

SUPPLEMENTAL MATERIALS

**RECEIVERSHIP & INSOLVENCY (E) TASK FORCE
SUMMER NATIONAL MEETING**

Monday, August 14, 2023
11:00 AM - 12:00 PM (Pacific)

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August 10, 2023

The Honorable James J. Donelon, Chair
The Honorable Glen Mulready, Vice Chair
Receivership and Insolvency (E) Task Force
C/O Jane Koenigsman
Sr. Manager - Life/Health Financial Analysis
National Association of Insurance Commissioners
1100 Walnut Street
Suite 1500
Kansas City, MO 64106-2197

BY ELECTRONIC MAIL

RE: MODEL 540 COMMENTS

Dear Commissioners Donelon and Mulready and members of the Task Force:

Please accept this letter as my comments regarding the August 7, 2023 amendments to the Property and Casualty Insurance Guaranty Association Model Act (# 540) Exposure Draft proposed by the Receivership Law (E) Working Group (RLWG). The proposed amendments address two main issues: (1) a request by the Restructuring Mechanism (E) Working Group (RMWG) that the RLWG propose amendments to Model 540 if necessary to assure that implementation of Insurance Business Transfer (IBT) and Corporate Division (CD) transactions will not result in loss by policyholders of guaranty association protection, and (2) coverage of cybersecurity insurance, approved by the Executive (EX) Committee. I address only the first issue, regarding IBT and CD transactions. I offer no comment as to the second issue, related to cybersecurity insurance.

EXECUTIVE SUMMARY

With respect to the first issue, I submit respectfully that the proposed amendments (called Version 1 by the RLWG):

1. Go far beyond the charge to the Working Group,
2. Unnecessarily scale back guaranty association protection for policyholders in certain insolvencies unrelated to IBT and CD transactions by reversing amendments of Model 540 adopted by the NAIC in 2009,

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3. Solely for that reason, are unduly complicated (amending 278 lines of text and comment in Model 540), and
4. Create illogical outcomes.

The proposed amendments contrast with amendments (called Version 2 by the RLWG) I offered for the same purpose that I submit respectfully:

1. Were much simpler (4 lines of amendment compared to 278 in Version 1),
2. Would accomplish fully the charge to preserve guaranty association coverage in IBT and CD transactions,
3. Would not roll back any coverage already adopted by the NAIC, and
4. Would not have created the illogical outcomes.

The details are provided below. In evaluating this issue, I would suggest that the Task Force pose the following questions to the Working Group:

1. Would Version 2's 4-line amendment accomplish fully the preservation of guaranty association coverage in IBT and CD transactions requested by the RMWG?
2. What advantage does the adopted Version 1's 278-line proposed amendment provide?
3. Would the proposed Version 1 reverse amendments adopted the NAIC in 2009?
4. If so, who proposed this reversal to the Working Group and who charged the Working Group with taking on an amendment for this reversal?
5. On what empirical data is the Working Group basing its recommendation for this reversal and scale back in guaranty association coverage?

BACKGROUND

Last summer, the RMWG requested that the RLWG propose amendments to Model 540, if necessary to assure that implementation of IBT and CD transactions, will not result in loss by policyholders of guaranty association protection. That was the entire charge to the RLWG. Two competing proposals were submitted to RLWG by a drafting group appointed for that purpose. The first (Version 1) was drafted by Barbara Cox and Rowe Snider - associated with the National Conference of Insurance Guaranty Funds (NCIGF) - and Robert Wake of the Maine Bureau of Insurance. Concerned about issues presented by this proposal, I offered a separate proposal (Version 2). After several discussions and edits, the RLWG voted to forward Version 1, but not Version 2, to this Task Force.

I submit respectfully that this Task Force should not adopt Version 1 and should not recommend its adoption to the E Committee. There are three principal reasons for this conclusion.

First, the proposal adopted by the RLWG deliberately goes far beyond the RMWG charge, choosing to also address a self-appointed issue regarding guaranty association coverage of "assumed claims". This additional issue was not referred to it by the Task Force or the RMWG and is unrelated to assuring the continuity of guaranty association protection for policyholders in IBT and CD transactions.

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Second, Version 1 creates a mechanism for reversing amendments to Model 540 adopted by the NAIC in 2009 that provide guaranty fund coverage for policyholders in “assumed claims” transactions (described in more detail below). Neither this Task Force nor the RMWG requested that the RLWG address this matter, let alone reverse amendments approved by the NAIC in 2009. The Working Group took on this task *sua sponte*. Not only is there no reason to “peel back” this policyholder coverage in order to assure continued protection in the case of IBTs and CDs, I submit that there is no defensible public policy in support of this reduction in policyholder coverage.

Third, Version 1 is very complicated and contemplates editing 278 lines in the Model Act text and comments. It would delete 180 lines of current text and 15 lines of current comment, add 75 lines of new text and 5 lines of new comment, and amend another 3 lines of text. In contrast, Version 2 accomplishes fully the goal of the referral, but only requires editing 4 lines of the Model Act to do so. Among other things, this unnecessary complexity will make it more difficult for individual departments to propose these changes to their own legislatures. This complexity is made necessary only by the effort to roll back “assumed claims” coverage. As demonstrated by Version 2, accomplishing the referral’s goals is much, much simpler.

Further, in scaling back guaranty fund coverage for assumed claims, Version 1 would inject new potential problems and ambiguities into Model 540. For example, Version 1:

1. Proposes to delete language (Subsection D) that already goes a long way in assuring continuity of guaranty fund coverage in the case of IBTs and CDs. In fact, it is likely that policyholders would retain guaranty fund coverage in most IBT and CD transactions without making ANY change to Model 540. But if language is desired to avoid any uncertainty, the four lines of Version 2 would accomplish this goal.
2. Gives rise to illogical outcomes. For example, consider this scenario:
 - a. Insurer A assumes a workers compensation block, (including open workers compensation claims), from a self insured trust in year 1;
 - b. In years 2 through 15, Insurer A pays premium taxes and guaranty association assessments on the workers compensation policies assumed with the block, including those under which open claims had arisen that were also assumed;
 - c. In year 16, Insurer A becomes insolvent.
 - d. Under Version 1, those assumed workers compensation claims would not be covered by the guaranty funds because the policy had not been issued originally by a member insurer. See Version 1, section G(1). It would make no difference that Insurer A will have been paying premium taxes and assessments on these policies for fifteen years.
 - e. Moreover, at that point, the assumed claim and policy are likely to be all but indistinguishable from Insurer A’s other policies and claims. Yet, Version 1 will create two classes of business, one covered the other not, though they be otherwise largely indistinguishable.

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3. In response to my opposition to scaling back assumed claims coverage, the drafters of Version 1 then added a new optional section G(3) intended to revive the coverage they removed in section G(1). Notably, this optional section is opposed by NCIGF. See June 20, 2023, letter from NCIGF to RLWG. Of course, there is no justification for the convoluted complexity of the 278 line amendment that takes away assumed claims coverage in section G(1) and then adds it back in section G(3) unless the hope is that, as NCIGF advocates, section G(3) will not be adopted.

The full text of Version 1, as adopted by RLWG, is included beginning at page 7 of the August 3 materials for the Task Force's August 14 meeting in Seattle. Despite my request, Version 2 and my comments are not included in those materials. I thank NAIC staff for distributing them now.

PROPOSED VERSION 2

Here is the entire text of Version 2, what I propose as the amendment of Model 540 to assure the continuity of guaranty association coverage for policyholders in an IBT or CD transaction. The proposed edits are underlined and in blue print.

H. *"Covered claim" means the following:*

- (1) *An unpaid claim, including one for unearned premiums, submitted by a claimant, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this Act applies, if the insurer becomes an insolvent insurer after the effective date of this Act and the policy was either issued by the insurer or assumed by, or allocated to, the insurer in an assumed claims transaction or in an Insurance Business Transfer or Corporate Division transaction that was approved by the chief insurance regulator in the insurer's state of domicile and, if required, by the [Commissioner/Director/Superintendent]; and ...*

No other change to the Act would be needed to fulfill the goal of the referral to the RLWG. The NAIC could adopt this simple amendment thereby assuring that IBT and CD transactions would not result in the loss of guaranty association coverage.

In my effort to be as helpful to the RLWG as possible, I did note that Model 540 does not define IBT or CD transactions and offered a suggestion for doing so if it were deemed desirable.

- (c) *For purposes of this Act, an Insurance Business Transfer or Corporate Division transaction shall mean a transaction [ALTERNATIVE 1] as described in [INSERT STATE STATUTORY CITATIONS] [OR ALTERNATIVE 2] authorized by the laws of another state authorizing such transactions and as the result of which, apart from other provisions, the insurer assumed all of the obligations under the policy from a transferor which was thereby discharged from such obligations.*

To be clear, however, this definition is an optional suggestion, unrelated to the assumed claims issue and not strictly necessary to achieve the stipulated purpose.

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During the discussions of my proposed Version 2, the Chair observed that, since many states have not adopted the assumed claims provisions added to Model 540 in 2009, Version 2 might not make sense in those states. That is true because Version 2 (like Version 1) was intended to amend Model 540 as it exists currently. However, given the importance of preserving guaranty association coverage in IBT and CD transactions in every state, regardless of whether they had adopted the 2009 amendments, I offered an alternative to Version 2, that could be used in states that have not adopted the 2009 assumed claims amendment:

- (1) *An unpaid claim, including one for unearned premiums, submitted by a claimant, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this Act applies, if the insurer becomes an insolvent insurer after the effective date of this Act and the policy was either issued by the insurer or assumed by, or allocated to, the insurer in an Insurance Business Transfer or Corporate Division transaction that was approved by the chief insurance regulator in the insurer's state of domicile and, if required, by the [Commissioner/Director/Superintendent]; and ...*

I also offered two other two alternatives (not salient to this discussion) that would have enabled states to adopt Version 2 to preserve coverage for IBT and CD transactions depending on whether or not they also wanted to include guaranty association coverage for transactions in which the recipient company is not a member insurer. Because that essentially would mean that the recipient company would not be a licensed insurer, it is difficult for me to conceive of circumstances in which commissioners would want blocks of insurance for consumers (those implicating guaranty association coverage) transferred to them.

What is important is that all of the alternative iterations of Version 2 I offered the RLWG have the same virtue as the basic proposal: they only envision limited (3 or 4 lines) edits to Section H(1). Thus, no matter what its preference, under Version 2, a state could accomplish very simply the referral's goal of preserving coverage in the case of IBTs or CDs, whether or not they had adopted the 2009 assumed claims amendments.

The simple explanation for the difference between these competing proposals is that, unlike my Version 2, NCIGF's Version 1 is structured to permit the NAIC to reverse course now and remove the assumed claims coverage added in 2009. If it were not for that new goal, there would be no reason to prefer the 287 line edits of Version 1. That new goal, of course, was not part of the charge to the Working Group.

This point merits a bit of further explanation. Version 2 DOES enable an individual state to provide guaranty association coverage for IBT and CD transactions WITHOUT assumed claims coverage. Where it differs from Version 1, adopted by the Working Group, is that the latter enables amendment of the Act to ELIMINATE EVEN THE POSSIBILITY of assumed claims coverage for states adopting the Model. I submit respectfully that there is no public policy justification for this *sotto voce volte-face*.

THE ASSUMED CLAIMS COVERAGE

What is the assumed claims coverage that has given rise to this spirited debate? The 2009 amendments adding that coverage were the result of the Virginia receivership for Reciprocal of America (ROA), a workers compensation and professional liability insurer doing business primarily in the southeast. In the 1990s, when the workers compensation market tightened and rates increased, a number of institutional ROA workers compensation insureds moved their coverage to existing or newly formed self insured vehicles. By the turn of the millennium, when the market softened, those blocks were once again assumed by ROA in assumption reinsurance, loss portfolio transfers, or similar transactions. In 2003, ROA was placed in receivership and eventually in liquidation. A number of guaranty associations declined to provide coverage for claims arising under these blocks because they had been assumed from non-member insurers. Even more, they objected to the liquidator using estate assets to pay those same claims, asserting that they were not entitled to policyholder priority and therefore could not be paid from estate assets until guaranty association had been fully reimbursed for their payment of covered claims. The issue was litigated vigorously in Virginia courts, resulting in a ruling that these claims were obligations to policyholders just as those arising under policies issued directly by ROA. See August 24, 2005, Final Order of the Virginia State Corporation Commission, attached. While an appeal was lodged from this order, it was later abandoned. See December 22, 2005, Withdrawal of Appeal, also attached.

This litigation proved expensive for the ROA receivership and extremely injurious and disruptive to injured workers whose workers compensation benefits were interrupted by the guaranty association challenge. In an effort to avoid repetition, in 2004 the Virginia General Assembly adopted amendments to Virginia Code Section 38.2-1603, the “covered claims” definition of the Virginia Property and Casualty Insurance Guaranty Association Act (the Virginia version of Model 540). The amendments specified that assumed claims, such as those at issue in ROA, were within the scope of guaranty association coverage.

There followed efforts to accomplish the same result for the entire country, which took the form of the amendment of Model 540 adopted by the NAIC in 2009 over vigorous opposition from the NCIGF. Without speculating as to the opposition or other cause for this, it is true that few states have since adopted these amendments, just as even fewer states have done so for the Insurance Receivership Model Act (Model 555), adopted by the NAIC in 2005. Nonetheless, as of this writing, Models 540 and 555 represent the judgment of the NAIC as to how insurance insolvencies should be managed.

THE RENEWED ATTACK

Under the banner of “coverage neutrality”, the NCIGF has seized on the IBT/CD referral to the RLWG as the opportunity to renew its attacks on the assumed claims coverage incorporated by the NAIC in 2009. What is remarkable, of course, is that the assumed claims coverage issue has nothing to do with preservation of guaranty association protection for policyholders in IBT and CD transactions. Arguably, Model 540 already does that without the need for any amendment at all. It does so precisely because of the amendments adopted in 2009, though they were intended for the

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narrower circumstances than in controversy. This much I pointed out to the RLMG on November 9, 2022, when I suggested that,

“[a]t most, if one wanted to adopt a “belt and suspenders” approach, the language in Section D(2) (or subsection (3) of Alternative 2) could be amended as follows:

***An assumption reinsurance or other transaction in which all of the following occurred:*”**

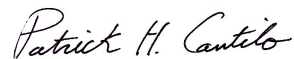
Among the responses to this argument, was that few states had adopted the 2009 amendments. That led me to propose the simple 4-line Version 2 that could be used in states that had not adopted the assumed claims language to assure that IBT and CD transactions would not result in loss of guaranty association protection.

So, what is really at issue in today’s debate is whether the Task Force, without having been asked to do so, wants to propose to the E Committee and then to the NAIC that it revoke its 2009 decision to provide in Model 540 the possibility of guaranty association coverage to claimants like the ROA workers compensation insureds described above. I submit respectfully that there is no defensible public policy that would be served by such an about face. I urge this Task Force to continue putting policyholder interests at the top of its list of priorities and adopt my proposed Version 2 in response to the RMWG referral.

As usual, my firm and I are not compensated for our contributions to the deliberations of the Task Force. We do not, in this matter, represent the interests of any constituency other than our effort to protect policyholders who are otherwise largely unrepresented in these discussions. The views I express are strictly my own and not offered on behalf of any client or organization. They are informed generally by my experience with troubled insurers during the last four decades, and specifically by my work on behalf of policyholders of failed insurers. I would be happy to answer any questions about these matters.

I thank you for your kindness in considering my comments.

Very truly yours,



Patrick H. Cantilo

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, AUGUST 24, 2005

APPLICATION OF

RECIPROCAL OF AMERICA and
THE RECIPROCAL GROUP

CASE NO. INS-2003-00239

For a Determination Whether Certain Workers'
Compensation Insurance Policy Payments May be
Made to Claimants Formerly Covered by SITs and GSIAs

FINAL ORDER

On July 11, 2003, the Deputy Receiver of Reciprocal of America¹ filed an Application for Order Authorizing the Continuation of Workers' Compensation Disability Payments by Reciprocal of America and The Reciprocal Group for Workers' Compensation Claims Denied Coverage by State Guaranty Associations ("Application") in Case No. INS-2003-00024. Therein, the Deputy Receiver of ROA sought an order from the State Corporation Commission ("Commission") authorizing him to continue payment of medical and recurring partial or total disability payments for workers' compensation claims that were assumed by ROA through assumption reinsurance, or similar transactions, and denied or likely to be denied coverage by the applicable state guaranty associations.²

In the Application, the Deputy Receiver of ROA asserted that the guaranty associations of the applicable states have refused, or likely will refuse, to make certain workers' compensation insurance policy payments for workers' compensation claims that ROA assumed from Self-Insured Trusts ("SITs") in Alabama, Arkansas, Kentucky, and Missouri and Group Self-

¹ Reciprocal of America and The Reciprocal Group are collectively referred to herein as "ROA."

² Application at 1.

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Insurance Associations ("GSIAs") in Mississippi, North Carolina, Tennessee, and Virginia (collectively referred to as the "Assumed Businesses") as a result of assumption reinsurance or similar transactions ("Assumed Claims").³ The Deputy Receiver of ROA noted that the Assumed Claims likely will not be paid because the Assumed Businesses were not member insurers and/or the policies under which the claims arose were not ROA policies. The payments purportedly totaled approximately \$125,139 weekly.

The Deputy Receiver of ROA further contended that the insureds of the Assumed Businesses are direct insureds of ROA and, due to the necessity for continued payment by the recipients thereof, requested authorization from the Commission to continue making such payments.⁴ The Deputy Receiver of ROA classified the Agreements as "assumption reinsurance."⁵ The Deputy Receiver of ROA further asserted that the livelihood of many injured workers is dependent upon continued receipt of the payments and that a discontinuation of such payments would cause the recipients to suffer a substantial hardship.⁶ Accordingly, the Deputy Receiver of ROA sought an order from the Commission authorizing the continued payment of workers' compensation insurance policy claims assumed by ROA through assumption reinsurance or similar transactions and denied or likely to be denied coverage by the applicable state insurance guaranty associations.

On August 14, 2003, the Commission entered an Order Scheduling Hearing on Application, and on August 18, 2003, the Commission entered an Order Clarifying Previous

³ Such Assumed Claims and assets of the Assumed Businesses were purportedly assumed by ROA through merger agreements or different forms of assumption agreements ("Agreements"). Application at 4.

⁴ Id.

⁵ Id. at 6-7.

⁶ Id. at 9. The Deputy Receiver stated that payments to approximately 450 injured workers are at stake. Id. at 10.

Order ("Orders"). In the Orders, the Commission scheduled a hearing for September 17, 2003, to determine whether the insureds of the Assumed Businesses are direct insureds of ROA and therefore a direct responsibility of ROA or, if not, whether such insureds' claims should be treated as "hardship" claims. The Commission further ordered that the Deputy Receiver of ROA is not directed or authorized to make any workers' compensation insurance policy payments to claimants of the SITs or GSIA's until further order of the Commission.

A number of other parties, including the SDRs of the Tennessee Companies,⁷ the Virginia Property and Casualty Insurance Guaranty Association ("VPCIGA"), the Indiana Insurance Guaranty Association, the Kansas Insurance Guaranty Association, the Mississippi Insurance Guaranty Association, the Tennessee Insurance Guaranty Association, and the Texas Property and Casualty Insurance Guaranty Association (collectively, "Guaranty Associations"),⁸ the Coastal Region Board of Directors and the Alabama Subscribers it represents ("Coastal"), the Kentucky Hospitals,⁹ and the Virginia Workers' Compensation Commission's Uninsured

⁷ The Special Deputy Receivers of Doctors Insurance Reciprocal ("DIR"), Risk Retention Group ("RRG"), American National Lawyers Insurance Reciprocal ("ANLIR"), RRG, and The Reciprocal Alliance ("TRA"), RRG are referred to herein as the "SDRs." DIR, ANLIR, and TRA are referred to herein collectively as the "Tennessee Companies."

⁸ The Guaranty Associations no longer include the Texas Property and Casualty Insurance Guaranty Association, which was permitted to withdraw from this proceeding on April 27, 2004.

⁹ The "Kentucky Hospitals" include Appalachian Regional Healthcare, Caverna Memorial Hospital, Clinton County Hospital, Crittenden Health System, Cumberland County Hospital, Gateway Regional Medical Center, Hardin Memorial Hospital, Highlands Regional Medical Center, Jane Todd Crawford Hospital, Lincoln Trail Hospital, Livingston Hospital & Healthcare Service, Marcum & Wallace Memorial Hospital, Marshall County Hospital, Monroe County Medical Center, Murray-Calloway County Hospital, Ohio County Hospital, Owensboro Mercy Health System, Pattie A. Clay Hospital, Pineville Community Hospital, Regional Medical Center/Trover Clinic Foundation, Rockcastle Hospital, St. Claire Medical Center, T.J. Samson Community Hospital, Twin Lakes Regional Medical Center, and Westlake Regional Hospital.

Employers' Fund ("UEF")¹⁰ all joined this proceeding and have participated in some fashion, either in support of, or in opposition to, the Application.

The Commission held a hearing on this matter on September 17, 2003. Briefs were subsequently filed by the Deputy Receiver of ROA, the Guaranty Associations, the VPCIGA, Coastal, the Kentucky Hospitals, and the UEF.

On November 12, 2003, the Commission entered an Order, in which it directed the Deputy Receiver of ROA to pay the Assumed Claims insofar as they constitute indemnity and wage-replacement payments but did not authorize the payment of physician or hospital bills. In the same Order, the Commission assigned the determination of whether the SITs and GSIA's or employers thereof constitute "other policyholders arising out of insurance contracts" pursuant to § 38.2-1509 B 1 ii of the Code of Virginia¹¹ ("Code") to a hearing examiner and docketed the proceeding as Case No. INS-2003-00239.¹²

On January 8, 2004, the Commission entered an Order on Reconsideration, in which we denied the Guaranty Associations' request that we reverse our November 12, 2003 Order. The Commission also denied their request to suspend the execution of that Order pending an appeal.

¹⁰ On September 17, 2003, the Virginia Workers' Compensation Commission ("VWCC") filed a Motion to Intervene. Therein, the VWCC asserted that the UEF, which is administered by the VWCC, may become a significant creditor of ROA. On October 2, 2003, counsel for the VWCC and UEF filed a letter in which he stated that the VWCC's pleadings in this case were filed for the VWCC solely in its capacity as the administrator of the UEF, and not in its role as an adjudicative body. He stated his intention to submit future pleadings on behalf of the UEF, rather than the VWCC. The Commission granted the Motion to Intervene on October 16, 2003. For convenience of reference, the Commission will refer to the "UEF" in the remainder of this Order when discussing the "VWCC" or the "UEF."

¹¹ Statutory references are to the Code of Virginia.

¹² All three commissioners agreed with the decision to refer the underlying question involving § 38.2-1509 B 1 ii of the Code to a hearing examiner. One commissioner dissented from the decision to permit disbursements from the ROA estate to pay the Assumed Claims while such question was pending.

We reinstated our Order dated November 12, 2003, effective as of January 8, 2004.¹³ Hence, the Deputy Receiver of ROA was authorized to pay the Assumed Claims insofar as they constitute indemnity and wage-replacement payments as of January 8, 2004.¹⁴

Subsequent to the referral of this case to a hearing examiner and without objection from any party, this proceeding was expanded to include, in addition to the nine agreements involving workers' compensation coverage, two agreements covering other liability coverage.¹⁵ Unlike with the workers' compensation insurance policy payments, the Deputy Receiver of ROA did not seek to make any payment on the liability policy Assumed Claims but noted that there were approximately 128 such claims.¹⁶ The assumed workers' compensation SITs were the Healthcare Workers Compensation Self-Insured Fund (Alabama) ("HWCF"), the Arkansas Hospital Association Workers' Compensation Self-Insured Trust ("AWCT"), Compensation Hospital Association Trust (Kentucky) ("C-HAT"), and MHA/MSA Compensation Trust (Missouri) ("MHA/MSA"). The assumed liability SITs were the Alabama Hospital Association Trust ("A-HAT") and the Kentucky Hospital Association Trust ("K-HAT"). The assumed workers' compensation GSAs were MHA Private Workers' Compensation Group (Mississippi) ("MHA

¹³ By Order entered on December 2, 2003, the Commission prohibited the Deputy Receiver of ROA from making any payments pursuant to the November 12, 2003 Order until it had ruled on the Guaranty Associations' Petition for Rehearing or Reconsideration.

¹⁴ One commissioner dissented from the January 8, 2004, Order permitting payments to be made from the ROA estate prior to a decision being rendered in the INS-2003-00239 case.

¹⁵ See Amendment to Application for Order Authorizing the Continuation of Workers' Compensation Disability Payments by Reciprocal of America and The Reciprocal Group for Workers' Compensation Claims Denied Coverage by State Guaranty Associations ("Amendment") filed by the Deputy Receiver of ROA on January 21, 2004; and Order entered on January 29, 2004, in which the Commission accepted the Amendment to the Application and directed the hearing examiner to also consider and make a determination as to whether or not the liability assumed claims of ROA constitute claims of "other policyholders arising out of insurance contracts," in accordance with § 38.2-1509 B 1 ii of the Code. "Assumed Claims" hereinafter will include both the liability assumed claims and the workers' compensation assumed claims.

¹⁶ Amendment at 6.

Private"), MHA Public Workers' Compensation Group (Mississippi) ("MHA-Public"), SunHealth Self-Insurance Association of North Carolina ("SunHealth"), THA Workers' Compensation Group (Tennessee) ("THA"), and Virginia Healthcare Providers Group ("HPG").

The Guaranty Associations and the VPCIGA pursued an appeal of the November 12, 2003, and January 8, 2004, Orders to the Supreme Court of Virginia, which dismissed their appeal on July 9, 2004.¹⁷ The litigation before the hearing examiner continued while such appeal was pending. An evidentiary hearing was convened on September 22, 2004, and continued for six days thereafter. The Deputy Receiver of ROA, the Guaranty Associations, the VPCIGA, the Kentucky Hospitals, Coastal, the SDRs of the Tennessee Companies, the UEF, the Children's Hospital of Alabama, the Bureau of Insurance, and Richard W.E. Bland all participated in the hearing in one form or another. Post-hearing briefs were filed by the Deputy Receiver of ROA, the Kentucky Hospitals, Coastal, the UEF, the VPCIGA, and the Guaranty Associations.

On April 21, 2005, the hearing examiner filed his report ("Report"). The 130-page Report contains an exhaustive summary of the record of this proceeding, as well as the hearing examiner's discussion of the legal issues involved in this case, along with his findings and recommendations. The hearing examiner made the following findings and recommendations:

- (1) Virginia substantive law should control in this case to avoid exposing the ROA receivership estate to a myriad of possible conflicting state laws, to provide for the equitable payment of claims and distribution of the assets of the ROA estate among creditors of the same class no matter where the creditors may reside, and to provide for the orderly administration and wind down of the ROA estate;
- (2) Virginia law recognizes that entities such as the SITs and GSIA's transact the business of insurance, but are exempt from regulation as insurance companies under Title 38.2 of the

¹⁷ The Supreme Court of Virginia found that the two aforesaid Orders were not final Orders and dismissed the appeals without prejudice. Indiana Ins. Guar. Ass'n v. Gross, 268 Va. 220 (2004).

- Code of Virginia, except as specifically provided for in statutes adopted by the General Assembly;
- (3) The Commission is not bound by the erroneous legal conclusions of a member of the staff in the Bureau of Insurance;
 - (4) There is no basis for judicially estopping ROA and the SITs and GSIA's from arguing that they were self-insured trusts or group self-insurance associations that issued contracts of insurance providing coverage for their employer-members' liability or workers' compensation risks;
 - (5) The employer-members of SITs and GSIA's pooled their risk of loss for the purpose of transferring an individual employer-member's risk of loss to the group;
 - (6) The SITs and GSIA's were a type of reciprocal insurer in which the employer-members were both the insurer and the insured;
 - (7) The arrangement in which HWCF provided its employer-members workers' compensation liability coverage was an insurance contract under Virginia law;
 - (8) The arrangement in which A-HAT provided its employer-members medical professional liability, general liability, and personal injury liability coverage was an insurance contract under Virginia law;
 - (9) The arrangement in which C-HAT provided its employer-members workers' compensation liability coverage was an insurance contract under Virginia law;
 - (10) The arrangement in which K-HAT provided its employer-members hospital professional and general liability coverage was an insurance contract under Virginia law;
 - (11) The arrangement in which MHA Public provided its employer-members workers' compensation liability coverage was an insurance contract under Virginia law;
 - (12) The arrangement in which MHA Private provided its employer-members workers' compensation liability coverage was an insurance contract under Virginia law;
 - (13) The arrangement in which THA provided its employer-members workers' compensation liability coverage was an insurance contract under Virginia law;
 - (14) The arrangement in which HPG provided its employer-members workers' compensation liability coverage was an insurance contract under Virginia law;
 - (15) The arrangements in which AWCT and MHA/MSA provided their employer-members workers' compensation liability coverage were insurance contracts under Virginia law;
 - (16) The fortuity and known loss doctrines are inapplicable in this case;

- 17) The Acquisition of Assets and Assumption of Liabilities and Merger Agreements effected an assumption reinsurance transaction in which ROA assumed the then existing insurance obligations of the SITs, GSIAs, and their employer-members on the policies of insurance that had been written by the SITs and GSIAs;
- 18) A novation occurred in which ROA was substituted as the insurer of the former insurance obligations of the SITs, GSIAs, and their employer members;
- 19) The Assumed Claims are "claims of other policyholders arising out of insurance contracts" pursuant to § 38.2-1509 B 1 ii of the Code; and
- 20) The Deputy Receiver of ROA may pay the workers' compensation Assumed Claims at 100% without creating an unlawful preference.

The hearing examiner also concluded that the arrangement in which SunHealth provided its employer-members workers' compensation liability coverage was an insurance contract under Virginia law,¹⁸ even though he omitted such conclusion from his list of findings and recommendations. We thus treat it as an additional finding for purposes of our analysis. The hearing examiner recommended that the Commission adopt his findings, direct the Deputy Receiver of ROA to pay the workers' compensation Assumed Claims at 100%, and direct the Deputy Receiver of ROA to pay the Liability Assumed Claims at the same percentage as the claims of the Guaranty Associations and the VPCIGA.¹⁹

On April 26, 2005, the VPCIGA filed a Consented to Joint Motion for Extension of Time to File Responses and Objections to Hearing Examiner's Report ("Joint Motion"). On April 28, 2005, the Commission entered an Order Extending Time for Filing Comments, in which it

¹⁸ See Report at 116.

¹⁹ Report at 130. On July 20, 2004, the Deputy Receiver of ROA filed his Application for Approval of Agreement to Stay Proceedings and Tolling Agreement, in which he requests, among other things, the Commission to approve payment by the Deputy Receiver of ROA of claims of ROA direct policyholders and insureds at a 17% percentage, subject to certain limitations, conditions, and exclusions. That case is currently before a hearing examiner. See *Application of Reciprocal of America and The Reciprocal Group For Approval of Agreement to Stay Proceedings and Tolling Agreement*, Case No. INS-2004-00244 ("Case No. INS-2004-00244").

granted the Joint Motion and provided all parties with an extension to file comments on the Report until June 1, 2005.

Comments to the Report were filed by the VPCIGA, the Guaranty Associations, Coastal and the Kentucky Hospitals (comments filed jointly), and the Deputy Receiver of ROA. Generally, the VPCIGA and the Guaranty Associations requested that the hearing examiner's findings and recommendations be rejected, while the Kentucky Hospitals, Coastal, and the Deputy Receiver supported the hearing examiner's findings and recommendations. We have thoroughly considered the entire record in this proceeding.

NOW THE COMMISSION, having considered the evidence and arguments of the parties, the pleadings, the Report and the comments thereto, and the applicable law, finds as follows. We agree with the hearing examiner that the Assumed Claims, and thus the claims of the SITs and GSIA's or employers thereof, constitute "claims of other policyholders arising out of insurance contracts," pursuant to § 38.2-1509 B 1 ii of the Code. We do not agree, however, that the Code permits us to pay the Assumed Claims at 100%. Unfortunately, we find that we are constrained by the law to pay the Assumed Claims, so that such payment is "apportioned without preference." Accordingly, the Assumed Claims may not be paid until such time as the payment percentage is finalized and approved in Case No. INS-2004-00244. If and when such payment percentage is approved by the Commission, the Assumed Claims may be paid a like percentage. Accordingly, we adopt findings 1, 5-15,²⁰ and 19. We reject finding 20, as we believe it to be inconsistent with applicable law. We take no action with respect to findings 2-4 and 16-18 as they are not necessary to our decision in this case.

²⁰ We also adopt the additional finding regarding SunHealth. See note 18 and accompanying text.

Discussion

In our November 12, 2003, Order, we ordered that "[t]he determination of whether the SITs and GSIA's or employers thereof constitute 'other policyholders arising out of insurance contracts' pursuant to § 38.2-1509 B 1 ii is hereby assigned to a Hearing Examiner and is assigned Case No. INS-2003-00239." Thus, we agree with the hearing examiner that "the issue of whether the Assumed Claims are 'covered claims' may be saved for another day," and do not decide such issue here.²¹ The narrow question that we referred to the hearing examiner has spawned nearly two years of litigation before this Commission.

Section 38.2-1509 B 1 ii of the Code provides, in pertinent part, that "[t]he Commission shall disburse the assets of an insolvent insurer as they become available in the following manner: 1. Pay, after reserving for the payment of the costs and expenses of administration, according to the following priorities: . . . (ii) claims of the associations for "covered claims" and "contractual obligations" as defined in §§ 38.2-1603 and 38.2-1701 and *claims of other policyholders arising out of insurance contracts apportioned without preference. . .*" (emphasis added). We must determine if the SITs and GSIA's or employers thereof constitute "policyholders arising out of insurance contracts" to determine whether they fall within this category of the asset disbursement scheme for insolvent insurers crafted by the General Assembly.

We first determine whether the contracts between and among the SITs and GSIA's and employers thereof constitute "insurance contracts." Neither Chapter 15 nor Chapter 1 of

²¹ Report at 127. We also do not decide here whether or not the Commission has jurisdiction to determine the "covered claims" issue.

Title 38.2 of the Code contains a definition for "policyholder" or "insurance contracts."²² We find the hearing examiner's analysis employing the tests in American Surety Co. v. Commonwealth, 180 Va. 97 (1942) and Group Hospitalization Medical Service, Inc. v. Smith, 236 Va. 228 (1988), to be convincing. Both of those cases provide the essential terms of a contract of insurance. "The essential terms of a contract of insurance are (1) the subject matter to be insured; (2) the risk insured against; (3) the commencement and period of the risk undertaken by the insurer; (4) the amount of insurance; and (5) the premium and time at which it is to be paid." 180 Va. at 105, 236 Va. at 230-231. As aptly explained by the hearing examiner, each of the coverage documents issued by the SITs and the GSIA's to their member-employers satisfied the American Surety and Group Health tests.²³ Accordingly, we find that those agreements constituted "insurance contracts," as those words are used in § 38.2-1509 B 1 ii of the Code.

The VPCIGA and the Guaranty Associations contend, however, that, the Commission must first determine that insurance exists before it even gets to the American Surety and Group Hospitalization tests for determining whether an insurance contract exists.²⁴ We agree that there must be insurance for an insurance contract to exist. However, we disagree with the Guaranty Associations' and the VPCIGA's arguments that no insurance existed here.

Section 38.2-100 of the Code provides a definition for insurance:

'Insurance' means the business of transferring risk by contract wherein a person, for a consideration, undertakes (i) to indemnify another person, (ii) to pay or provide a specified or ascertainable amount of money, or (iii) to provide a benefit or service upon the

²² Section 38.2-100 of the Code does provide that "[w]ithout otherwise limiting the meaning of or defining the following terms, 'insurance contracts' or 'insurance policies' shall include contracts of fidelity, indemnity, guaranty and suretyship." Because of the language "[w]ithout otherwise limiting the meaning of or defining," we must search elsewhere in order to define "insurance contracts" in the context of § 38.2-1509 B 1 ii of the Code.

²³ See Report at 114-117.

²⁴ See, e.g., Response and Objections of VPCIGA to Report of Hearing Examiner, at 14.

occurrence of a determinable risk contingency. . . . 'Insurance' shall not include any activity involving an extended service contract that is subject to regulation pursuant to Chapter 34 (§ 59.1-435 et seq.) of Title 59.1 or a warranty made by a manufacturer, seller, lessor, or builder of a product or service.

Unlike the exclusion of warranties from this definition, the General Assembly chose not to exclude specifically any of the types of contracts at issue in this case.

The essence of the definition is a contract by a *person* to indemnify or pay another upon the occurrence of a determinable risk contingency. We believe it important that the General Assembly chose to use the word "person" here, rather than "insurer." Thus, we do not take a position on whether the SITs or GSIA's were "insurers" under any provision of the Code, as it is unnecessary for us to do so to find that "insurance" existed here.²⁵ An "insurer" is not a necessary party to an "insurance contract" under § 38.2-1509 B 1 ii of the Code.

What is required is a transfer or shifting of the risk. See Lawyers Title Ins. Corp. v. Norwest Corp., 254 Va. 388, 390, 392 (1997) (Supreme Court of Virginia affirmed Commission's determination that Title Option Plus was not insurance and stated that a "shifting of the risk is the essence of insurance."); Hilb, Rogal and Hamilton Co. v. DePew, 247 Va. 240,

²⁵ We have reviewed a number of cases in reaching our conclusion, including authorities cited by the parties. We read the Iowa Supreme Court's decision in Iowa Contractors Workers' Compensation Group v. Iowa Ins. Guar. Ass'n, 437 N.W.2d 909 (Iowa 1989) to be inapposite to our conclusion. There, the Supreme Court of Iowa found, among other things, that a self-insured group was not an "insurer" under Iowa law. The result of such finding, of course, was that the Iowa Insurance Guaranty Association was liable for certain claims. 437 N.W.2d at 916. We decline to adopt the Supreme Court of Iowa's reasoning to the extent the court determined that no risk is transferred unless all of the risk is transferred. See, 437 N.W.2d at 917.

Similarly, in South Carolina Property and Cas. Ins. Guar. Ass'n v. Carolinas Roofing and Sheet Metal Contractors Self-Insurance Fund, 446 S.E.2d 422 (S.C. 1994), the Supreme Court of South Carolina found that the self-insured roofers' fund was an "insurer" under that state's law. The court's analysis differed from the Iowa court's in that the Supreme Court of South Carolina found that the members of the group self-insurer did transfer a portion of their risk. 446 S.E.2d at 425.

In California Plant Protection, Inc. v. Zayre Corp., 659 N.E.2d 1202 (Mass. App. Ct. 1996), the court found that the self-insured group was not an "insurer" and was therefore entitled to guaranty fund protection. Id. at 1205. We are not required to decide in this case whether the SITs or GSIA's constitute an "insurer" under our law.

248 (1994) ("Such shifting of the risk is the essence of insurance."). We find that such a risk transfer or shift took place here.

We do not believe that the existence of joint and several liability served to nullify any risk transfer that occurred among the members' pooling of their liabilities. Nor does the fact that the members could have been assessed under their policies nullify the transfer or shifting of risk. We find the hearing examiner's discussion to be persuasive in this regard. While we decline to adopt *in toto* the reasoning of the Supreme Court of South Carolina or the Supreme Court of Iowa, we agree that, in Virginia, insureds may be assessed under an insurance policy without altering the policy's essential nature as an insurance contract.

We find further support for our decision in the Court of Appeals of Maryland's decision in Maryland Motor Truck Ass'n Workers' Compensation Self-Insurance Group v. Property & Cas. Ins. Guar. Corp., 871 A.2d 590 (Md. 2005), a decision filed after the hearing examiner filed his report, but before the deadline for filing comments in this case.

In Maryland Motor Truck, the Court of Appeals of Maryland, its highest court, was faced with the question of whether the Maryland Motor Truck Association Workers' Compensation Self-Insurance Group ("MMTA") was an "insurer" under Maryland law. If the MMTA was an "insurer," the Property and Casualty Insurance Guaranty Corporation ("PCIGC") was not responsible for paying the claims of the members of the MMTA, which had an excess insurance policy with Reliance National Indemnity Company, an insurance company declared insolvent by a Pennsylvania court. The members of the MMTA were each jointly and severally liable for the workers' compensation obligations of the group and its members that were incurred during their period of membership.²⁶

²⁶ 871 A.2d at 592.

In discussing differences between self-insurance with only one entity insuring itself, and group self-insurance, with multiple members, the Maryland Court of Appeals stated,

[i]n reality, because in that situation there is no spreading of the risk for that part of a loss that is either within a deductible or over the policy limit, the policyholder is more likely *non*-insured for that segment. As we shall explain later, that is not necessarily the case with group self-insurance. There, the retained risk is transferred from the individual (member) to the group and is spread throughout the group. The member may share with the other members joint and several liability for the overall, aggregate combinations of the group, but is relieved of any direct obligation for payment of particular claims made against it. That is much more akin to the nature and concept of insurance than to that of non-insurance.

871 A.2d at 596 (emphasis in original). The Maryland Court of Appeals continued by analyzing the contract and concluded that "[t]he mere fact that the members retain joint and several liability for any remaining obligations of the [self-insured] Group does not suffice to preclude the Agreement from constituting an insurance contract. . . . Such an arrangement—joint and several liability for a deficiency and the right to recover part of the surplus funds in the form of dividends—is a traditional characteristic of assessment mutual insurance companies." *Id.* at 598.

The Court of Appeals of Maryland found that, because the contracts were insurance contracts, the self-insured group was an "insurer," and the PCIGC was not responsible for the claims under Maryland law. While we are not determining the precise question of whether the SITs or GSIAAs constitute an "insurer," and specifically decline to do so here, we find the reasoning of the Court of Appeals of Maryland persuasive as it relates to the determination that the underlying contracts were insurance contracts. Simply put, we do not believe that the existence of joint and several liability, when analyzed in the context of the remainder of the contracts among the members and the SITs and GSIAAs, nullifies the fact that risk was shifted or transferred. The VPCIGA argues that "[t]his agreement by each member to assume an obligation

it did not otherwise have and to pay and discharge the liability of every other member cannot be characterized as a transfer of risk."²⁷ We think the opposite is true. Each member assumed an obligation it did not otherwise have (accepted risk) and agreed to pay and discharge the liability of every other member (accepted risk). By the same token, each member transferred a portion of its risk to the group, while retaining or receiving back a portion of, or possibly all, of such risk upon the occurrence of certain contingencies. Nothing in the definition of "insurance" in the Code, or case law from the Supreme Court of Virginia, supports the notion that, without a complete transfer or shift of all the risk, no risk is transferred at all. We think, to the contrary, that sufficient indicia of risk transfer or shift was present here for the contracts to be insurance contracts.

Having determined that risk was transferred or shifted and shared or pooled among and between the members and the SITs and GSIA's, we then apply the American Surety and Group Hospitalization tests to determine whether the contracts were insurance contracts under Virginia law. In this regard, we agree with the hearing examiner's analysis and findings that all 11 of the SITs' and GSIA's' coverage documents constituted "insurance contracts."²⁸ Finally, we believe that the Assumed Claims are those of "policyholders." In this regard, while the "policyholders" may have been the employers-members of the SITs and GSIA's rather than a third-party claimant or employee, we believe the language "arising out of" is broad enough to encompass the Assumed Claims.²⁹ Having found that the contracts between and among the SITs and GSIA's

²⁷ Response and Objections of VPCIGA to Report of Hearing Examiner, at 20.

²⁸ Report at 114 -117, 128-129 (findings and recommendations 7-15). See also Report at 116 and note 18 and accompanying text, *supra*, regarding SunHealth.

²⁹ The parties did not spend much, if any, time disputing whether the employers-members were "policyholders" under § 38.2-1509 B 1 ii of the Code. While the employers-members were technically the "policyholders" under the contracts, see Atkinson v. Penske Logistics, LLC, 268 Va. 129, 135 (2004) ("... 'named insured' is the policyholder."), we think it is patently obvious, and the parties apparently agreed, that the employees thereof were

and their employers-members were "insurance contracts," and that the Assumed Claims constituted claims of "policyholders arising out of insurance contracts," we find it unnecessary to decide whether the Agreements constituted assumption reinsurance or whether a novation occurred. Accordingly, it is also unnecessary for us to decide whether ROA assumed "known losses" through the Agreements.

Apportioned without preference

The remaining pertinent language is that the Commission must pay "the claims of other policyholders arising out of insurance contracts *apportioned without preference*." Section 38.2-1509 B 1 ii of the Code (emphasis added). We cannot agree with the hearing examiner here that we have the authority to pay the Assumed Claims at 100%. Hence, the Assumed Claims may not be paid until a decision is rendered in the INS-2004-00244 case and then only at the percentage arrived at in such case.³⁰

The hearing examiner concluded that the General Assembly's preference for paying the full amount of a workers' compensation claim that is a "covered claim" under § 38.2-1606 A 1 a i of the Code indicates that the General Assembly "never intended that one group of workers' compensation policyholders of an insolvent insurer should receive 100% payment of their

also "policyholders" as they were the beneficiaries of the contracts. The language "arising out of" appears to be broad enough to include such claimants as "policyholders." See Trex Co., Inc. v. ExxonMobil Oil Corp., 234 F. Supp. 2d 572, 576 (E.D. Va. 2002) ("In the insurance context 'arising out of' is broader than 'caused by,' and ordinarily means 'originating from,' 'having its origin in,' 'growing out of,' 'flowing from,' or 'incident to or having connection with.'"); St. Paul Fire and Marine Ins. Co. v. Insurance Co. of North America, 501 F. Supp. 136, 138 (W.D. Va. 1980) (same, applying Virginia law).

³⁰ We recognize, and are not unmindful of the fact, that the injured workers may suffer a serious hardship as a result of our decision. We also recognize the apparent inequity in certain workers' compensation claimants receiving 100% of their claim (those that are eventually deemed "covered claims" under § 38.2-1606 A 1 a i of the Code) while others (for example, those impacted by our decision today) receive a substantially smaller percentage. Without deciding the "covered claim" issue, we note that the priority scheme for workers' compensation claimants in Chapter 16 of Title 38.2 of the Code could have been utilized in the disbursement scheme in Chapter 15 of Title 38.2 of the Code. The General Assembly, however, for whatever reason, chose not to do so.

claims; while an identical group of workers' compensation policyholders from the same insolvent insurer might receive less than 100% payment of their claims."³¹ We do not agree with the hearing examiner's *in para materia* analysis, however, as we believe that Chapters 15 and 16 of Title 38.2 of the Code, while related, pertain to different matters.

Section 38.2-1509 of the Code is part of a carefully crafted scheme for handling the disbursements of the assets of an insolvent insurer's estate, while § 38.2-1606 deals with the duties and powers of the Virginia Property and Casualty Insurance Guaranty Association. Section 38.2-1509 B of the Code controls the manner in which the Commission will pay claims out of the estate of the insolvent insurer. See *Swiss Re Life Co. America v. Gross*, 253 Va. 139, 146 (1997). That statute does not provide for the payment of one class of policyholders at 100%, while another policyholder receives whatever percentage may be paid by the estate as "available." Instead, it provides that all policyholder claims are to be "apportioned without preference."

The General Assembly has enumerated the order in which claimants of the insolvent insurer's assets may be paid, and we may not deviate from such legislative scheme. "When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way." *Grigg v. Commonwealth*, 224 Va. 356, 364 (1982). We are not permitted to exercise our discretion here to override the General Assembly's priority scheme, because of the General Assembly's policy judgment set forth in an

³¹ Report at 127.

entirely different chapter of Title 38.2 of the Code.³² Had the General Assembly wanted to incorporate a super-priority for workers' compensation policyholders in Chapter 15 of the Code, it could have done so.³³ The legislature's determination instead that the assets are to be paid to satisfy the "claims of other policyholders apportioned without preference" is a clear command not to create exceptions for certain policyholders.

Conclusion

We find that the Assumed Claims are "claims of other policyholders arising out of insurance contracts." We also conclude that such claims must be "apportioned without preference" in accordance with the priority scheme established by the General Assembly set forth in § 38.2-1509 of the Code. Hence, we adopt findings 1, 5-15,³⁴ and 19 of the Report. We reject finding 20, as we believe it to be inconsistent with applicable law. We take no action with respect to findings 2-4 and 16-18 as they are not necessary to our decision in this case.

Accordingly, IT IS ORDERED THAT:

(1) The Application of the Deputy Receiver of ROA is APPROVED, except as modified herein.

³² If we ultimately determine that the Assumed Claims are "covered claims," as have the North Carolina Industrial Commission and the North Carolina Court of Appeals, see, Bowles v. BCJ Trucking Services, Inc., I.C. No. 821763 (North Carolina Ind. Comm'n, July 17, 2003) (Opinion of Douglas Berger, Deputy Commissioner), *aff'd*, Bowles v. BCJ Trucking Services, Inc., I.C. No. 821763 (North Carolina Indus. Comm'n, April 16, 2004) (2-1 decision by full commission), *aff'd*, Bowles v. BCJ Trucking Services, Inc., 615 S.E.2d 724 (N.C. Ct. App. 2005); In re: SunHealth GSIA/The Reciprocal Group, I.C. Nos. 402156, 467439, 822818, 734242, 902560, 426774, 705360, 616611, 734300 & 944966 (N.C. Indus. Comm'n, July 19, 2004), then the injured employees ultimately may receive 100%. We make no such determination today as the question of whether the "Assumed Claims" are "covered claims" is not before us.

³³ The General Assembly created such a super-priority for workers' compensation claimants in § 38.2-1606 of the Code.

³⁴ We also adopt the additional finding regarding SunHealth. See note 18 and accompanying text.

(2) The Assumed Claims constitute "claims of other policyholders arising out of insurance contracts" pursuant to § 38.2-1509 B 1 ii of the Code.

(3) The Deputy Receiver may not pay the Assumed Claims until such time as a payment percentage is determined by the Commission in Case No. INS-2004-00244.

(4) This matter is closed and the papers herein be passed to the file for ended causes.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the State Corporation Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219.

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December 22, 2005

Via Hand Delivery

Joel H. Peck, Esquire
Clerk
State Corporation Commission
Tyler Building, 1st Floor
1300 East Main Street
Richmond, Virginia 23219

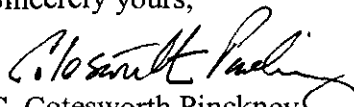
Re: Application of Reciprocal of America and the Reciprocal Group; For a Determination Whether Certain Worker's Compensation Insurance Policy Payments May be Made to Claimants Formerly Covered by SITs and GSIA's
Case No. INS-2003-00239; Notice of Withdrawal of Appeal

Dear Mr. Peck:

Enclosed for filing in the above-referenced matter are the original and fifteen copies of a Notice of Withdrawal of Appeal which has been executed in counterparts by counsel for the Guaranty Associations, the Virginia Association, the Alabama Claimants and the Kentucky Hospitals.

Thank you for your assistance in this matter.

Sincerely yours,


C. Cotesworth Pinckney

Enclosures

cc: Gregory P. Deschenes, Esquire
Wiley F. Mitchell, Jr., Esquire
Greg E. Mitchell, Esquire

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COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

APPLICATION OF)
)
RECIPROCAL OF AMERICA and)
THE RECIPROCAL GROUP)
) Case No. INS-2003-00239
For a Determination Whether Certain Workers')
Compensation Insurance Policy Payments)
May be Made to Claimants Formerly)
Covered by SITs and GSIA's)

NOTICE OF WITHDRAWAL OF APPEAL

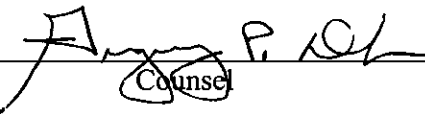
The Indiana Insurance Guaranty Association, Kansas Insurance Guaranty Association, Mississippi Insurance Guaranty Association and Tennessee Insurance Guaranty Association (the "Guaranty Associations"), the Virginia Property and Casualty Insurance Guaranty Association (the "Virginia Association"), the Coastal Region Board of Directors and the Alabama Subscribers (the "Alabama Claimants") and the Appalachian Regional Healthcare, Clinton County Hospital, Crittenden Health System, Cumberland County Hospital, Gateway Regional Medical Center, Hardin Memorial Hospital, Highlands Regional Medical Center, Livingston Hospital & Healthcare Service, Marcum & Wallace Memorial Hospital, Marshall County Hospital, Monroe County Medical Center, Murray-Calloway County Hospital, Ohio County Hospital, Owensboro Mercy Health System, Pattie A. Clay Hospital, Pineville Community Hospital, Regional Medical Center/Trover Clinic Foundation, Rockcastle Hospital, St. Claire Medical Center, T.J. Samson Community Hospital, Twin Lakes Regional Medical Center, and Westlake Regional Hospital (the "Kentucky Hospitals") each filed with the Clerk of the State Corporation Commission a notice of appeal from the Final Order of the State Corporation Commission entered on August 24, 2005 in Case No. INS-2003-00239 (the "Order").

Each of the Guaranty Associations, the Virginia Association, the Alabama Claimants and the Kentucky Hospitals (collectively, the "Claimants") has agreed with each of the other Claimants, in consideration of the similar agreements of such other Claimants, that it will abandon its appeal from the Order.

ACCORDINGLY, each of the Claimants by counsel hereby gives notice of its withdrawal of its appeal from the Order. Each of the Claimants acknowledges that this Notice of Withdrawal of Appeal may be executed in any number of counterparts (and by different parties hereto in different counterparts) each of which when so executed and delivered shall be deemed to be an original and all of which taken together shall constitute but one and the same instrument.

Dated December 21, 2005.

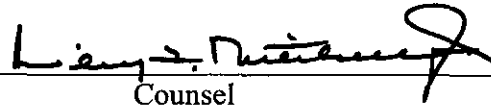
INDIANA INSURANCE GUARANTY
ASSOCIATION, KANSAS INSURANCE
GUARANTY ASSOCIATION, MISSISSIPPI
INSURANCE GUARANTY ASSOCIATION, and
TENNESSEE INSURANCE GUARANTY
ASSOCIATION

By 
Counsel

VIRGINIA PROPERTY AND CASUALTY
INSURANCE GUARANTY ASSOCIATION

By 
Counsel

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AND THE ALABAMA SUBSCRIBERS

By 
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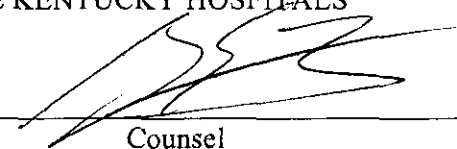
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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December, 2005, the original foregoing Notice of Withdrawal of Appeal executed in counterparts and fifteen copies thereof were delivered by hand to:

Joel H. Peck, Esquire
Clerk of the Commission
State Corporation Commission
Tyler Building
1300 East Main Street
Richmond, Virginia 23219

and photocopies thereof were mailed by first class mail to:

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State Corporation Commission
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Mississippi Insurance Guaranty Association and
Kansas Insurance Guaranty Association

A handwritten signature in cursive script, reading "Gregory P. Deschenes", is written over a horizontal line.

1424281