IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| M. DIANE KOKEN,<br>Insurance Commissioner of the<br>Commonwealth of Pennsylvania,<br><br>Plaintiff,<br><br>v.<br><br>RELIANCE INSURANCE CO.,<br><br>Defendant. | : | No. 269 M.D. 2001 |

**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF REHABILITATOR FOR RECONSIDERATION OF JULY 30, 2001 ORDER GRANTING THE PETITION FOR THE APPOINTMENT OF A POLICYHOLDERS' COMMITTEE**

M. Diane Koken, Commissioner of Insurance of the Commonwealth of Pennsylvania, in her capacity as statutory Rehabilitator (hereinafter "Rehabilitator") of Reliance Insurance Company (hereinafter "Reliance"), urges this Court to reconsider its July 30, 2001 Order ("July 30 Order" or "Order") granting the Petition for the Appointment of a Committee of Policyholders.

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Based on the deteriorating financial condition of Reliance, and with the consent of its Board of Directors, this Court on May 29, 2001, issued an Order of Rehabilitation, and appointed the Pennsylvania Insurance Commissioner statutory Rehabilitator of Reliance pursuant to Article V of the Pennsylvania Insurance Department Act ("the Act"). See Order of Rehabilitation (filed May 29, 2001); see also 40 P.S. § 221.15. The Act authorizes the

Insurance Commissioner as Rehabilitator to take "such action as [she] deems necessary or expedient to correct the condition or conditions which constituted the grounds for the order of the court to rehabilitate the insurer[,]" specifically including steps to remedy any condition of the insurer which would be "hazardous, financially, to [the insurer's] policyholders, creditors or the public." See 40 P.S. §§ 221.14, 221.16. The May 29 Rehabilitation Order directs the Rehabilitator "to take such action as the nature of this case and the interests of the policyholders, certificateholders, creditors, or the public may require." See Order of Rehabilitation, ¶ 3. Once Reliance is placed in rehabilitation, the Rehabilitator has "all the powers of the directors, officers and managers" and has "full power to direct and manage . . . and deal with the property and business of the insurer." 40 P.S. § 221.16(b). Thus, the Rehabilitator effectively takes over the Company in rehabilitation while she formulates a Plan of Rehabilitation.

The Act provides the exclusive statutory authority and procedures for a rehabilitation or liquidation of a financially troubled insurance company, such as Reliance. The Act vests the Rehabilitator with broad authority to take the actions necessary to protect policyholders. 40 P.S. § 221.16. The Rehabilitator's powers and duties include: (1) appointing and compensating deputies; (2) operating the insurer, with all of the powers of its officers, directors and managers, including handling policyholder and other claims; (3) bringing actions against any person, if it appears there has been wrongdoing detrimental to the insurer; (4) creating and submitting a plan of rehabilitation; (5) avoiding fraudulent transfers; and (6) taking any other action she deems "necessary or expedient" to correct the condition which led to the Order of Rehabilitation. Id. at § 221.16.

Just one day after the Order of Rehabilitation was entered, on May 30, 2001, Petitioners, alleged to be a group of Reliance policyholders, identified by name and alleged claim amount, filed the Petition ("Policyholder Petition") seeking "an order appointing an Official Committee of Policyholders of Reliance Insurance Company . . . ."

On June 18, 2001, the Rehabilitator filed her opposition to the appointment of a policyholder committee, along with preliminary objections seeking dismissal of the Petition in its entirety. Petitioners responded and the Rehabilitator replied to the response.

On July 30, 2001, this Court granted the Policyholder Petition and authorized Petitioners to form a committee of policyholders. See July 30 Order. The July 30 Order stated that it was "treating the Petition as an Application for Special Relief," and appointed Robert H. Levin, Esquire, "as interim counsel for the policyholders committee, pending identification and notification of all affected parties, persons and/or entities." See id.

The Rehabilitator respectfully seeks reconsideration of the July 30 Order, as it conflicts with the exclusive statutory scheme and is not warranted in this case.

## II. LEGAL STANDARD

It is well settled law in the Commonwealth of Pennsylvania that courts have the "inherent power to reconsider [their] own rulings." Hutchinson v. Luddy, 611 A.2d 1280, 1288 (Pa. Super. 1992) (citing Atlantic Richfield Co. v. J.J. White, 448 A.2d 634 (Pa. Super. 1982)). "Where an order does not effectively place the litigant out of court or end the lawsuit, it is within the . . . court's discretion to entertain a motion to reconsider the interlocutory order . . . ." Hutchinson, 611 A.2d at 1288 (citations omitted); see Marble v. Fred Hill & Son, 624 A.2d 190, 192 (Pa. Super. 1993).

With regard to interlocutory orders which may be appealed as of right, Rule 1701 of the Pennsylvania Rules of Appellate Procedure specifically contemplates that a lower court can and may review its own orders, even after the filing of a notice of appeal. See Pa. R. Ap. P. 1701(b)(3);[1] Leonard v. Anderson Corporation, 445 A.2d 1279, 1280-81 (Pa. Super. 1982) (stating that "[t]he mere filing of a petition for reconsideration does not toll the period in which an appeal may be perfected" (citations omitted)).[2]

---

[1] Rule 1701(b)(3) of the Pennsylvania Rules of Appellate Procedure provides, in relevant part:

> (b) After an appeal is taken[,] . . . the trial court . . . may . . . (3) Grant reconsideration of the order which is the subject of the appeal or petition, if: (i) an application for reconsideration of the order is filed in the [lower] court . . . within the time provided or prescribed by law; and (ii) an order expressly granting reconsideration of such prior order is filed in the [lower] court . . . within the time prescribed by these rules for the filing of a notice of appeal . . . .

See Pa. R. Ap. P. 1701(b)(3).

[2] Because the appointment of a policyholder committee directly impacts the ability of the Rehabilitator to "administer [the assets of Reliance] under the [May 29, 2001 Order of Rehabilitation]," see 40 P.S. § 221.15(c), the July 30 Order is an order modifying the receivership of Reliance. See Pa. R. Ap. P. 311(a)(2); see also Hargrove v. Ehinger, 638 A.2d 282 (Pa. Comwlth. Ct. 1994). Accordingly, the Rehabilitator may appeal the July 30 Order as of right to the Supreme Court of Pennsylvania. See 42 P.S. §§ 702, 723; see also Pa. R. Ap. P. 311, 902 (manner of taking appeal). Rule 902 of the Pennsylvania Rules of Appellate Procedure states that "[a]n appeal permitted by law as of right from a lower court to an appellate court shall be taken by filing a notice of appeal . . . within the time allowed by Rule 903(time for appeal)." See Pa. R. Ap. P. 902. Rule 903 states that "the notice of appeal required by Rule 902 . . . shall be filed within 30 days after the entry of the order from which the appeal is taken." See Pa. R. Ap. P. 903. Rule 1701(b)(3)(ii) divests a lower court of jurisdiction to consider a motion for reconsideration unless "an order expressly granting reconsideration of the order is filed in the [lower] court . . . within the time prescribed by the[] rules for the filing of a notice of appeal[,]" in this case, thirty days from July 30, 2001, or August 29, 2001. Pa. R. Ap. P. 1701. The Note to Rule 1701 states:

> The better procedure under this rule will be for a party seeking reconsideration to file an application for reconsideration below and a notice of appeal, etc. If the application lacks merit the trial court . . . may deny the application by the entry of an order to that effect or by inaction. The prior appeal paper will remain in effect, and appeal will have been taken without the necessity to watch the calendar for the running of the appeal period.

Here, for the reasons that follow, this Court should exercise its power to reconsider its July 30 Order, and deny the request for appointment of a policyholder committee.

## III. DISCUSSION

### A. The Rehabilitation Procedure Set Forth in The Act Is Exclusive And Does Not Contemplate Participation of A Policyholder Committee

The Act sets forth a detailed set of standards and procedures applicable to the Insurance Department, the Commissioner as Rehabilitator and the Commonwealth Court. See 40 P.S. §§ 221.1 et seq. It is the exclusive statutory procedure for the rehabilitation or liquidation of an insurance company. Id.

The Supreme Court of Pennsylvania declared in Foster v. Mutual Fire Marine and Inland Ins. Co., 531 Pa. 598, 614 A.2d 1086 (1992), that the Pennsylvania legislature granted the Insurance Commissioner "freedom of action in the over-all management of the [financially troubled insurance] company which will permit [her] to knowledgeably evaluate, plan, devise and implement a program which in [her] best judgment and in keeping with [her] expertise in the field of insurance accomplish the objective of [rehabilitation]." Id. at 1093 (citations omitted). The Act itself explains that the purpose of rehabilitation is the "protection of the interests of insureds, creditors and the public generally[.]" See 40 P.S. § 221.1. Similarly, this Court and the Supreme Court have held that the Act charges the Rehabilitator with the duty to protect the interests of all policyholders. Foster, 614 A.2d at

---

See Pa. R. Ap. P. 1701, Note; see also Leonard, 445 A.2d at 1281. Therefore, notwithstanding having sought reconsideration from this Court, the Rehabilitator must also file a timely notice of appeal with the Clerk of the Commonwealth Court.

1104; Grode v. Mutual Fire Marine and Inland Ins. Co., 132 Pa. Cmwlth. 196; 572 A.2d 798, 811 (1990).

The Supreme Court has further held that "our courts will not disturb [the Insurance Commissioner's] administrative discretion in interpreting legislation within [the Insurance Department's] own sphere of expertise absent fraud, bad faith, abuse of discretion or clearly arbitrary action." Winslow-Quattlebaum v. Maryland Ins. Group, 561 Pa. 629, 752 A.2d 878, 881 (2000); see Foster, 614 A.2d at 1093; accord Alpha Auto Sales, Inc. v. Dept. of State, Bureau of Professional and Occupational Affairs, 537 Pa. 353; 644 A.2d 153, 155 (1994) (stating that "[w]e have long held that contemporaneous construction of a statute by those charged with its execution and application . . . is entitled great weight . . . ."); In re Insurance Stacking Litigation, 754 A.2d 702, 706 (Pa. Super. 2000) (stating that "[c]ourts traditionally accord an interpretation of a statutory provision by an administrative agency charged with administering that statute . . . deference" (citations omitted)); cf. Armstrong Communications, Inc. v. Pennsylvania Public Utility Comm., 768 A.2d 1230, 1232 (Pa. Cmwlth. Ct. 2001) (Colins, J.) (stating that "[a]n agency's interpretation should not be disregarded unless it is shown to be clearly erroneous").

Indeed, the legislature has explicitly acknowledged the difference between the Court's power over a court-appointed receiver and its much more limited role with respect to a statutory receiver such as the Insurance Commissioner or Secretary of Banking. Rule 1533 of the Pennsylvania Rules of Civil Procedure governs the appointment of receivers generally, permitting the appointment of a receiver in exigent circumstances, under broad supervision by the Court. See Pa. R. Civ. P. 1533. However, Rule 1533(h) specifically addresses the

limitation on the Court's authority to encroach upon the authority of a statutory receiver governed by specific legislation. It stipulates that "[t]hese rules shall not be deemed to impose upon the Secretary of Banking, the Insurance Commissioner or other public officer acting as statutory receiver any duties or restrictions which are in conflict with the Acts of Assembly authorizing their appointment and prescribing their rights and duties." Pa. R. Civ. P. 1533(h).

Appointing a policyholder committee, over the objection of the Insurance Commissioner, and at this early stage will require the Rehabilitator to submit each matter she brings before the Court to the policyholder committee for comment and possible objection. This "oversight" of the Rehabilitator by a policyholder committee, in addition to being outside of the exclusive statutory scheme, is directly contrary to the unambiguous provisions of the Act, as construed by the Supreme Court of Pennsylvania, which provide the Rehabilitator with broad discretionary powers. Foster, 614 A.2d at 1092-93. Section 221.16 specifically provides that "[t]he rehabilitator may take such action as [she] deems necessary or expedient to correct the condition or conditions which constituted the grounds for the order of the court to rehabilitate the insurer." See 40 P.S. § 221.16(b) (emphasis added); see also Foster, 614 A.2d at 1092-93 (discussing the broad grant of discretion to the Commissioner under the Act).

The Supreme Court explained that the Legislature constrained the judiciary's role in Rehabilitation proceedings to a limited and "narrow" scope of review. Foster, 614 A.2d at 1093. In Foster, the Supreme Court stated:

> The courts cannot dictate or outline the general policy or course of conduct of the Insurance Commissioner or [her] department because this outline is

> dependent on the terms of the applicable statutory provisions and not upon judicial discretion. Our statutory provisions . . . properly place the responsibility on both the Insurance Commissioner and the courts, the Commissioner being required to follow the statutory mandates and to use reasonable discretion in the rehabilitation of the seized company, with abuses of discretion to be checked by the judiciary. . . .
>
> This Court has concluded that this great deference in favor of the Insurance Commissioner and the resulting narrow scope of review for the courts are in recognition of the expertise of the administrative agency or individual officer assigned the task of regulating a given industry.

Foster, 614 A.2d at 1093 (citations omitted, internal quotations and alterations omitted, emphasis in original). The Foster court further defined the limited scope of the Commonwealth Court's review of actions taken by the Rehabilitator, holding:

> [I]n order to make a reasonable evaluation of the Commonwealth Court's review of administrative agency activity[,] . . . we adopt the following three part standard: (1) examination of whether the Commonwealth Court exceeds its statutory authority to approve, disapprove or modify the rehabilitation plan; (2) determine whether the Commonwealth Court substituted any of its own beliefs into the rehabilitation process; and (3) if so, whether the exercise of such discretion was for the prevention of *further* abuse by the Rehabilitator, and not to change the substance of the plan. . . . [T]his limited scope of review is especially appropriate in a highly specialized industry such as insurance, where the skill, judgment and expertise of the Insurance Commissioner are statutorily recognized and deferred to, resulting in a broad scope of discretionary power.

Id. at 1092 (emphasis added). The appointment of a policyholder committee, under present circumstances, conflicts with the discretion vested in the Rehabilitator by statute and is inconsistent with the Foster standard and with the proscriptions of Rule 1533(h).

Appointment of a policyholder committee at this preliminary stage in the proceedings also flies in the face of Petitioners' own concession that they do not contend that the Rehabilitator has abused her discretion in any respect. See Petitioners' Brief at 7. Indeed, Petitioners concede that they "have no reason to believe[] that the Commissioner as

statutory rehabilitator will act in any way improperly." Id. The record before this Court contains not a single verified or unverified fact or allegation of "fraud, bad faith, abuse of discretion or clearly arbitrary action" by the Rehabilitator. Winslow-Quattlebaum, 752 A.2d at 881.

Petitioners' stated intention to influence the substance of the Plan of Rehabilitation[3] from the very commencement of these proceedings further illustrates the prematurity of these issues. See Policyholder Petition, ¶ 8(c). Section 221.16(d) specifically provides that policyholders may respond to a Plan of Rehabilitation after the Rehabilitator has submitted a Plan to the Court for approval. See 40 P.S. § 221.16(d) (providing that the Court may require notice and hearing on the proposed Plan of Rehabilitation). Under the standard set forth in Foster, even the Court may not influence the substance of the Plan where there has been no abuse of the Rehabilitator's discretion. Foster, 614 A.2d at 1092. Here, the court-appointed policyholder committee, by its own admission, seeks to impose its will upon the Insurance Commissioner in formulating a Plan of Rehabilitation. See Policyholder Petition, ¶ 8(c). The Act specifically prohibits the Court or any other party, or a policyholder committee, from interfering in this way with the "broad scope of [the Commissioner's] discretionary powers." Foster, 614 A.2d at 1092.

Under the law of this Commonwealth, the Insurance Commissioner's reasonable interpretation of the Act is entitled to "great deference" by this Court. Foster, 614 A.2d at 1093. Therefore, in the absence of the Rehabilitator's consent, the appointment of a

---

[3] At this early stage in these proceedings involving Reliance it is unclear whether Reliance will remain in rehabilitation, or will be forced to file a Petition for Liquidation. This further demonstrates the prematurity of appointing a policyholder committee at this time.

policyholder committee, given the present circumstances, is unauthorized under the Act. The Court should reconsider its July 30 Order and deny the Petition.

### 1. The Rehabilitations of Mutual Fire Marine and Inland Insurance Company and the Fidelity Mutual Life Insurance Company Support the Rehabilitator's Interpretation of the Act

The fact that policyholder committees were appointed in the rehabilitations of the Mutual Fire Marine and Inland Insurance Company ("Mutual Fire") and the Fidelity Mutual Life Insurance Company ("FML") is not inconsistent with the Rehabilitator's interpretation of the Act. In Mutual Fire, the appointment of a policyholder committee followed submission by the rehabilitator of the initial Plan of Rehabilitation to the Court for approval. Accordingly, participation was sought at the time when the statute calls for notice and possible comment by policyholders. In addition, the Mutual Fire Court appointed the committee only after it found that that rehabilitator had not notified all policyholders of the impact of the original Plan on their interests, and therefore that the statutory requirements had not been appropriately followed. The Court concluded (albeit without statutory authority) that the policyholders required additional protection of their interests. See Grode v. Mutual Fire Marine and Inland Ins. Co., 132 Pa. Cmwlth. 196, 572 A.2d 798, 801 (1990). As a remedy, it appointed a policyholder committee.

Here, Petitioners identify no abuse of discretion by the Rehabilitator which would justify a "remedy" of any kind. See Petitioners' Brief at 7. While this Court treated the petition for a policyholder committee as a request for "special relief,"[4] "special relief" obviously requires grounds. None were advanced here. There has been no harm caused by

the Rehabilitator for which the remedy of an appointment of a policyholder committee would serve to redress.[5]

In the FML rehabilitation, the Insurance Commissioner chose to consent to the appointment of a policyholder committee. This decision may have been influenced by the fact that FML is a mutual life insurance company. See Chidsey v. Keystone Mutual Cas. Co., 366 Pa. 149; 76 A.2d 867, 870 (1950) (stating, in an insurance liquidation proceeding, that a mutual insurance company "is a co-operative enterprise wherein the policyholders, as members, are both insurer and insured"). The rehabilitation of Reliance, a non-mutual property and casualty insurance company, whose policyholders are principally sophisticated business entities, does not involve the unique and common policyholder issues associated with a rehabilitation of a mutual life insurance company. The Rehabilitator chose here not to consent to the appointment of a policyholder committee and her decision is entitled to stand absent a manifest abuse of discretion.[6]

---

[4] The Rehabilitator, assumes that the Court was referring to Rule 1533 as no other special relief rule appears remotely applicable to an insurance rehabilitation proceeding.

[5] This point further serves to underscore that Petitioners lack standing to apply to this Court for Special Relief. See Preliminary Objections; Sur-Reply at 12-13. Because Petitioners have failed to establish that they are "aggrieved" within the meaning of Pennsylvania's standing doctrine, the Rehabilitator's Preliminary Objections pursuant to Pa. R. Civ. P. 1028(3), (5) should be sustained and Petitioners' Petition dismissed.

[6] In deciding to oppose the appointment of a policyholder committee, as discussed in the Response and Sur-Reply, the Rehabilitator also specifically considered the expense to the insurer's estate of supporting a policyholder committee, the delays caused by the duplicative efforts of a policyholder committee and the encroachments on the Rehabilitator's authority associated with participation of a policyholder committee. See Response at 8-15; Sur-Reply at 2-5, 8-9. In Foster, the Supreme Court recognized that policyholder committees have these very same drawbacks. Foster, 614 A.2d at 1104 n.14.

## 2. The Act Provides for Exclusive Statutory Procedures

The Act provides the exclusive statutory procedures for the Insurance Department to rehabilitate a financially troubled insurance company, and it does not include participation by a policyholder committee. The appointment of a policyholder committee over the objection of the Rehabilitator and without a record demonstrating abuse of discretion conflicts with the exclusive statutory procedures of the Act, and therefore should be rejected.

This Court, sitting en banc, directly rejected a similar attempt by interested parties to engraft non-statutory procedures onto a statutory receivership in Hargrove v. Ehinger, 638 A.2d 282 (Pa. Comwlth. Ct. 1994). In Hargrove, a group of excess depositors attempted to bring a class action against a private bank in statutory receivership, where the Secretary of Banking was serving as statutory receiver. Hargrove, 638 A.2d at 283. Reviewing the statute authorizing the Secretary to act as receiver for a troubled bank, this Court held that (1) a statutory procedure existed for the processing of claims of would-be class members; (2) the procedure was exclusive under the statute; and (3) because the statutory scheme did not provide for the procedure of class actions by claimants of a bank in receivership, a class action as a procedural tool was unavailable to the claimants and could not be imposed by the Court of Common Pleas. See id. 285-86.

The decision in Hargrove comports with long-standing Pennsylvania authority that courts do not have authority to depart from exclusive statutory procedures. See generally, Metropolitan Property and Liability Ins. Co. v. Insurance Commissioner, 517 Pa. 218, 535 A.2d 588, 591-93 (1987) (finding, under Section 1008.1 et seq. of the Insurance Department Act, that the Legislature had established exclusive statutory procedures for the termination

of certain insurance policies); In re Gordon, 348 Pa. 255; 35 A.2d 521, 522 (1944) (holding, under the Department of Banking Code, that the equitable powers of the courts are restricted by statutory provisions which specifically provide procedures for the liquidation of banking institutions); Genkinger v. City of New Castle, 146 A.2d 640, 641-42 (Pa. Super. 1958) (stating that the "procedure prescribed by statute . . . to object to [bond] rates regularly and properly filed is lodged exclusively in the insurance department and the Court . . . is without jurisdiction in the matter"); see also 1 P.S. § 1504 (providing that "[i]n all cases where . . . anything is directed to be done by any statute, the directions of the statute shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the common law, in such cases, further than shall be necessary for carrying such statute into effect").

Just as the Department of Banking Code did in Hargrove, the Act establishes procedures designed to safeguard the interests of all policyholders. See 40 P.S. §§ 221.14-18. The Rehabilitator, through all of her powers and duties set forth above, including the important step of formulating and administering a Plan of Rehabilitation, is charged by statute to protect the interests of policyholders. While the obligation to provide notice to policyholders and opportunity to be heard may arise once a Plan of Rehabilitation is submitted to the Court, see 40 P.S. § 221.16(d), the Act, under present circumstances, does not contemplate participation by a policyholder committee. Petitioners have asserted no basis to justify the extra-statutory exercise of this Court's authority to appoint such a committee, especially one that (1) is opposed by the administrative agency charged by the Legislature with executing and applying the Act; and (2) will likely and needlessly deplete the assets of the estate and unreasonably prolong these proceedings.

## B. A Policyholder Committee Is Premature and Not in the Best Interests of Policyholders

The Order of Rehabilitation was entered on May 29, 2001. Since that date, the Rehabilitator and her staff have been engaged in the monumental tasks required to fulfill their statutory duties with respect to this huge property and casualty insurance company. However, the task of evaluating the financial condition of Reliance and marshalling the insurer's assets is not complete and the task of formulating a Plan of Rehabilitation has not yet commenced. The appointment of a policyholder committee, at this stage of the rehabilitation proceeding, is clearly premature and will only serve to deplete the limited assets of the estate and cause unnecessary delay in the preparation of a Plan of Rehabilitation.

### 1. Unnecessary Delay and Expense

In the rehabilitation of Mutual Fire, the Court appointed a policyholder committee only at the time the original Plan of Rehabilitation was submitted for Court approval, and only when it appeared that adequate notice had not been provided to the policyholders. Foster, 614 A.2d at 1089. A Plan for Rehabilitation has not yet been prepared here and there has been not even an allegation of improper or inadequate procedures by the Rehabilitator in this matter. The appointment of a committee of policyholders, at this time, is unsupported by the case law, as well as by those portions of the Act which limit direct policyholder participation to later stages of the rehabilitation proceedings. See 40 P.S. § 221.16(d).

Section 221.16(d) of the Act establishes the timing of policyholder comment and objections, if any, to the proposed Plan of Rehabilitation. See id. The Section states that notice and hearing are afforded to all interested parties, including policyholders, "[u]pon

application of the rehabilitator for approval of the plan[.]" Id. It was only at this stage of the proceeding, submission of a proposed plan of rehabilitation, that the Court in Mutual Fire appointed a policyholder committee. See Foster, 614 A.2d at 1089; Grode, 572 A.2d at 801. Similarly, in the rehabilitation of FML, the Court did not appoint a policyholder committee until almost nine months after a draft Plan of Rehabilitation had been formulated by the Insurance Commissioner, and more than two years after this Court issued the Order of Rehabilitation. See Response at 14-15.

If the Rehabilitator is required to submit to a committee of policyholders, for comment and possible objection, each action that she takes, her efforts to efficiently and expeditious formulate a Plan of Rehabilitation will be significantly hampered, causing unnecessary delays in the rehabilitation of Reliance, delays which are clearly not in the best interests of policyholders, creditors and the general public. See 40 P.S. § 221.1. Indeed, even given the limited role played by the policyholder committee in the rehabilitation of Mutual Fire, the Supreme Court in Foster noted that the policyholder committee made "numerous attempts to interfere with the Plan [of Rehabilitation], ignore[d] Orders of the Court and bill[ed] the estate of Mutual Fire millions of dollars in expenses and fees . . . ." Foster 614 A.2d at 1104 n.14.

### 2. Policyholder Conflict of Interest

A policyholder committee should also not be appointed because of the unavoidable conflicts of interests among the diverse groups of Reliance policyholders. Reliance is a large property and casualty insurer, which wrote policies covering many different types of risks. Reliance's policyholders do not share identical interests and goals as would a group of life

insurance policyholders. Divergent and conflicting interests between policyholders and groups of policyholders may (1) result in the application of sub-groups of policyholders for official recognition by the Court, a process which will only further deplete the limited assets of Reliance and further delay this matter; and (2) prevent a policyholder committee from achieving its primary goal of protecting policyholders as a class.

In Vickodil v. Commonwealth, 559 A.2d 1010 (Pa. Cmwlth. Ct. 1989), this Court recognized that it is precisely because difficult decisions affecting the competing interests of policyholders will need to be made that the regulation of insurers is entrusted to a public, rather than a private entity. Vickodil, 559 A.2d at 1013. Similarly, in enacting the Act, the legislature conferred the duty of resolving the conflicting interests of policyholders and the broad discretion needed to discharge this duty upon the Insurance Commissioner, not a committee of private policyholders. See 40 P.S. § 221.16.

Given the magnitude and importance of the issues implicated by the rehabilitation of Reliance, the creation of an artificial, extra-statutory and time-consuming procedure, a policyholder committee, may potentially prejudice the Rehabilitator's ability to attempt to achieve the goals of statutory rehabilitation. This is particularly so when the Insurance Commissioner, in exercising her expertise and prudent judgment, has determined that the appointment of a such a committee is not in the best interests of the rehabilitation of Reliance, and the committee will "be an unacceptable financial detriment" to the estate. Foster, 614 A.2d at 1104 n.14; see Petitioners' Brief at 7. Under these circumstances, the delay and expense associated with policyholder committees, and the lack of any significant benefit to policyholders as a class, clearly weigh against the appointment of such a

committee. Even putting to one side the fact that a policyholder committee is unauthorized under the Act, given the significant and unavoidable drawbacks, the appointment of a policyholder committee is not in the best interests of Reliance policyholders, creditors or the public generally.

Alternatively, should the Court be reluctant to deny the Policyholder Petition at this time and given that the Petition is wholly premature as measured from the Court's own experience in the rehabilitations of Mutual Fire and FML, the Court may "expressly grant reconsideration" of the July 30 Order, within the meaning of Pa. R. Ap. P. 1701(b)(3), and stay or defer the Policyholder Petition until a future date, which the Rehabilitator believes should be no sooner than the date a proposed Plan of Rehabilitation has been submitted to the Court for approval. In this manner, the Rehabilitator may discharge its obligations under the Act without the unwarranted encroachments on her authority associated with policyholder committees; and Petitioners' right to seek the appointment of a committee will be preserved for later review by this Court.[7]

### C. The Rehabilitator's Preliminary Objections Should be Sustained

The Rehabilitator's Preliminary Objections to the Policyholder Petition underscore the procedural defects in the Petition and provide this Court with an appropriate basis to reconsider its July 30 Order and dismiss the Petition.

#### 1. The Policyholder Petition Fails to Comply with the Rules of Court

Rule 123(c) of the Pennsylvania Rules of Appellate Procedure requires that "facts which do not already appear of record . . . be verified . . . ." See Pa. R. Ap. P. 123(c). Both

the Policyholder Petition and Petitioners' Answer to the Rehabilitator's Preliminary Objections are unverified despite the fact that they set forth numerous facts which do already appear of record. Notwithstanding the numerous opportunities available to Petitioners, they have similarly failed to file a curative verified statement. Thus, there are no facts properly before this Court to support Petitioner's claim for relief and the Petition should be dismissed as procedurally defective.

### 2. Petitioners Lack the Legal Capacity to Seek the Requested Relief

Petitioners have admitted in their submissions to the Court that they have not been aggrieved by any action by the Rehabilitator.[8] See Petitioner's Brief at 7. Pennsylvania law requires a party to demonstrate that it is aggrieved in order to establish standing. See Pennsylvania Game Comm'n v. Pennsylvania Dept. of Environmental Resources, 521 Pa. 121; 555 A.2d 812 (1987); see also note 5 supra. Having admitted that they are not aggrieved, and therefore lack standing to seek relief in this Court, the Policyholder Petition should have been dismissed. This Court should reconsider its July 30 Order and dismiss the Policyholder Petition. See Pa. R. Civ. P. 1028 (a)(3), (5).

### 3. The Policyholder Petition is Legally Insufficient

Because the relief requested by Petitioners conflicts with the exclusive statutory procedures of the Act, is unsupported by any legal or factual basis, and is unripe for consideration at this early stage of the proceeding, the Policyholder Petition is legally

---

[7] By suggesting this alternative, the Rehabilitator does not consent to the participation of a policyholder committee at a later stage of this proceeding.

[8] Petitioners wrongly contend that the May 29 Order of Rehabilitation rendered them aggrieved. The Order of Rehabilitation protects Petitioners and all policyholders from depletion of assets at this critical juncture.

insufficient within the meaning of Rule 1028(4) of the Pennsylvania Rules of Civil Procedure. This Court should reconsider its July 30 Order and dismiss the Petition.

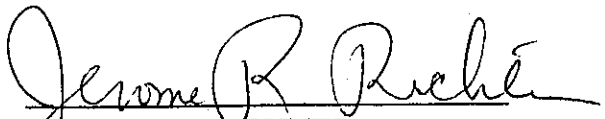
### D. The Court's Concerns Can Be Addressed by Alternative Procedures

If the Court believes certain matters brought before it require inquiry and analysis by a third party, it should consider the special master procedure rather than a policyholder committee. See Sur-Reply at 9-10. This Court has the authority to appoint a special master to assist the Court in carrying out its functions under the Act. See 42 P.S. §§ 102, 562. The use of masters in insurance insolvency proceedings is commonplace. See Sur-Reply at 10 (collecting examples of cases). More importantly, in the Order of Appointment, the Court has the ability and the authority to narrowly define the powers and duties of a master. Using this approach, the Court can obtain third-party input while avoiding the expense, delay and conflicts of interest associated with policyholder committees, and simultaneously preserve the Insurance Commissioner's broad discretionary powers under the Act.

## IV. CONCLUSION

This Court should reconsider its Order of July 30, 2001, and deny the Petition for the Appointment of a Policyholder Committee. The appointment of a policyholder committee conflicts with the exclusive statutory procedure, is not supported by any legal or factual grounds, and is clearly premature.

Respectfully submitted,



JEROME R. RICHTER
Attorney No. 03649
ANN B. LAUPHEIMER
Attorney No. 81883
BLANK ROME COMISKY & McCAULEY LLP
One Logan Square
Philadelphia, PA 19103
(215) 569-5500

Counsel for Plaintiff,
M. DIANE KOKEN, Insurance Commissioner of the Commonwealth of Pennsylvania as Rehabilitator of RELIANCE INSURANCE COMPANY

DAVID F. SIMON
Chief Counsel
INSURANCE DEPARTMENT OF
THE COMMONWEALTH OF PENNSYLVANIA
1321 Strawberry Square
Harrisburg, PA 17120
(717) 787-6009

Dated: August 8, 2001

## CERTIFICATE OF SERVICE

I, Anthony Vidovich, hereby certify that on August 8, 2001, the foregoing was served via first class United States mail, postage prepaid on the persons listed in the attached Master Service List.

ANTHONY VIDOVICH

# Master Service List

M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania
v.
Reliance Insurance Company
No. 269 M.D. 2001 (Commonwealth Court of Pennsylvania)

Jerome R. Richter
Ann B. Laupheimer
Blank Rome Comisky & McCauley LLP
One Logan Square
Philadelphia, PA 19103
(215) 569-5500

David F. Simon
Chief Counsel
Insurance Department of the
Commonwealth of Pennsylvania
1321 Strawberry Square
Harrisburg, PA 17120
(717) 787-6009

Hillary C. Steinberg
Hangley Aronchick Segal & Pudlin, P. C.
One Logan Square 12th Floor
Philadelphia, PA 19103
(215) 496-7073

Jeffrey B. Rotwitt
Obermayer Rebmann Maxwell Hippple
1 Penn Center, 19th Floor
Philadelphia, PA 19103-1895

James Michael Matour
Hangley Aronchick Segal & Pudlin
27th Floor One Logan Square
Philadelphia, PA 19103
(215) 496-7001

Edward A. Perell
Debevoise & Plimpton
875 Third Avenue
New York, NY 10005

William Charles Bensley
George Whittaker Howard
Edward M. Nass
Howard Brenner & Nass, P.C.
1608 Walnut Street Suite 1700
Philadelphia, PA 19103
(215) 546-8200

Brad S. Karp
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

Robert H. Levin
Adelman Lavine Gold & Levin, P. C.
1900 Two Penn Center Plaza
Philadelphia, PA 19102
(215) 568-7515

Richard E. Poole
Potter Anderson & Corroon LLP
1313 North Market Street
P.O. Box 951
Wilmington, DE 19899-0951
(302) 984-6006

Richard P. Coe
Weir & Partners, LLP
1339 Chestnut Street Suite 500
Philadelphia, PA 19107
(215) 665-8181

Theodore E. Huenke
Huenke & Rodriguez
One Huntington Quadrangle, Suite 2S02
Melville, NY 11747
(631) 756-2024