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1 BIC 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Bedivere Insurance Company,	:	
In Liquidation	:	No. 1 BIC 2021

ARCHDIOCESE OF NEW ORLEANS ANSWER IN OPPOSITION TO LIQUIDATOR'S APPLICATION FOR APPROVAL OF TRANSFER AGREEMENT

The Roman Catholic Archdiocese of New Orleans (the "Archdiocese"), by undersigned counsel, respectfully submits this Answer in Opposition to the Application for Approval of Transfer Agreement (the "Application") submitted by Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania (the "Liquidator"), in her capacity as Liquidator of Bedivere Insurance Company (in Liquidation) ("Bedivere"). In support thereof, the Archdiocese states as follows:

1. The Archdiocese purchased primary and excess commercial general liability ("CGL") insurance from American Employers Insurance Company ("American Employers") during the 1960s and 1970s. On May 1, 2020, the Archdiocese filed for bankruptcy in the United States Bankruptcy Court for the Eastern District of Louisiana. *In re The Roman Catholic Church of the Archdiocese of New Orleans*, Case No. 20-10846. The Archdiocese has provided notice to Bedivere, as successor to American Employers, of claims alleging sexual abuse committed by priests and other individuals for which the Archdiocese is allegedly responsible.

2. The Archdiocese objects to the proposed transaction on the following grounds. First, the Liquidator's Application is not supported by sufficient evidence to permit the Court or creditors to fully evaluate its merits. Second, the Liquidator's Application is premature in so far as the deadline for proofs of claims set by the Liquidator has not passed and, as a result, many policyholders who may be impacted by the transaction proposed in the Application are not yet involved in these proceedings and may not be aware of the Application. Third, as the proposed transaction may impact policyholders who eventually submit proofs of claims, it was incumbent upon the Liquidator to take affirmative steps to serve all policyholders with the Application, which the Liquidator failed to do.

3. According to the Application, Bedivere, then known as OneBeacon Insurance Company, underwrote Specialty Lines policies prior to its acquisition by Trebuchet US Holdings pursuant to a Sale Purchase Agreement executed in 2012 and closed in December 2014. *See* Application ¶ 5. The Specialty Lines insurance policies are the subject of 149 open claims as to which case reserves were valued at approximately $34.5 million as of March 31, 2021. *Id*. ¶ 6. According to the Affidavit of Bedivere's Chief Liquidation Officer, Keith Kaplan, who negotiated the Transfer Agreement for which the Liquidator seeks the Court's approval, a reinsurance program that became effective in 2014 covers the obligations arising under these Specialty Lines policies. *See* App. Ex. A (Transfer Agreement) p.1.

Pursuant to an Amended and Restated 100% Quota Share Reinsurance Agreement (Specialty) between Bedivere and Atlantic Specialty Insurance Company ("ASIC") (the "Reinsurance Agreement"), ASIC, which appears to have been Bedivere's subsidiary until on or about 2012 (see App. Ex. A p. 1 ("[Bedivere] transferred its ownership of ASIC to its parent company"), agreed to reinsure 100% of Bedivere's liability under the Specialty Lines insurance policies. *See* App. Ex. B (Affidavit of Keith Kaplan, June 9, 2021) ("Kaplan Aff.") at ¶¶ 5-7. The Liquidator, however, did not submit a copy of the Reinsurance Agreement, or any related documentary evidence, in support of the Application.

4. The Transfer Agreement for which the Liquidator seeks Court approval would transfer responsibility for the Specialty Lines policies from Bedivere to the reinsurer (ASIC). Although the transaction would remove the claims under the Specialty Lines policies from Bedivere's estate, it would also effectively terminate Bedivere's rights to recover more than $30 million in reinsurance proceeds. As Mr. Kaplan concedes near the end of his Affidavit, "the estate also loses a proportionate amount of reinsurance asset." Kaplan Aff. ¶ 17. Nonetheless, the Application innocuously describes the transaction as merely "moot[ing]" ASIC's reinsurance obligation (App. ¶ 8); and while that may be true as to the Specialty Lines policyholders, the consequence of approval would be anything *but* innocuous for Bedivere's other policyholders, including the Archdiocese, who otherwise would

benefit (to a degree not yet determined) from maintaining ASIC's reinsurance obligations as general assets of Bedivere's estate.

5. The Liquidator contends that that the Transfer Agreement "avoids any preferences or prejudice to the rights of Bedivere's creditors and is in the best interests of the Bedivere estate." App. ¶ 3; *see also* Ex. B. ¶ 6 (". . . I determined that there are two ways to treat this portfolio equitably within the Bedivere Insurance Company liquidation"). However, "[t]he Liquidator does not have discretion to disburse the assets of the estate in the way the Liquidator thinks is equitable for policyholders." *In re Penn Treaty Network Am. Ins. Co.*, No. 1, 2021 Pa. Commw. LEXIS 510, at *37 (Commw. Ct. July 9, 2021). "The liquidation of an insolvent insurer follows a rigid procedure . . . ." *Id.*

6. "In most liquidations, reinsurance proceeds become *general assets* of an insolvent insurer's estate." *Koken v. Legion Ins. Co.*, 831 A.2d 1196, 1234 (Pa. Commw. Ct. 2003) (emphasis added), *aff'd sub nom. Koken v. Villanova Ins. Co.*, 583 Pa. 400, 878 A.2d 51 (2005). The rationale for this rule is straight-forward:

> Were it otherwise, inequities between policyholder-level claimants could result. For example, a workers' compensation book of business written in Nevada may be reinsured by a high-quality reinsurer that pays claims timely, while an automobile insurance book of business in Utah may be reinsured by a reinsurer on the brink of insolvency that has a history of denying claims for reinsurance without cause. Were guaranty funds, or policyholders, allowed to bypass the proof of claim process in favor of a direct claim against the reinsurer, the Nevada guaranty fund would receive more reimbursement on its claims than would the Utah guaranty fund. Such a result would not comport with

> the requirement of Article V [of the Insurance Department Act of 1921] that the claims of all guaranty funds, as policyholder-level claimants, be treated alike.

Gen. Reinsurance Corp. v. Am. Bankers Ins. Co. of Fla., 996 A.2d 26, 37 (Pa. Commw. Ct. 2009) (citing *Koken v. Legion (Oregon Insurance Guaranty Association)*, 941 A.2d 60, 68 (Pa. Commw. Ct. 2008).[1] The court went on to explain:

> The general rule that reinsurance recoveries are general assets of the estate is based, in part, upon the simple fact that policyholders usually have nothing to do with the insurer's decision on placement of the reinsurance and do not even know of the existence of reinsurance at the time they purchase coverage from the insolvent insurer. By pooling all reinsurance recoveries as general assets of the estate, all policyholder claimants, including guaranty associations, will receive the same pro-rata amount on their claims against the estate, as required by Article V.

Id. at 37-38 (internal citation omitted).

7. A limited exception to the general rule exists where a policyholder can show it has direct rights to the reinsurance. *Gen. Reinsurance Corp. v. Am. Bankers Ins. Co. of Fla.*, 996 A.2d 26, 37-38 (Pa. Commw. Ct. 2009). Policyholders may bring a direct action against the reinsurance company "where the policyholder is a 'third-party' beneficiary or intended beneficiary of the reinsurance contract." *Legion Ins. Co.*, 831 A.2d at 1236 (citing *Reid v. Ruffin*, 503 Pa. 458, 461, 469 A.2d 1030, 1032 (1983)). "[A] third-party beneficiary relationship is established by

[1] Article V of The Insurance Department Act of 1921, *as amended*, 40 P.S. §§ 221.1-221.63, governs the rehabilitation and liquidation of insolvent insurers.

reference to the standards of Section 302 of the Restatement (Second) of Contracts." *Id*. (citing *Scrapitti v. Weborg*, 530 Pa. 366, 370-71, 609 A.2d 147, 149-50 (1992)). The Pennsylvania Supreme Court summarized these requirements:

> [A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, *unless*, the circumstances are so compelling that *recognition of the beneficiary's right is appropriate to effectuate the intention of the parties*, and the performance satisfies an obligation of the promise to pay money to the beneficiary or the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance.

Scarpitti, 530 Pa. at 372-73, 609 A.2d at 150-51 (quoted in *Legion Ins. Co.*, 831 A.2d at 1236-37) (first emphasis in original, second emphasis added by *Legion*).

8. As the movant, the Liquidator has the burden to show that the Reinsurance Agreement fits within the exception to the general rule that reinsurance proceeds are general assets of the insurer's estate. The Liquidator, however, has not offered sufficient evidence to satisfy this burden. Apart from the Transfer Agreement, the only evidence offered in support of the Application is the Kaplan Affidavit, which makes a number of general statements about the nature and purpose of the reinsurance. The Affidavit, however, does not cite to or enclose any documents or testimony in support of these statements. In fact, the Affidavit does not even attach a copy of the Reinsurance Agreement. Without more detailed and substantive information about the reinsurance in question, it is not possible for the Court or policyholders to fully evaluate the proposed transaction, which, if approved,

would terminate the estate's rights to tens of millions of dollars to the detriment of policyholders. Plainly, questions of fact (*e.g.*, the intentions of the contracting parties, the circumstances surrounding the reinsurance agreement, and the impact on the estate) abound.

9. In *Koken*, this Court explained that "a determination of whether an original insured may sue a reinsurer directly must be made on a case-by-case basis, *viewing the plain language of the agreement* in light of the generally recognized functions and purposes of reinsurance." *See* 831 A.2d at 1236 (emphasis added). This Court, which conducted an evidentiary hearing, went on to examine extensive evidence, including the terms of the reinsurance agreements at issue there. *See, e.g.*, 831 A.2d at 1239. The Liquidator, however, has presented no competent evidence as to the intentions of ASIC and Bedivere at the time they executed the Reinsurance Agreement, nor as to the circumstances under which the Reinsurance Agreement was executed. Instead of disclosing the Reinsurance Agreement or other documents relating to the transaction with Trebuchet (which would be the best evidence of the parties' intentions), the Liquidator submits only the *post facto* affidavit of a liquidation officer who was not present at conception.[2]

[2] If anything, the Liquidator's Application suggests that the Reinsurance Agreement was *not* intended to benefit the Specialty Lines policyholders, but rather, it was intended to benefit *One Beacon Group* – which was the common owner of both ASIC and Bedivere, and which desired to retain the Specialty Lines policies but otherwise sell Bedivere to Trebuchet US Holdings. *See*

10. The Archdiocese concedes there are circumstances under which the Specialty Lines polices *might* fall within an exception to the rule that reinsurance proceeds are general assets of the insurer's estate – such as in the case of a mere fronting company. *See, e.g. Legion*, *supra*, 831 A.2d at 1237 (insurer was mere "fronting company"); *Ario v. Reliance Ins. Co.*, 981 A.2d 950 (Pa. Commw. Ct. 2009) (same). But the Liquidator has not proven that to be the case here. Instead, the Court is asked to trust the Chief Liquidation Officer's incomplete, second-hand contentions that that is what ASIC and Bedivere originally intended. As far as the Archdiocese is aware, the Specialty Lines policyholders purchased insurance from Bedivere *without regard for reinsurance.*[3] Indeed, the Reinsurance Agreement post-dates the issuance of the Specialty Lines policies and the Archdiocese is unaware any effort to inform Specialty Lines policyholders of the Reinsurance Agreement or to seek their consent to the agreement. Moreover, the Liquidator fails to disclose whether the Reinsurance Agreement is treaty reinsurance or facultative reinsurance. This distinction may very well be relevant, as it was in *Koken*, 831 A.2d at 1237 (noting that "[t]he rights of Pulte, Rural/Metro and PPG stem from facultative reinsurance agreements specific to their individual risks; they were issued facultative

Kaplan Aff. ¶ 7. Thus, the Specialty Lines policyholders may have been *incidental* beneficiaries of the Reinsurance Agreement, but they were not its *intended* beneficiaries.

[3] *Contrast Ario v. Reliance Ins. Co.*, 981 A.2d 950 (Pa. Commw. Ct. 2009) (insureds chose insurance program "because of the reinsurer's participation and not because of insurer as fronting company").

certificates; American claims rights under a reinsurance agreement that is not strictly facultative, i.e., a facultative obligatory treaty.").

11. If the Liquidator wishes to bring the Specialty Lines reinsurance proceeds within the exception to the general rule in order to transfer them outside Bedivere's estate, then she should be required to produce the Reinsurance Agreement for inspection, along with any contemporaneous evidence that she contends supports a conclusion that the Reinsurance Agreement was intended at the outset to benefit the Specialty Lines policyholders *to the exclusion of all others*. The Archdiocese and all other policyholders should then be permitted to evaluate and challenge that evidence, including at an evidentiary hearing, if necessary.[4]

12. The Archdiocese's objection to the Application is not academic, nor is it an assertion of form over substance. The relief sought by the Liquidator would deprive the estate – and thus policyholders such as the Archdiocese – of a valuable asset, *i.e.* the reinsurance proceeds. Moreover, the deadline for policyholders to claim against the assets of Bedivere's estate will not expire until December 2021; thus, the hasty effort to transfer substantial reinsurance proceeds out of the estate on

[4] Although Mr. Kaplan's Affidavit seeks to downplay Bedivere's connection to the Specialty Lines policies and the Reinsurance Agreement, the Affidavit admits that "Bedivere still recorded the liabilities associated with the Specialty Policies along with the corresponding reinsurance cession and reinsurance recoverable from ASIC in their financial statements" (Kaplan Aff. ¶ 7) and "the written documentation and the accounting employed by and between ASIC and Bedivere are insufficient to effect novations (*id.* ¶ 12). These statements undermine the Liquidator's contention that the reinsurance was intended to directly benefit Specialty Lines policyholders.

a thin record appears not only unwarranted, but also unduly prejudicial to policyholders who have not yet filed their proofs of claims and received notice of the Liquidator's Application.

13. Nowhere in the Application does the Liquidator show why the Court must approve the Application at this time, months in advance of the proofs of claims deadline. Many policyholders have not submitted proofs of claims yet. Notably, the proofs of claims deadline is not until December 31, 2021. As a result, many policyholders who may be impacted by the Liquidator's Application are not participants in these proceedings and may not be aware of the Application. Nor does it appear that the Liquidator undertook to notify and advise all policyholders of the Application. Given the timing of the Application and the lack of notice to all policyholders, many policyholders may be deprived of a full and fair opportunity to consider, evaluate, and file any objections to the Liquidator's Application. At a minimum, if the Court does not deny the Application, it should postpone the Application until after the proof of claims deadline passes and more policyholders have an adequate opportunity to evaluate the proposed transaction.

WHEREFORE, the Archdiocese respectfully requests the Court (i) deny the Application without prejudice, and (ii) permit the Liquidator to refile and serve the Application *after* the claims deadline has passed, along with a copy of the

Reinsurance Agreement and any evidence that the Liquidator contends supports a conclusion that the reinsurance proceeds at issue are not general assets of the estate.

CONCLUSION

For the foregoing reasons, the Archdiocese objects to the Liquidator's Application.

Respectfully submitted

POST & SCHELL P.C.

DATE: July 15, 2021

/s/ Abraham Rein

Abraham J. Rein
Attorney ID No: 207090
1600 John F. Kennedy Blvd.
14th Floor
Philadelphia, PA 19103
Tel: (215) 587-1057
Fax: (215) 320-4194
arein@postschell.com

JONES WALKER

Mark Mintz, Esquire (*pro hac vice* forthcoming)
Jones Walker
201 St. Charles Ave.
New Orleans, LA 70170

Counsel for the Archdiocese of New Orleans

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CERTIFICATE OF SERVICE

I, ABRAHAM J. REIN, ESQUIRE, hereby certify that the foregoing Answer in Opposition to Liquidator's Application for Approval of Transfer Agreement was submitted to the Commonwealth Court of Pennsylvania via the PACfile System on July 15, 2021. In addition, within seven (7) days of this date, one (1) copy of the Answer will be forwarded to the Chief Clerk of the Commonwealth Court via U.S. First Class Mail, postage prepaid.

I further certify that the Answer was served on the following persons via the PACFile system on this same day:

Jodi A. Frantz, Esquire
Amy G. Daubert, Esquire
John J. Lacek, IV, Esquire
Kathryn McDermott Speaks, Esquire
Pennsylvania Insurance Department
1341 Strawberry Square
Harrisburg, PA 17120
(717) 787-2567
Counsel for Plaintiff, Insurance Commissioner of the Commonwealth of Pennsylvania and Jessica K. Altman

Preston M. Buckman, Esquire
Benjamin A. Lorah, Esquire
Pennsylvania Insurance Department
901 N 7th Street, Suite 200
Harrisburg, PA 17102
(717) 886-2080
Counsel for Plaintiff, Insurance Commissioner of the Commonwealth of Pennsylvania and Jessica K. Altman

Steven B. Davis, Esquire
Stradley Ronon Stevens & Young, LLP
2005 Market Street, Suite 2600
Philadelphia, PA 19103
(215) 564-8714
Counsel for Bedivere Insurance Company

POST & SCHELL P.C.

DATE: July 15, 2021

/s/ Abraham Rein

Abraham J. Rein
Attorney ID No: 207090
1600 John F. Kennedy Blvd.
14th Floor
Philadelphia, PA 19103
Tel: (215) 587-1057
Fax: (215) 320-4194
arein@postschell.com

JONES WALKER

Mark Mintz, Esquire (*pro hac vice* forthcoming)
Jones Walker
201 St. Charles Ave.
New Orleans, LA 70170

Counsel for the Archdiocese of New Orleans