

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. DIANE KOKEN  
Insurance Commissioner of the  
Commonwealth of Pennsylvania,

Plaintiff,

v.

RELIANCE INSURANCE COMPANY,

Defendant.

*IN RE* MAWSON & MAWSON, INC.  
vs. RICHARD RUHL

DOCKET NO. 269 MD 2003

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**MEMORANDUM OF LAW OF THE LIQUIDATOR OF RELIANCE INSURANCE  
COMPANY FILED IN COMPLIANCE WITH THE COURT'S ORDER OF JULY 11,  
2003, WITH RESPECT TO THE DISPUTE OF  
MAWSON & MAWSON, INC. AND RICHARD RUHL**

M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, in her official capacity as Liquidator ("Commissioner" or "Liquidator") of Reliance Insurance Company ("Reliance"), hereby submits this Memorandum of Law in compliance with the Court's Order of July 11, 2003, as amended, regarding the dispute between Mawson & Mawson, Inc. ("Mawson"), a policyholder of Reliance, and Mr. Richard Ruhl ("Ruhl"), a third party claimant in the Reliance estate.

**I. Introduction**

In its July 11 Order, the Court directed the Liquidator to file a Memorandum of Law addressing the following issue under § 221.40(a) of Article V of the Insurance Department Act of 1921, 40 P.S. §§ 221.1 – 221.63 (the "Act"):

Whether a third party claimant may withdraw a proof of claim submitted to the Liquidator, where no action upon the proof of claim has taken place, and, if so, what constitutes a withdrawal of a proof of claim, and what effect, if any, does the withdrawal of a proof of claim have on the release of the insured's liability to the third party on the cause of action forming the basis of the proof of claim in the amount of the applicable policy limit as provided for in 40 P.S. § 221.[40](a).

The language of § 221.40(a) of the Act, the public policies supporting the release provisions of the Act, analogous statutes and case law, and common law doctrines, each support the view that the attempt to withdraw a proof of claim, once voluntarily and knowingly filed by a third party claimant with the Liquidator in accordance with the statutory and court-approved proof of claim ("POC") procedures, will have no effect on the release triggered by § 221.40(a). While a third party claimant such as Ruhl may choose not to pursue a previously filed POC, under § 221.40(a), the prior knowing and voluntary filing of the POC continues to operate as a release of the liability of the policyholder on the claim of the third party claimant.

Through §§ 221.40 and 221.38, the Legislature intended to protect policyholders harmed by the insolvency of the insurer in whom they placed their trust and to whom they paid their premium. Where a third party claimant elects to seek payment directly from the estate of an insolvent insurer, the release provisions of the Act, §§ 221.38 and 221.40, provide a policyholder with the economic benefit of the insurance policy (i.e., a release up to the policy limits of liability) even when the estate of the insurer is unable to make payment in full on the policyholder's behalf.

Because § 221.40(a) provides that the release is effective upon filing of the POC with the Liquidator, filing by a third party claimant operates as an election of remedies. Permitting the "withdrawal" of a POC to operate as a revocation of the release required under § 221.40(a) would do additional harm to policyholders, and add an additional layer of uncertainty to the

liquidation process, when policyholders should be able to reasonably rely upon the statutory release of § 221.40(a) (subject only to the voiding of that release by a subsequent determination by the Liquidator that the claim is not covered under the relevant policy). Policyholders should not be held hostage to the uncertainties occasioned by a third party claimant's efforts to hedge his bets in seeking to maximize his recovery on a claim.

## II. Discussion

### A. **Relevant Provisions of the Insurance Department Act Are Clear and Unambiguous – the Release Is Effective Upon Filing of the POC**

Section 221.40(a) of the Act requires a third party claimant to release a policyholder from liability on a claim upon the filing of a POC. The section provides:

The filing of the claim shall operate as a release of the insured's liability to the third party on that cause of action in the amount of the applicable policy limit, but the liquidator shall also insert in any form used for the filing of third party claims appropriate language to constitute such release. The release shall be null and void if the insurance coverage is avoided by the liquidator.

40 P.S. § 221.40(a) (emphasis added). With respect to this matter, the relevant inquiry focuses on the following provision of § 221.40(a): “[t]he filing of the claim shall operate as a release of the insured's liability to the third party on that cause of action . . . .” See Order of the Court (filed July 11, 2003); see also 40 P.S. § 221.40(a) (emphasis added).

Prior orders in this matter already define what constitutes the “filing” of a POC in the Reliance liquidation. The Court's Order of September 9, 2002, provides that “[a] proof of claim shall be deemed filed the day it is received by the Liquidator, unless first class mail is utilized, in which case it will be deemed filed on the date of mailing.” See Order of the Court (filed Sept. 9, 2002), ¶ 1.

In this matter, Ruhl's POC is dated January 25, 2002, and appears to have been mailed

that same day. In any event, the Liquidator received Ruhl's POC on January 29, 2002.<sup>1</sup> Thus, Ruhl's POC was "filed" with the Liquidator no later than January 29, 2002, and on that day the filing "operate[d] as a release of [Mawson's] liability to [Ruhl] on [the] cause of action in the amount of the applicable policy limit." 40 P.S. § 221.40(a).

1. **No "Acceptance" of Coverage Is Required To Effectuate the Release**

Ruhl argues that the § 221.40(a) release is not effective or irrevocable until the Liquidator "accepts" coverage of the POC under the relevant policy. See Ruhl's Answer to Petition to Enforce Proof of Claim (filed Feb. 19, 2003), ¶ 12. The statute clearly contradicts this position. The release is valid and effective upon "filing" of the POC. 40 P.S. § 221.40(a) (the filing of the claim shall operate as a release . . . ).

In Oberneder v. Link Computer Corp., the Superior Court explained that "in Pennsylvania[,] the term 'shall' is generally construed as creating a mandatory duty, and . . . it has only been in rare cases involving matters of time or form that the word 'shall' has been construed as creating only a discretionary or directory duty." Oberneder v. Link Computer Corp., 674 A.2d 720, 722 (Pa. Super. 1996), aff'd, 696 A.2d 148 (Pa. 1997) (citations and internal quotations omitted). The Supreme Court has recently reiterated that the term "shall" in statutes is mandatory where the words of a statute are unambiguous. Commonwealth v. McCafferty, 758 A.2d 1155, 1164 n.13 (Pa. 2000). In considering whether statutes are ambiguous, "[i]n Pennsylvania, it is well settled that a court must construe the words of a statute according to their plain meaning." Comly, 779 A.2d at 620 (citing 1 Pa. C.S. § 1921(a)). "When the words of a statute are unambiguous, they are not to be disregarded under the pretext

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<sup>1</sup> See Petition of Mawson for Reconsideration of the Order Dismissing Petition to Enforce Proof of Claim and in the Alternative, Petition to Intervene of Mawson for the Purpose of Seeking Declaration of Its Statutory and Contractual Rights Under a Third Party Proof of Claim (filed February 24, 2003) (hereinafter "Mawson Reconsideration Petition"), Exhibit C (Ruhl POC).

of pursuing the spirit of the statute.” Id. (citations omitted); see Oberneder, 696 A.2d at 150.

Here, the plain meaning of the relevant terms of § 221.40(a) are clear and unambiguous -- “[t]he filing of the claim shall operate as a release . . . .” 40 P.S. § 221.40(a). The statute simply does not support a construction whereby subsequent action by the Liquidator is required to effectuate the release. The third party claimant’s election to pursue a POC and the filing of that POC with the Liquidator triggers the statutory release of § 221.40(a).

The public policy behind the policyholder release is an important one, underscored by the provisions of 40 P.S. § 221.38(a). Section 221.38(a) provides:

Proof of claim shall consist of a statement signed by the claimant that includes . . . in the case of any third party claim based on a liability policy issued by the insurer, a conditional release of the insured pursuant to [40 P.S. § 221.40(a).] . . . No claim need be considered or allowed if it does not contain all the foregoing information . . . .

40 P.S. § 221.38(a) (emphasis added). Through the provisions of §§ 221.38 and 221.40, the Legislature established the policyholder release as an essential prerequisite to the filing and allowance of claims by third parties in insurance insolvency proceedings such as these.

The only condition on the validity and effectiveness of the release is that it may be rendered “null and void if the insurance coverage is avoided by the liquidator.” 40 P.S. § 221.40(a). The “avoidance” contemplated by § 221.40(a) refers to the Liquidator’s substantive review of claims in the POC process and the resolution of the third party claim either at the notice of determination or disputed claim stages of the process. See Order of the Court (filed Sept. 9, 2002); see also 40 P.S. §§ 221.41, 221.45. Section 221.40(a) cannot reasonably be construed, as Ruhl’s position suggests, to defer the effectiveness of the release until final resolution of the third party’s claim. On the contrary, the Legislature clearly intended to confer the economic value of the insurance on the policyholder by making the release effective on the

very day the third party elects to pursue the insolvent insurer through the “filing” of the POC.<sup>2</sup>  
40 P.S. 221.40(a).

**B. The Filing of the POC, with the Attendant Release by Operation of Law, Constitutes An Irrevocable Election of Remedies**

Once it is determined that the release of Mawson is effective on the date Ruhl filed his POC with the Liquidator, the question remains whether Ruhl’s attempts to withdraw his POC in December, 2002, in any way rescinded, invalidated or otherwise affected the statutory release of Mawson. The answer to this question is “no.”

The filing of the POC by Ruhl constitutes an irrevocable election of remedies. While Ruhl may choose not to pursue his elected remedy, he cannot resurrect a claim against Mawson which he knowingly and voluntarily released.

In this matter, Ruhl, through his attorney, sought on December 9, 2002, to “withdraw” the POC he had filed with the Liquidator on January 29, 2002. See Mawson Reconsideration Petition, Exhibit G (Letter of Kim Nedelka to Joseph Orso (dated Dec. 13, 2002)). Reliance informed Ruhl that, in response to his request, his POC would be treated by the Liquidator as inactive. However, Reliance also informed Ruhl that the inactive status of his POC did not invalidate or render ineffective the statutory release of the policyholder which arose upon the filing of the POC. See id. Reliance specifically informed Ruhl that the “filing of the claim” operated to release Mawson. Id.

No court in Pennsylvania has considered the ability of a third party claimant to withdraw a POC filed in an insurance insolvency proceeding. Similarly, no legislative history under 40

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<sup>2</sup> To the extent that Ruhl’s argument in favor of a revocable release under § 221.40(a) is predicated upon the language included in the Reliance POC form, stating that the release is “subject to coverage being accepted by the Liquidator[,]” Ruhl’s position is equally unpersuasive. The term “accepted” in the Reliance POC release language is merely an affirmative restatement of the last sentence of § 221.40(a). See 40 P.S. § 221.40(a) (providing that the “release shall be null and void if the insurance coverage is avoided by the liquidator”).

P.S. § 221.40 bears on this issue. However, the Act, including § 221,40(a), is based upon the National Association of Insurance Commissioners (“NAIC”) Insurers Rehabilitation and Liquidation Model Act (hereinafter, “Model Act”). The original Model Act, in turn, was based primarily on the insurance insolvency statutes enacted in the State of Wisconsin in 1967.<sup>3</sup> see Wis. Stat. § 645.1 et seq. The Wisconsin statute contains a provision identical to § 221.40(a); it provides:

The filing of the claim shall release the insured’s liability to the third party on that cause of action in the amount of the applicable policy limit, but the liquidator shall also insert in any form used for the filing of third party claims appropriate language to constitute such a release. The release shall be null and void if the insurance coverage is avoided by the liquidator.

See Wis. Stat. § 654.64(1); compare § 221.40(a), with Wis. Stat. § 654.64(1); see also 1 Pa. C.S. § 1927 (providing that uniform statutes are to be construed to ensure a uniform effect in the states enacting them).

Unlike § 221.40, the Wisconsin analogue contains explanatory notes and comments on the purpose of the statute’s release provisions. These statutory comments explain that statutes like § 221.40(a) require a third party to make an irrevocable election between pursuing either the policyholder directly or the insolvent insurer’s estate through the POC process. See Wis. Stat. § 645.64, cmt. Moreover, the statutory comments specifically address the fairness of requiring a third party claimant to make this election of remedies, stating that “[i]t is entirely fair to the third party claimant to compel him to elect whether to share in the liquidation or exercise rights

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<sup>3</sup> See Hager v. Iowa Nat’l Mut. Ins. Co., 430 N.W.2d 420, 422 (Iowa 1988); Sizemore v. United Physicians Insurance Risk Retention Group, 56 S.W.3d 557, 563 n.7 (Tenn. App. 2001); Hager v. Anderson-Hutchinson Ins. Agency, 1989 U.S. Dist. LEXIS 13614, at \*11 (S.D.Iowa 1989); In re Rehabilitation of Mut. Benefit Life Ins. Co., 1993 N.J. Super. LEXIS 940, at \*57 (N.J. Super. 1993). Provisions of the Wisconsin statute and Model Act which are not specifically related to receivership issues unique to insurance insolvency were also based upon the U.S. Bankruptcy Act of 1898. Because § 221.40(a) concerns issues unique to insurance insolvency, reference to the federal bankruptcy laws provides no guidance to this court on the appropriate interpretation of this statute.

against the insured. This is a burden upon him, but is a reasonable allocation to him of part of the total burden imposed by an insolvency.” Id. The concept of equitable allocation of harm caused by an insurer’s insolvency reflected in the statutory comments to the Wisconsin statute is wholly consistent with the public policies and purposes supporting the Pennsylvania Act in general and § 221.40(a) in particular. See 40 P.S. § 221.1(c)(iv) (providing that one of the essential purposes of the Act is the “equitable apportionment of any unavoidable loss” occasioned by the insurer’s insolvency).

The statutory comments to the Wisconsin statute are illustrative of the legislative goals and public policies sought to be furthered by statutes like § 221.40(a). These comments state:

This section provides for the third party claimant to make a choice between pursuing his claim against the insured and presenting his claim in the liquidation. At first blush it would seem harsh and unnecessary to force such a choice. But this is not the case. Before he has to choose, the claimant has every opportunity to determine whether the insured is individually financially responsible. If he is, the claimant can proceed against him, rather than take his chances in the liquidation. If the insured is judgment proof or of doubtful solvency, the claimant can claim in the liquidation. So long as the choice is made before the deadline for filing, the claimant will participate in the liquidation at the appropriate level of priority. . . . By putting pressure on the third party to release the insured to the extent of the applicable policy limit if he wishes to make a claim in the proceeding, the liquidation can at least help make the insurance fund do the job of protecting the policyholder. It is unfortunate that the innocent third party must relinquish his right against the insured in order to claim in the liquidation but in no other way is it possible to settle the matter expeditiously, efficiently and equitably. The notion that the election is valid only if there is effective insurance does elementary justice. . . . It is entirely fair to the third party claimant to compel him to elect whether to share in the liquidation or exercise rights against the insured. This is a burden upon him, but is a reasonable allocation to him of part of the total burden imposed by an insolvency. Thus, without actually forcing the third party to elect in a formal sense, these provisions strongly encourage him to make an early decision, and preferably one to come into the liquidation. Ordinarily a third party will stay out of the liquidation only if he has a clearly solvent defendant.

See Wis. Stat. § 645.64, cmt. (emphasis added). As the statutory comment to Wis. Stat. § 645.64 explains, statutes like § 221.40(a) are intended to further a number of public policies, including

the legislative preference for the protection of policyholders, and the goal of equitably allocating the burdens resulting from an insurance insolvency.

Under statutes like § 221.40(a), third party claimants are not required to file claims in the liquidation. See Wis. Stat. § 645.64, cmt. (i.e., no forced election of remedies). However, if a POC is filed by a third party, after having every opportunity to determine whether the insured is financially able to satisfy a judgment, an election is made and as part of that election, the third party “must release the insured.” See Wis. Stat. § 645.64, cmt.

In this matter, Ruhl had every opportunity to weigh his options before filing the POC with the Liquidator. The Liquidator provided Ruhl with specific notice of the effect of filing the POC. In addition to the bold-faced type release language directly above the signature line on the Reliance POC form, see Mawson Reconsideration Petition, Exhibit B (Reliance POC form), the POC form was accompanied by a specific notice from the Liquidator stating:

You are a third party claimant if you have a claim against a Reliance insured which may be covered by the insured’s insurance policy. You may either file a claim with the Statutory Liquidator or pursue legal action against the insured to attempt to recover on your claim. If you choose to file a claim with the Liquidator, filing of this claim shall operate as a release of the insured’s liability to you on that cause of action in the amount of applicable policy limits. If coverage is avoided by the Liquidator, this release becomes null and void.

See Mawson Reconsideration Petition, Exhibit B (Reliance POC Form and Notice) (emphasis added). The Liquidator’s notice clearly informed Ruhl, as it did all third party claimants, that the claimant could pursue either the insured directly or a POC in the liquidation.<sup>4</sup> Like the statute itself, § 221.40(a), the Liquidator’s notice makes no provision for a third party claimant’s

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<sup>4</sup> In addition to being expressly set forth in the Reliance POC form and notice of the Liquidator, the effect of the filing of a POC on a third party’s rights against a policyholder was further explained in the instructional Q&A which was part of the overall informational POC package provided to claimants by the Liquidator. See Mawson Reconsideration Petition, Exhibit B.

attempt to hedge his or her bets, as Ruhl seeks to do here, by filing both a POC and pursuing the policyholder directly. Rather, the Liquidator's notice informed Ruhl that an election between these remedies was required; and Ruhl elected the filing of a POC. See id.

Decisions of other state courts interpreting similar statutes support the conclusion that a third party may not rescind the statutory release of the policyholder once an election has been made. In Ramos v. Jackson, the District Court of Appeal of Florida held that "once an election to seek relief under [the insurance insolvency statutes] is made [by the third party claimant] the insured is released, and furthermore that . . . election may not be withdrawn." 510 So. 2d 1241 (Fl. App. 1987); see also International Forum of Florida Health Benefit Trust v. South Broward Hosp. Dist., 607 So. 2d 432, 441 (Fl. App. 1992) (stating that "[h]aving elected to seek relief under the insolvency chapter, the [third party claimants] cannot withdraw their election"); 1 Couch on Insurance § 5.25 n.95 (citing Ramos for proposition that once election is made to seek relief under insolvency statutes, "that election may not be withdrawn"). The Florida section upon which the Ramos court relied, Fla. Stat. Ch. § 631.193, is substantially similar to the Pennsylvania provision.<sup>5</sup>

The laws of Wisconsin and Florida provide more than mere persuasive guidance to this Court on the issue of the appropriate construction of 40 P.S. § 221.40. While the laws of these states are not binding on this Court, these states have adopted insurance liquidation statutes which are substantially similar to Article V of the Pennsylvania Insurance Department Act and

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<sup>5</sup> The analogous Florida statute, Fla. Stat. Ch. 631.193, provides:

The filing of a claim constitutes a release of the insured from liability to the claimant to the extent of the coverage or policy limits provided by the insolvent insurer. The release is conditioned upon the cooperation of the insured with the receiver and the Florida Insurance Guaranty Association and any other guaranty association in defense of the claim. This release does not operate to discharge the Florida Insurance Guaranty Association or any other guaranty association from any of its responsibilities and duties set out in this chapter.

Fla. Stat. Ch. 631.193.

are based upon uniform statutes including the Model Act and the Uniform Insurers Liquidation Act. Compare 40 P.S. § 221.40(a), with Wis Stat. § 645.64, and Fla. Stat. Ch. § 631.193. In fact, the relevant provisions of Pennsylvania and Wisconsin law are identical and under the rules of statutory interpretation in Pennsylvania, uniform statutes are to be construed to achieve a general and uniform result in those states which enact them. See 1 Pa. C.S. § 1927 (providing that “[s]tatutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them”). Therefore, in the absence of authority in Pennsylvania suggesting an alternative construction intended by the Legislature, § 221.40(a) should be construed as suggested by the Florida court and by Wisconsin. See Foster v. Mutual Fire Marine and Inland Ins. Co., 614 A.2d 1086, 1091-93 (Pa. 1992) (discussing the deference normally afforded to the Insurance Commissioner, in her capacity as a receiver, in achieving the statutory purposes of the Act); see also 1 Pa. C.S. § 1(c)(8) (providing that in interpreting statutes, a court may consider, inter alia, “administrative interpretations” of the statute).

1. **The Pennsylvania Doctrine of Election of Remedies Is Consistent with Prohibiting a Third Party Claimant from Withdrawing a Proof of Claim in an Effort to Rescind the Statutory Release**

The Pennsylvania doctrine of election of remedies also supports the Liquidator’s construction of § 221.40(a). The doctrine of election of remedies stipulates that once a party has chosen one of multiple remedies available to him, that party cannot thereafter seek to recover through a different remedy. See Wedgewood Diner, Inc. v. Good et al., 534 A.2d 537 (Pa. Super. 1987); Rashid & Assoc. v. Gates et al., 24 Phila. Co. Rptr. 626 (Comm.Pl. 1992).

The Superior Court described the doctrine of election of remedies as follows:

An election of remedies has been defined as the act of choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts. The phrase has also been used in a more restrictive sense

to denote the doctrine that the adoption, by an unequivocal act, of one or two or more inconsistent remedial rights has the effect of precluding a resort to the others. The doctrine has frequently been regarded as an application of the law of estoppel, on the theory that a party cannot, in the assertion or prosecution of his rights, maintain inconsistent positions, and that where there is a choice of two remedies which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other.

Wedgewood Diner, 534 A.2d at 538; see Rashid, Phila. Co. Rptr. at 630 (finding doctrine is not primarily concerned with prevention of dual recovery, but rather operates as an estoppel against the plaintiff based upon his actions). This doctrine is applicable to the pursuit of alternate and inconsistent remedies against separate persons. Wedgewood Diner, 534 A.2d at 538-39. Where two remedies are alternate and inconsistent, “the pursuit of one remedy against one person bars recourse to the other remedy against a different person.” Id.

Here, Ruhl has elected his remedy. By enacting the release provisions of the Act, §§ 221.38 and 221.40, the Legislature has determined that pursuit of the POC remedy is inconsistent with a third party claimant’s pursuit of other remedies against the policyholder directly. 40 Pa.C.S. § 221.40. In filing the POC, Ruhl chose to release Mawson from all liability on his claim up to the applicable limits of the policy, in favor of pursuing a recovery from Reliance. This election of remedies was complete upon the filing of the POC. Under the doctrine of the election of remedies, therefore, Ruhl is now estopped from pursuing the inconsistent remedy of seeking to recover on his claim directly from Mawson. This Court should uphold the statutory release provisions of § 221.40 and direct Ruhl to pursue his claim, if at all, against the Reliance estate.

**III. Conclusion**

The clear and unambiguous language of the statute, applicable statutory and case law, and the Pennsylvania doctrine of the election of remedies all support the conclusion that the Legislature did not intend for a third party claimant to be able to void the statutory release of § 221.40(a) through the attempted withdrawal of a POC, knowingly and voluntarily filed in a liquidation proceeding. Accordingly, in this matter, the Liquidator believes that § 221.40(a) requires that this Court find that the Ruhl's release of Mawson is valid and unaffected by Ruhl's attempt to withdraw his POC.

Respectfully submitted,

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Dated: October 10, 2003

**CERTIFICATE OF SERVICE**

I, Anthony Vidovich, hereby certify that this day a true and correct copy of the foregoing Memorandum of Law was served on all persons listed on the attached Master Service List by U.S. Mail, postage prepaid. In addition, the foregoing was served this day via facsimile on counsel for Mawson & Mawson, Inc. and counsel for Richard Ruhl.

Dated: October 10, 2003

  
ANTHONY VIDOVICH

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v.

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