisfied with the conclusions of the Liquidator. The statute specifically stays actions against the Liquidator or Reliance for precisely this reason. The question of the available policy limits, including the reinstatement of limits, is one that is appropriate for determination in the context of the proof of claim procedure.

17. The allegations in this paragraph are denied as conclusions of law to which no responsive pleading is required. The claims alleged in the attached Complaint are either subject to an exclusive statutory procedure, not within the jurisdiction of this Court or premature.

18. IHS's request to intervene in this case should be denied. IHS has not pleaded grounds adequate to support intervention. Pa. R. Civ. P. 2328 (requiring a petition to intervene to set forth the ground on which intervention is sought). The collateral held by the Liquidator is not being held as a general asset of the estate. As collateral, it is being held subject to the terms of the agreements between IHS and Reliance – terms which clearly permit Reliance to continue to hold the collateral at this time, when there is at least \$10 million in claims exposure still outstanding under the Policies between Reliance and IHS. Until such time as there is a determination by Reliance to take the collateral into the general assets of the estate, there is no case or controversy and no grounds for intervention.

19. Rule 2327 of the Pennsylvania Rules of Civil Procedure provides that a person not a party to an action may be permitted to intervene if:

(1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or

(2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or

(3) such person could have joined as an original party in the action or could have been joined therein; or

(4) the determination of such action may affect any legally enforceable interest of such person whether or not he may be bound by a judgment in the action.

Pa. R. Civ. P. 2327. Here, there is no action pending before this Court that would adversely affect the interests of IHS. It is specifically denied that the collateral "should be used to pay for defense costs of claims brought against IHS and for settlement of claims." On the contrary, the collateral should be maintained until such time as Reliance determines it should be taken into the general assets of the estate based upon unpaid obligations of IHS to reimburse Reliance for claims payments within the deductibles of the policies, or returned to IHS based upon information that IHS has satisfied sufficient claims itself to warrant a reduction in the collateral. In re Pennsylvania Crime Comm'n, 453 Pa. 513, 524 n. 11, 309 A. 2d 401, 408 n. 11 (1973).

20. Denied, as a conclusion of law. The response set forth to paragraphs 18 and 19 are incorporated herein by reference.

21. The responses to paragraphs 1 through 20 are incorporated by reference. The affidavit of Ronald L. Lord, general counsel of IHS is simply a verbatim repetition of the allegations contained in this Petition.

WHEREFORE, the Rehabilitator requests that this Court deny IHS's Petition to Intervene.

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Dated: August 5, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the preceding Response of M. Diane Koken in Opposition to Integrated Health Services, Inc.'s Petition to Intervene for Purposes of Filing an Action for Declaratory Judgment was served by first class mail, postage prepaid, facsimile and/or electronic mail on the attached Master Service List and on the following individuals:

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