

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

ZENITH INSURANCE COMPANY

Petitioner,

v.

Before
JAMES GARDNER COLINS,
President Judge

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

Respondent.

ORDER

And NOW this _____ day of _____, 2004, upon

consideration of the Objections of Zenith Insurance Company to the Denial of a Direct Payment Request; the Response of M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania in her official capacity as Statutory Liquidator of Reliance Insurance Company (In Liquidation) and Supporting Memorandum of Law; Zenith's Reply in Further Objection to the Denial of a Direct Payment Request; and the Surreply of the Statutory Liquidator to Zenith's

Objection to the Denial of a Direct Payment Request; it is HEREBY ORDERED AND DECREED that Zenith's Objections are DENIED AND DISMISSED.

IT IS FURTHER ORDERED AND DECREED that the Statutory Liquidator's Denial of Zenith's Direct Payment Request is APPROVED and ADOPTED by the COURT.

JAMES GARDNER COLINS, President Judge

THE COMMONWEALTH COURT OF PENNSYLVANIA

M. DIANE KOKEN,
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RELIANCE INSURANCE COMPANY,

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ZENITH INSURANCE COMPANY

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v.

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

Respondent.

No. 269 M.D. 2001

**STATUTORY LIQUIDATOR'S SURREPLY TO THE OBJECTION OF ZENITH
INSURANCE COMPANY-AS SUCCESSOR TO THE ASSOCIATED
GENERAL CONTRACTORS SELF-INSURERS TRUST FUND-TO THE
LIQUIDATOR'S DENIAL OF A DIRECT PAYMENT REQUEST UNDER 40 § 221.34**

I. INTRODUCTION

Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, in her official capacity as Statutory Liquidator of Reliance Insurance Company, submits this surreply in further opposition to Zenith Insurance Company's ("Zenith")-as successor to the Associated General Contractors Self-Insured Trust Fund ("AGC")-Objection to the Liquidator's Denial of its Request for a Direct Payment Under 40 P.S. § 221.34. In its response to Zenith's Objection, the Liquidator explained that Zenith was not eligible for payments under 40 P.S. § 221.34 and the Guidelines because it was a reinsured rather than an insured. In its reply to the Liquidator's Response, Zenith does not dispute that it would be unable to obtain the relief requested if it is deemed to be a reinsured rather than an insured. Instead, Zenith argues that the "Aggregate Excess of Loss Reinsurance Agreement" ("Reinsurance Agreement" or "Agreement") (emphasis added) is an insurance contract rather than a reinsurance agreement, despite the clear title (and content) of the Agreement, and further claims that as a self-insured fund, Zenith is an insured, rather than a reinsured, for the purposes of recovery.

Zenith has failed to provide any support which suggests that the Agreement is anything other than a contract of reinsurance, and that Zenith is a reinsured of Reliance. Moreover, Zenith's (previously AGC) status as a self-insured fund has no bearing on its ability to enter into a reinsurance agreement, nor does it change the nature of the Agreement from that of a reinsurance contract to one of insurance. Given Zenith's status as a reinsured rather than an insured, Zenith's direct payment request was properly denied.

II. ARGUMENT

A. The “Aggregate Excess Of Loss Reinsurance Agreement” Is Clearly A Reinsurance Contract.

Zenith’s attempt to characterize the Reinsurance Agreement as an insurance contract is meritless, and contradicts the overwhelming evidence which demonstrates that the subject Agreement is a contract of *reinsurance*. Zenith acknowledges that the Agreement is entitled “Aggregate Excess of Loss *Reinsurance* Agreement” (emphasis added), which is a common form of reinsurance.¹ Zenith Reply at 3. Moreover, the Agreement consistently employs language typically found in reinsurance contracts, rather than insurance policies. For example:

1. Reliance is defined as “the Reinsurer” and is referenced as such throughout the Agreement; and
2. The type of coverage provided by the Reinsurer is identified as “Reinsurance”, and the various rights and obligations of the parties are defined in that context (see, e.g., provisions regarding “Reinsurer’s Share”; “Reinsurance Premium”; “Business Covered”) (Agreement at 1).

Significantly, one needs to look no further than Zenith’s own characterization of the Agreement in other documents to recognize it as a reinsurance contract. In a January 14, 2002 letter from John J. Tickner, Senior Vice-President and General Counsel to Zenith, to Thomas Stolp of Reliance regarding the Reinsurance Agreement, Mr. Tickner states the following:

As a result of the pending liquidation of Reliance Insurance Company it would appear unlikely that any claim filed by Zenith Insurance Company as a *ceding company*² will result in a

¹ See Robert W. Strain, *Reinsurance*, 245-246 (Strain, 1997 rev. ed.). (Exhibit A).

² The term “ceding company” or “cedent” (Zenith in this case) refers to the original insurer, or “reinsured” in a reinsurance arrangement. Graydon S. Staring, *Law of Reinsurance* § 1.1 (1993 ed.). The “reinsured” will “cede (continued...)

significant recovery. We are aware, however, that Reliance Insurance Company *retroceded*³ virtually all of these loss portfolio type *reinsurance agreements*...(emphasis added).

Letter dated January 14, 2002 to T. Stolp from J. Tickner at 1. (Exhibit B). In another document, a billing statement sent to Howard Steinberg from John Tickner of Zenith, Zenith provides a copy of the "AGC Reliance Reinsurance Calculation". See Fax dated May 21 (year unknown) to H. Steinberg from J. Tickner. (Exhibit C).

B. Zenith's Status As A Self-Insured Trust Fund Does Not Change Its Status As A Reinsured Versus An Insured and Has No Effect On Its Ability To Enter Into A Reinsurance Agreement.

Notwithstanding the express title and language of the Agreement, Zenith stubbornly insists that it is an insured rather than a reinsured. Zenith derives this counter-intuitive conclusion by arguing that (1) a self-insurance trust fund is not an "insurance company" and (2) only insurance companies can enter into reinsurance contracts.

None of the cases cited by Zenith support the proposition that a self-insured fund cannot be a party to a reinsurance contract, nor do they involve reinsurance agreements. At best, they stand for the proposition that a self-insurer is not an "insurer" or "insurance company." These cases, however, are readily distinguishable from the present matter.⁴ Moreover, there is

(continued...)

business to the reinsurer." *Id.* The "reinsurer" (Reliance) will "assume liability [of the cedent] by way of reinsurance, either pro rata sharing or indemnifying the reinsured for losses in excess of the reinsured's loss retention." *Id.*

³ A "retrocedent" is a reinsurer who obtains its own reinsurance. "When [a reinsurer obtains reinsurance] for losses on a particular risk...it is said to *retrocede* the risk or business, and its reinsurer is called a retrocessionaire." *Id.*

⁴ For example, Kleban v. National Union Fire Ins. Co. of Pittsburgh, 771 A.2d 39 (Pa. Super. Ct. 2001), which Zenith cited for the proposition that self-insurance is not insurance, is a direct insurance case which deals with *self-insured retentions* rather than self-insured groups or funds. See also Farley v. Gateway Ins. Co., 302 So.2d 177 (Fla. Dist. Ct. App. 1974) (where court refused to treat uninsured stepfather as an "insurer" under Florida's no-fault insurance law when stepson was injured in automobile accident); see also Zinke-Smith, Inc. v. Florida Ins. Guar.

(continued...)

legal authority in multiple jurisdictions treating self-insured groups as the equivalent of insurance companies,⁵ including in Florida, the state Zenith most heavily relies upon in its reply papers.⁶

More importantly, regardless of whether Zenith, as a self-insured trust fund, is deemed an insurer or insurance company, it has no bearing on its ability to enter into a reinsurance contract. A reinsurance “contract is one of indemnity to the *person or corporation* reinsured...” Graydon S. Staring, Law of Reinsurance § 16.1 at 16-7 (1993 ed.) (citing Allemannia Fire Ins. Co. v. Fireman's Ins. Co. of Baltimore, 209 U.S. 326, 332 (1908)). (emphasis added). Although reinsurance contracts typically reinsure insurance companies, parties to a reinsurance agreement need not be conventional insurance companies; to the contrary, “[r]einsurance can play an important role in a self-insurance program.” Eric M. Holmes, 14 Holmes’ Appleman on Insurance 2d § 102.7 (Holmes 2000) (“Reinsurance is important to a self-insurance program for a number of reasons”). (Exhibit D).

(continued...)

Assoc., 304 So.2d 507 (Fla. Dist. Ct. App. 1974) (involving single company insuring itself, rather than multiple members, and excess insurance policy rather than reinsurance agreement); see also, Florida Auto. Dealers Self-Insurers Fund, 566 So.2d 558 (Fla. Dist. Ct. App. 1990) and State Farm Mutual Auto. Ins. Co. v. Universal Atlas Cement Co., 406 So.2d 1184 (Fla. Dist. Ct. App. 1981) (did not involve reinsurance agreement).

⁵ See, e.g., Loven v. City of Minneapolis, 626 N.W.2d 198 (Minn. 2002) (self-insurance is the functional equivalent of a commercial insurance policy); Korzun v. Chang-Keun Yi, 207 W.Va. 377 (2000) (self-insured automobile lessor is an insurance company); South Carolina Property & Casualty Insurance Guaranty Association v. Carolinas Roofing and Sheet Metal Contractors Self-Insurance Fund, 446 S.E.2d 422 (S.C. 1994) (holding that group self-insurer was an “insurer” under South Carolina Property and Casualty Insurance Guaranty Association Act); Hillgass v. Landwehr, 499 N.W.2d 652, 655 (Wisc. 1993) (self-insurance constitutes “insurance” within the meaning of an automobile liability policy’s “other insurance” clause, and “self-insurance is just a form of insurance...[T]he modifying term ‘self’ just indicates where it emanates...”); and Allstate Ins. Co. v. Elassal, 512 N.W.2d 856, 858-859 (Mich. App. 1994) (holding that “self insurance is the functional equivalent of insurance under the no-fault and financial responsibility acts.”).

⁶ See, e.g., Florida Automobile Dealers Industry Benefit Trust, 592 So.2d 1179 (Dist. Ct. App. Fla. 1992) (awarding attorneys’ fees to an employee who prevailed on a claim against a multiple employer welfare arrangement, a self-insured fund, under Florida statute permitting recovery of attorneys’ fees by insured against insurer.).

It is not unusual for a self-insured fund to obtain reinsurance. See e.g., National American Insurance Company v. American Re-Insurance Company, 358 F.3d 736 (10th Cir. 2004) (self-insured group providing liability insurance for its members purchased aggregate excess of loss reinsurance); and In Re Physician Corporation of American Securities Litigation, 50 F. Supp.2d 1304, 1307 (S.D. Fla. 1999) (“a self-insured fund...can obtain reinsurance.”) See also, Louisiana Home Builders Association Self-Insurers’ Fund v. Adjustco, Inc., 633 So.2d 630 (Ct. App. La. 1993) (group self-insurance fund obtained reinsurance to pay claims above the amount available in fund). Zenith has identified no legal authority suggesting that a self-insurance fund cannot be reinsured.


The form and substance of the Reinsurance Agreement clearly indicates that it is, in fact, a contract of reinsurance, and Zenith’s own actions unequivocally demonstrate its understanding of the Agreement as such. Zenith’s status as a self-insured fund has no impact on its ability to enter into a reinsurance agreement, or its clear status as a reinsured. As Zenith recognizes, that status as a reinsured removes it from the ambit of Section 221.34, and requires denial of the direct payment request.

III. CONCLUSION

For the foregoing reasons, M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, in her official capacity as Statutory Liquidator of Reliance Insurance Company, requests that the Court deny Zenith's objection, and affirm the Liquidator's denial of Zenith's direct payment request.

Respectfully submitted,

PEPPER HAMILTON LLP

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Dated April 12, 2004

THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Plaintiff,

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RELIANCE INSURANCE COMPANY,

Defendant.

ZENITH INSURANCE COMPANY,

Petitioner,

v.

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

Respondent.

Docket No. 269 M.D. 2001

EXHIBITS

Robert W. Strain, Reinsurance, 245-246 (Strain, 1997 rev. ed.)

Exhibit A

Letter to Thomas Stolp from John J. Tickner, dated January 17, 2002

Exhibit B

Fax to Howard Steinberg from John J. Tickner, dated May 21 (year unknown)

Exhibit C

Eric M. Holmes, 14 Holmes' Appleman on Insurance 2d § 102.7 (Holmes 2000)

Exhibit D

Exhibit A

Reinsurance

Revised Edition

Prepared by Fifty-Six Authorities

Edited and Published

by

Robert W. Strain

CLU, CPCU

Strain Publishing & Seminars, Inc.

6

Aggregate Excess or Stop-Loss Reinsurance

by Thomas A. Lehrke *

NATURE, PURPOSE AND BENEFITS

In general, aggregate excess of loss or stop-loss reinsurance is a form of reinsurance coverage for an insurance company that deals with the accumulation of the reinsured's net loss position over a specified period of time, usually one calendar year. As is true with any form of excess of loss reinsurance, the reinsurance agreement includes a loss retention (for the reinsured) and a limit (for the reinsurer) of reinsurance.

Generally, the reinsured's retention is stated in one of two ways — either as a flat dollar amount, or as a percentage of annual subject insurance premium (i.e., the premium affected by the reinsurance). Often, if the retention is specified as a flat dollar amount, the agreement is referred to as an aggregate contract; if the retention is specified as a percentage of annual subject premium, the contract is referred to as a stop-loss contract. Similarly, the reinsurer's limit may be stated as a flat dollar amount or as a percentage of annual subject premium.

Reinsurers of aggregate and stop-loss contracts will typically require some form of co-participation by the reinsured to be applied to the reinsurer's limit. Therefore, these covers generally apply for 90% or 95% of the excess loss. The purpose of the co-participation is to keep the reinsured involved in equitable loss settlement even after the loss has moved above the retention level.

One unique feature of aggregate or stop-loss reinsurance is that it deals with the net loss experience of the reinsured. Therefore, any benefit from the balance of a reinsured's reinsurance program (whether it be proportional or nonproportional) is treated as inuring to the benefit of the reinsurance, which is then applied against gross subject losses to determine whether an aggregate or stop-loss recovery is due the

* M.B.A., President, W. J. LEHRKE CO., 6600 France Avenue South, Edina MN 55435.
An autobiography follows the chapter.

reinsured on the basis of its net loss experience. Typically (assuming a property cover), inuring reinsurance coverages would include some if not all of the following: working layer per risk excess of loss reinsurance; surplus share reinsurance; facultative reinsurance; and catastrophe reinsurance.

As mentioned previously, aggregate or stop-loss reinsurance is usually written for a period of one calendar year. These covers are often renewed from year to year or written on a continuous basis, with either party having the option of cancelling at any calendar year-end. Since all insurance companies are required to file their statutory Annual Statements (with the state insurance departments in the states in which they are licensed on a calendar-year basis, it makes sense for an aggregate or stop-loss reinsurance contract to track with the underwriting aspects of this reporting requirement. In fact, many reinsureds view aggregate or stop-loss reinsurance as protecting their Annual Statement results. This is particularly true of a property-casualty company buying a multi-line aggregate or stop-loss reinsurance agreement to apply across its entire book of business.

Under a multi-line agreement, the reinsured is basically protecting the overall underwriting results of the company for a specific calendar year. However, typically, these covers (aggregate and stop-loss) are written on a more limited basis, i.e., for property lines only. Crop-hail, stop-loss reinsurance is an excellent example (discussed in a later chapter of this book). The aggregate or stop-loss concept is nonetheless used in reinsuring a number of different lines of business, whether the lines be crop hail, other property-only lines, multi-line, or accident and health. It is, however, rare that this type of reinsurance would be offered on casualty only lines because of the uncertainty in accurately setting loss reserves on casualty business. (The difficulty in setting loss reserves on casualty lines will be discussed later in this chapter.)

The following contains two examples — one of an aggregate cover, one of stop-loss. The XYZ Insurance Company (writing property lines only) has purchased, for the current calendar year, an aggregate cover of \$2,700,000 (90% of \$3,000,000) in reinsurance limit in excess of a \$7,000,000 retention. Assume the Company had \$11,000,000 of gross earned premium for the year and \$1,000,000 in ceded earned premium for other reinsurances (pro rata or excess of loss) which inure to the benefit of the aggregate cover. Additionally, assume the gross losses for that same year are \$12,000,000 and that the Company will be making \$2,000,000 of inuring reinsurance recoveries. Therefore, with the

Exhibit B

TheZenith

January 14, 2002

FEDERAL EXPRESS

Mr. Thomas Stolp
Reliance Insurance Company, in Liquidation
5 Hanover Square, 11th Floor
New York, NY 10004

~~2/15~~
3/1

RE: Associated General Commerce Self-Insurance Fund

Dear Mr. Stolp:

Reference is made to our several telephone conversations regarding the captioned.

In 1993, Associated General Commerce Self-Insurance Fund ("AGC") purchased an Aggregate Excess of Loss Reinsurance Agreement from Reliance Insurance Company, providing \$21 million in benefits in exchange for an upfront premium of \$13 million. Numerous other self-insurance funds in the State of Florida purchased such contracts, as regulation of these funds became more stringent.

Effective December 31, 1996, Zenith Insurance Company purchased AGC and the aforementioned Reinsurance Contract became an asset of Zenith Insurance Company.

As a result of the pending liquidation of Reliance Insurance Company it would appear unlikely that any claim filed by Zenith Insurance Company as a ceding company will result in a significant recovery. We are aware, however, that Reliance Insurance Company retroceded virtually all of these loss portfolio type reinsurance agreements, and merely kept a fee for doing so. In fact, we are aware of the retrocessionaries on the captioned Agreement as well as the terms thereof.

While the Liquidator may view the Zenith/Reliance Contract as a general creditor relationship (for purposes of the liquidation), we believe there are other factors which should impact this unique arrangement. First, the Contract was between a self-insurance fund and Reliance and the contractual relationships are, at best, confusing.

Second, and more importantly, Zenith's ongoing processing of "AGC claims" and the subsequent conversion of that data to conform to the Treaty provisions is

Zenith Insurance Company
Corporate Offices
21255 Califa Street
Woodland Hills, CA 91367-50
Reply to: P.O. Box 9055
Van Nuys, CA 91409-9055
Telephone 818/713-1000

Page 2

Mr. Thomas Stolp

January 14, 2002

time-consuming and expensive. The required annual independent actuarial report alone costs thousands of dollars. Simply stated, there is no incentive for Zenith to continue complying with an agreement which produces no financial benefit to our Company.

In our last conversation you suggested that I make a proposal to the liquidator regarding this specific treaty; and, we are pleased to do so. We would, however, like to make our proposal relevant to the specific provisions of the Retrocessional Agreement. Therefore, if you would kindly forward a copy of the Agreement between Reliance Insurance Company and Inter-Ocean Re (the retrocessionaire), we will be happy to submit a proposal to the liquidator.

To assure that we are talking about the same Agreements, we are attaching hereto a copy of the Reliance Insurance Company AGC Agreement.

We look forward to hearing from you shortly. If you have any questions, please contact me at (818) 594-5564.

Sincerely,



JOHN J. TICKNER
Senior Vice President
and General Counsel

JJT:rf
Attachment

Exhibit C

212-858-
3600

The Zenith

Good 5/24

FACSIMILE TRANSMITTAL SHEET

PLEASE DELIVER FAX AS SOON AS POSSIBLE

Date: 5/21 858-5079

To: HOWARD STEINBERG FAX NO: 212-~~858-3600~~ (703)

From: JOHN TICKNER FAX NO: _____

PAGES TO FOLLOW EXCLUDING COVER SHEET 3

IF ALL PAGES NOT RECEIVED, PLEASE CALL (818) 594 - 5564

THIS FACSIMILE IS INTENDED ONLY FOR THE USE OF THE ADDRESSEE NAMED HEREIN AND MAY CONTAIN LEGALLY PRIVILEGED AND CONFIDENTIAL INFORMATION. IF YOU ARE NOT THE INTENDED RECIPIENT OF THIS FACSIMILE, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS FACSIMILE IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS FACSIMILE IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL FACSIMILE TO US AT THE ADDRESS ABOVE VIA THE UNITED STATES POSTAL SERVICE. WE WILL REIMBURSE ANY COSTS YOU INCUR IN NOTIFYING US AND RETURNING THE FACSIMILE TO US. THANK YOU.

MESSAGE:

PER OUR CONVERSATION, HERE IS THE LATEST
BILLING.
THANKS

Zenith Insurance Company
Corporate Offices
21255 Califa Street
Woodland Hills, CA 91367-5021
Reply to: P.O. Box 9055
Van Nuys, CA 91409-9055
Telephone 818/713-1000

AGC RELIANCE REINSURANCE CALCULATION

Exhibit 2

Interest Calculation

Date	Credit	Debit	Interest	Balance	Days	Intrest
11/06/1995	6,223,692			6,223,692		
11/29/1995			42,159	6,265,851	23	0.1075
02/29/1996		2,153,743	165,515	4,277,623	92	0.1048
05/30/1996		1,677,585	109,314	2,709,351	91	0.1025
08/29/1996		1,259,295	69,237	1,519,293	91	0.1025
11/29/1996		1,519,037	39,252	39,508	92	0.1025
03/01/1997		667,808	1,021	-627,279	92	0.1025
05/30/1997		1,158,316	-16,132	-1,801,727	90	0.1043
06/05/1997	2,066,570		-3,110	261,733	6	0.1050
08/29/1997		1,139,898	6,400	-871,765	85	0.1050
11/29/1997		680,297	-23,072	-1,575,134	92	0.1050
12/08/1997	2,978,507		-4,078	1,399,295	9	0.1050
03/01/1998		250,639	33,411	1,182,066	83	0.1050
05/30/1998		399,481	30,604	813,190	90	0.1050
08/29/1998		517,439	21,288	317,038	91	0.1050
11/29/1998		356,905	8,143	-31,724	92	0.1019
03/01/1999		394,126	-780	-426,629	92	0.0975
03/02/1999	1,107,260		-114	680,517	1	0.0975
05/30/1999	411,040	509,700	16,179	598,035	89	0.0975
08/18/1999	440,773		12,460	1,051,269	78	0.0975
09/01/1999		400,773	4,085	654,580	14	0.1013
11/29/1999		552,798	16,408	118,190	89	0.1028
12/15/1999	510,040		533	628,763	16	0.1028
02/29/2000	413,117		13,459	1,055,339	76	0.1028
03/01/2000		410,770	297	644,866	1	0.1028
05/30/2000		240,660	17,491	421,697	90	0.1100
09/01/2000		374,792	11,692	58,597	92	0.1100
11/29/2000		137,832	1,572	-77,664	89	0.1100
03/08/2001	77,448		-2,317	-2,533	99	0.1100
05/29/2001		173,736	-63	-176,331	82	0.1100

Total 14,228,447 14,975,630 570,852

AGC RELIANCE REINSURANCE CALCULATION

Exhibit 1

	1985	1986	1987	1988	1989	1990	1991	Total	Quarterly Change
Ultimates	12,290,000	16,190,000	24,440,000	28,210,000	36,800,000	39,510,000	26,430,000	183,870,000	
Paid at 12/97	12,171,570	15,919,044	23,164,869	26,662,047	34,647,807	37,090,094	23,721,187	173,376,618	
Paid at 3/98	12,174,843	15,967,256	23,202,319	26,736,414	34,740,547	37,181,740	23,774,181	173,776,099	399,481
Paid at 6/98	12,186,843	15,970,144	23,232,221	26,906,189	34,841,739	37,277,856	23,879,546	174,293,538	517,439
Paid at 9/98	12,186,879	15,946,374	23,266,606	27,037,042	34,937,856	37,342,006	23,933,680	174,660,443	356,905
Paid at 12/98	12,186,275	15,964,416	23,309,183	27,099,093	34,993,286	37,414,789	24,087,528	175,044,569	394,126
Paid at 3/99	12,186,275	15,959,661	23,468,308	27,155,991	35,067,252	37,467,941	24,248,841	175,664,269	509,700
Paid at 6/99	12,186,331	15,981,051	23,491,113	27,271,993	35,107,851	37,522,761	24,413,942	176,068,042	400,773
Paid at 9/99	12,186,329	15,964,783	23,520,422	27,322,286	35,245,701	37,567,782	24,700,527	176,607,840	552,798
Paid at 12/99	12,186,466	15,967,331	23,560,185	27,459,759	35,350,007	37,626,311	24,768,551	176,918,610	410,770
Paid at 3/00	12,187,358	15,969,136	23,576,872	27,404,266	35,408,876	37,664,594	24,948,168	177,159,270	240,660
Paid at 6/00	12,186,683	15,971,895	23,603,332	27,532,552	35,471,198	37,746,352	25,022,050	177,534,062	374,792
Paid at 9/00	12,186,830	15,973,866	23,628,036	27,562,981	35,498,790	37,787,651	25,033,750	177,671,884	137,832
Paid at 12/00	12,186,830	15,977,141	23,663,016	27,586,294	35,544,251	37,830,717	25,057,381	177,846,630	173,736
Remaining	103,170	212,859	776,984	623,706	1,265,749	1,679,283	1,372,819	6,024,370	

Exhibit D

HOLMES' APPLEMAN ON INSURANCE 2D

ERIC MILLS HOLMES
Dean and Charter Professor of Law
Appalachian School of Law
Grundy, Virginia 24614

L. ANTHONY SUTIN
Assistant Professor of Law
Appalachian School of Law
Grundy, Virginia 24614

ORIGINAL EDITION
by
JOHN ALAN APPLEMAN

VOLUME 14
CHAPTERS 102-110
§§ 102.1-110.5

LAW OF REINSURANCE

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ity on a given risk which is greater than its net line. As consideration, the reinsurer receives that portion of the total premium which the surplus bears to the total liability.

Target Risk – (1) Certain high valued bridges, tunnels and fine arts collections which are excluded from reinsurance contracts and release the reinsurer of any potential high accumulation of liability on any one risk from various sources; (2) a large hazardous risk on which insurance is difficult to place; or (3) a large attractive risk which is considered a target for competing insurance companies and producers. See also Total Insured Value.

Term Contract – A form of reinsurance contract written for a stipulated term (usually one year). The contract automatically expires at the end of the term and renewal must be negotiated. See also Continuous Contract.

Total Insured Value (TIV) – A clause in a reinsurance contract which stipulates that losses relating to risks which have a total insured value in excess of a given amount will not be protected under the contract. In many contracts this clause replaced the Target Risk Clause.

Treaty – A reinsurance contract under which the reinsured company agrees to cede and the reinsurer agrees to assume risks of a particular class or classes of business.

Ultimate Net Loss – The term applied to the reinsurer's loss under a reinsurance contract, generally the gross loss less any recoveries from other insurance which inure to the benefit of the contract in question.

Underlying – The amount of insurance or reinsurance on a risk (or occurrence) which applies to a loss before the next higher excess layer of insurance or reinsurance attaches.

Underlying Premium – See Subject Premium.

Unearned Reinsurance Premium – That part of the reinsurance premium applicable to the unexpired portion of the policies reinsured.

Working Cover – A contract covering an amount of excess reinsurance in which loss frequency is anticipated.

§ 102.7 The Role of Reinsurance in Self Insurance

Reinsurance also can play an important role in a self insurance program. A self insurance program is typically structured so that it interacts with the commercial insurance market, typically in the form of reinsurance and/or, in many instances, excess insurance. Through such interaction, the self insur-

ance program tries to reduce its exposure to risk by sharing some of that risk with commercial insurance companies.

Reinsurance is important to a self insurance program for a number of reasons. These reasons are quite similar to the functions played by reinsurance in the broader insurance market. First, it enables the program to establish a ceiling on the risks it will retain. Second, it enables the program to write risks it would otherwise deem unattractive, because of the ability of the program to share the risk through reinsurance. Third, it enables the program to obtain larger limits than if the program utilized solely its own internal capital and premiums. Finally, it enables the capital of the program to be used to write larger risks.

When reinsurance is used in a program of self insurance, the structure of such reinsurance often differs from normal commercial reinsurance arrangements. In normal commercial reinsurance arrangements, the reinsurer will generally follow the policy form and follow the fortunes of the reinsured. In contrast, where a self insurer uses a "captive" insurer to self insure and the captive seeks reinsurance, major differences and issues often arise, including the refusal of the reinsurer to insure behind or above a captive insurance company set up by the policyholder,¹¹¹ the rules of interpretation of policy wording,¹¹² excluded risks, privity between the reinsured and reinsurer as excluding the policyholder,¹¹³ cut-throughs,¹¹⁴ "follow the fortunes" clauses,¹¹⁵ "following policy" forms, the duty of utmost good faith,¹¹⁶ security arrangements, the duty of timely notice of claims¹¹⁷ and other notice requirements, bad faith compensatory damages¹¹⁸ and punitive

111. N.Y.—*Fried v. North River Ins. Co.*, 710 F.2d 1022 (4th Cir. 1983) (applying New York law). N.Y.—*Prince Carpentry, Inc. v. Cosmopolitan Mut. Co.*, 124 Misc. 2d 919, 479 N.Y.S.2d 284 (Sup. Ct. 1984).

112. N.Y.—*Loblaw, Inc. v. Employer's Liab. Assurance Corp.*, 85 A.D.2d 880, 446 N.Y.S.2d 743 (1981), *aff'd*, 57 N.Y.2d 872, 456 N.Y.S.2d 40, 442 N.E.2d 438 (1982).

113. Cal.—*American Reinsurance v. Insurance Comm'r*, 696 F.2d 1267 (9th Cir. 1983).

114. Mo.—*O'Hare v. Pursell*, 329 S.W.2d 614 (Mo. 1959). N.Y.—N.Y. Ins. Law § 1308(a)(2)(i), (ii) (McKinney).

115. N.Y.—*See, e.g., Insurance Co. of North America v. United States Fire Ins. Co.*, 67 Misc. 2d 7, 322 N.Y.S.2d 520 (Sup. Ct. 1971), *aff'd*, 42 A.D.2d 1056, 348 N.Y.S.2d 122 (1973).

116. N.Y.—*See, e.g., Hare & Chase, Inc. v. National Sur. Co.*, 49 F.2d 447 (S.D.N.Y. 1931), *aff'd*, 60 F.2d 909 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

117. Mo.—*See, e.g., Employers Reins. Corp. v. American Fidelity & Cas. Co.*, 196 F. Supp. 553 (W.D. Mo. 1959).

118. *See generally* Joseph C. Hanger, *Punitive Damages—Insurance and Reinsurance*, 47 INS. COUNS. J. 72 (1980); Thornton, *Extracontractual and Punitive Damage Liability of Insurers, Primary and Reinsurance Coverages*, 13 THE FORUM 754 (1978).

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§ 102.8 The Role

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119. *Id.*

120. N.Y.—*Slotkin v. Cj*
S. 981 (1980).

121. Miss.—*Union Sav.*
81, 484 (S.D. Miss. 1993).

122. N.Y.—*American Sp*
Supp. 183, 185 (S.D.N.Y. 19
Inc. Co., 757 F.2d 523 (2d
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123. *See, e.g., Va. Code*
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CERTIFICATE OF SERVICE

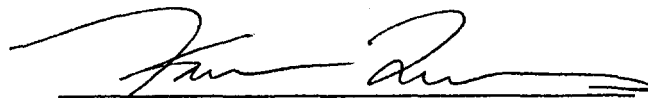
I hereby certify that on April 12, 2004, true and correct copies of the Statutory Liquidator's Surreply to Zenith Insurance Company's Reply in Further Objection to the Denial of A Direct Payment Request, Exhibits and Proposed Order were served via U.S. first-class mail upon the following:

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