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February 27, 2013

Via First Class Mail

Christopher L. Kerr
Michigan Department of Attorney General
P.O. Box 30755
Lansing, MI 48909

Re: Office of Financial and Insurance Regulation v American Community Mutual Insurance Company
Court of Appeals Case No. 312470

Dear Mr. Kerr:

Enclosed for your file is a copy of Appellees Trapeza CDO IX, Ltd. and Trapeza CDO X Ltd.'s Brief on Appeal that was e-filed with the Court today. Thank you.

Sincerely,

Karlene K. Schaeffer
Legal Administrative Assistant to
Lori McAllister

DEPT. OF
ATTORNEY GENERAL

FEB 28 2013

CORPORATE OVERSIGHT
RECEIVED

Enclosure

cc: Phillip Sternberg (*w/encl.*)
Daniel R. Brown (*w/encl.*)
John L. Noud (*w/encl.*)

STATE OF MICHIGAN

IN THE COURT OF APPEALS

KEN ROSS, COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE REGULATION,

Petitioner

vs.

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Respondent.
_______________________________/

Docket No. 312470

Lower Case No. 10-397-CR

Hon. William E. Collette

MICHAEL TOBIN, ELLEN DOWNEY, FRANCIS DEMPSEY, MICHAEL MCCOLLOM, BETH MCCROHAN and LESLIE GOLA,

Claimants/Appellants,

vs.

COMMISSIONER OF THE OFFICE AND INSURANCE REGULATION AS REHABILITATOR OF AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Respondent/Appellee,

and

TRAPEZA CDO IX, LTD. AND TRAPEZA CDO X, LTD. and HOLDCO ADVISORS, L.P.

Intervenor/Appellees

APPELLEES TRAPEZA CDO IX, LTD. AND TRAPEZA CDO X, LTD.'S
<u>BRIEF ON APPEAL</u>

ORAL ARGUMENT REQUESTED

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JURISDICTION OF THE COURT OF APPEALS

Appellees agree with the Claimants/Appellants' statement of jurisdiction in this case.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE LOWER COURT'S DECISION UPHOLDING THE PLAIN LANGUAGE OF MCL 500.8137(4) SHOULD BE AFFIRMED WHEN THE PAYMENTS SOUGHT BY THE FORMER OFFICERS OF AN INSOLVENT INSURANCE COMPANY WERE NOT FOR SERVICES RENDERED PRIOR TO THE REHABILITATION ORDER?

Claimants/Appellants say: No
Respondents/Appellees say: Yes
The Lower Court says: Yes

II. WHETHER THE FORMER OFFICERS' CLAIMS FOR CHANGE OF CONTROL BENEFITS ARE ENTITLED TO A PREFERENCE IN THE STATUTORY PRIORITY OF CLAIMS ESTABLISHED BY CHAPTER 81 OF THE INSURANCE CODE WHEN THOSE CLAIMS ARE BARRED AS A MATTER OF LAW?

Claimants/Appellants say: Yes
Respondents/Appellees say: No
The Lower Court says: No.

III. WHETHER THE LOWER COURT ERRED BY CONCLUDING THAT AN ORDER OF REHABILITATION IS NOT A "CHANGE OF CONTROL" AS DEFINED IN THE EMPLOYMENT AGREEMENTS OF THE FORMER OFFICERS?

Claimants/Appellants say: Yes
Respondents/Appellees say: No
The Lower Court says: No

IV. WHETHER THE LOWER COURT ERRED BY HOLDING THAT THE REHABILITATION ORDER DID NOT ENTITLE THE FORMER OFFICERS TO BENEFITS WHEN THOSE BENEFITS ARE BARRED BY APPLICABLE LAW?

Claimants/Appellants say: Yes
Respondents/Appellees say: No
The Lower Court says: No

V. WHETHER THE PUBLIC POLICY OF MICHIGAN, AS EXPRESSED IN THE UNAMBIGUOUS LANGUAGE OF SECTION 8137(4), DISALLOWS THE CLAIMS AT ISSUE HERE?

Claimants/Appellants say: No
Respondents/Appellees say: Yes
The Lower Court says: Yes

VI. WHETHER THE LOWER COURT PROPERLY REJECTED THE FORMER OFFICERS' CLAIM FOR SEVERANCE PAY UNDER THEIR EMPLOYMENT AGREEMENTS WHEN THE AWARD OF SEVERANCE PAY VIOLATES MCL 500.8137(4)?

Claimants/Appellants say: No
Respondents/Appellees say: Yes
The Lower Court says: Yes

INTRODUCTION

Claimants/Appellants seek to reverse the lower court's enforcement of the plain language of the Insurance Code by asserting claims for golden parachute or severance payments on behalf of the former officers of American Community Mutual Insurance Company at the time it went broke. Michigan's statutory framework governing insurance insolvencies is highly specific with regard to claims by former officers and directors of the insolvent company, limiting such claims to payment for services rendered prior to rehabilitation. Given the paramount interest that Michigan has in enforcing its own laws in accordance with their terms, and its interest in promoting uniformity in the interpretation of the insolvency laws across the country, the claims of the former management should be denied.

COUNTERSTATEMENT OF FACTS

A. The Financial Collapse of American Community

American Community Mutual Insurance Company ("American Community) was placed into rehabilitation by Order dated April 8, 2010. (Dkt. #3.)[1] The claimants here were all officers of American Community in the years preceding its financial collapse. The six former officers who submitted claims are (1) Michael Tobin, the former President and Chief Executive Order, (2) Francis P. Dempsey, the former Senior Vice President, General Counsel and Corporate Secretary, (3) Ellen M. Downey, former Vice President, Corporate Communications, (4) Michael A. McCollom, former Vice President, Underwriting, (5) Beth McCrohan, former Vice President and Chief Information Officer, and (6) Leslie Gola, former Vice President, Human Resources. Mr. Tobin became the President and CEO in 2007, and thus presided over the financial collapse

[1] All the exhibits attached to this Brief were submitted to the lower court as attachments to the Briefs of the parties with respect to Claimants' motion. The notation "Dkt. # is used to reference the docket number of the pleading as reflected on the lower court's docket sheet as filed with the Claim of Appeal.

of American Community. (Claimants' Brief, Ex. 2; Dkt. #147.)

The financial death spiral of American Community is well documented. On May 23, 2008, the independent rating agency that rates insurance company's financial strength and performance, A.M. Best, reported that American Community's financial outlook was "negative" due to a "series of operational missteps made ...over the past few years...." (Dkt. 160, Ex. D.)[2] The ratings continued to slide, ultimately landing at an anemic C+ (marginal) by the end of 2009. The company's financial performance mirrored the rating agency's action. In 2009, American Community reported a decrease in its capital and surplus of over $53 million from the prior year end. (Dkt. #3, p. 3) By the beginning of 2010, A.M. Best lowered American Community's rating to D (poor) due to its net operating loss and significant deterioration in surplus. (Dkt. 160, Ex. G.)

By the time of the April, 2010 Rehabilitation Order, American Community was no longer financially secure enough to assure that the claims of its policyholders would be satisfied. In fact, the financial demise of American Community was so obvious that the company stipulated to the Petition and Order placing it into rehabilitation, including the finding that it was operating in a financially hazardous position. (Dkt. #3, Rehabilitation Petition, Ex. A hereto (without exhibits to the Petition).)

Following the Rehabilitation Order, the Rehabilitator appointed by the Court began the difficult and complex process of preserving American Community's assets and paying claims of the creditors consistent with the requirements of the Michigan Insurance Code, MCL 500.8101 *et seq*. Claims have now been asserted by six former officers of the company, seeking payments

[2] The Claimants' statement that the insolvency was "based exclusively on the financial troubles of the company and the prevailing economic climatic (sic), rather than its operational performance" is made without any citation to the record before the lower court. (Claimants' Brief, p. 4.) The record evidence is to the contrary, as cited herein.

attributable to the "change of control" which they contend occurred solely because the company was placed into Rehabilitation. For ease of reference, these former officers are referenced herein as "Claimants." The collapse of American Community was complete, with over 80,000 policyholders forced to obtain alternative health care insurance, and over 200 people losing their jobs. (Dkt. 160, p. 4, and Ex. H.)

B. Interests of the Surplus Note Holders

Trapeza CDO IX, Ltd. and Trapeza CDO X, Ltd. (jointly "Trapeza") are the current beneficial holders of surplus notes, originally purchased in 2005 by a Credit Suisse affiliate in the aggregate principal amount of ten million dollars ($10,000,000.00). (Dkt. 163, Ex. 2, Affidavit of Carolyn Thagard, attached here as Ex. B) Trapeza purchased the $10 million of surplus notes for 99.9% of par, or $9.996 million. Contrary to multiple unsupported assertions in Claimants' Brief on Appeal, Trapeza did not acquire the surplus notes at a "deep discount." Instead, it paid almost 100% on the dollar for the surplus note, and certainly did not expect that American Community would spiral into insolvency at the time the notes were purchased. (Dkt. #175, Ex. 1, Thagard Aff., Ex. C hereto.)

The surplus notes issued by American Community are a unique source of capital used in the insurance industry. Unlike a commercial loan issued by a bank or a credit union, the holder of a surplus note does not receive security for the debt obligation, or receives collateral that is already pledged to secure other debts to which the surplus note is subordinated. In addition, American Community may not make any payments of the principal or interest on the surplus note without prior approval of the Michigan Commissioner of the Office of Financial and Insurance Regulation ("OFIR"). Because the surplus note holder agrees to subordinate the debt to other outstanding obligations of the company (such as the claims by policyholders to benefits under their policies, as well as other types of obligations), it is treated differently for purposes of the statutory accounting principles applicable to insurance companies. In particular, a surplus note is treated as capital and surplus of the company, rather than a liability under statutory accounting principles. Surplus notes therefore present double advantages to issuers of the notes (like American Community): the interest payments are tax deductible as surplus notes are reported as debt on a GAAP basis, and at the same time, they are treated as statutory surplus by state regulators and the National Association of Insurance Commissioners ("NAIC"). Cox and Zhang, *The Securitization of Surplus Notes by Property and Casualty Insurers: Empirical Evidence* (July 7, 2006)(Dkt. 163, Ex. 3, excerpts attached as Exhibit D.)

Because a mutual insurance company like American Community does not have the ability to sell stock to raise capital, the issuance of surplus notes is one of the few ways in which a mutual insurance company can obtain additional capital to run its business. Currently there are relatively few potential investors in surplus notes because of the subordinated nature of the debt and because they cannot be repaid without prior regulatory approval. *See* NAMIC online, *Focus on the Future Options for the Mutual Insurance Company*, available at http://www.namic.org/Home/ReadArticle/86935b7a-bb05-45b5-b6ab-cc78c144cf93. Because of these limitations, when American Community needed to increase its surplus in 2005, the surplus notes provided a valuable protection to American Community's policyholders as additional security to pay policyholder claims. Because the notes were one of the few available avenues for American Community to raise capital, as well as for the industry in general, the availability of surplus notes is scarce.

While American Community paid interest in the notes for a brief period, it then defaulted. Trapeza has not received a penny on the principal amount of the surplus notes. (Dkt. 175, Thagard Aff., Ex. C hereto.) Although Trapeza is owed $10 million plus unpaid interest, at best case, the Rehabilitator estimates that the surplus note holders will received about $16.1 million or 54% of their claims. (Dkt. 160, Ex. H.) This amount would be reduced by 17.6% if the Court permits the Claimants to recover on their change of control agreements. (*Id.*)

C. The Employment of Claimants

The Claimants attach Mr. Tobin's employment agreement to their Brief on Appeal. The remaining officers had similar agreements. There is no dispute that the agreements with the former officers were terminated in the initial Rehabilitation Order. Mr. Tobin's employment was terminated thereafter, on April 16, 2010. (Dkt. 160, Ex. I.) The remaining officers were offered participation in the retention bonus plan established by the Rehabilitator and accepted it. (Ex. 160, Ex. K.) One of the employees, Ellen Downey, was permanently laid off. (Dkt. 160, Ex. L and J.) The four remaining officers all voluntarily resigned, after drawing continued salary, retention bonuses and raises for a period of time. (Dkt. 160, Exs. N and J.)

D. Proceedings Below

Four of the former officers sent letters to the Rehabilitator in January, 2012, almost two years after the Order of Rehabilitation, asserting an entitlement to change of control payments. The Rehabilitator denied the claims by letter dated February 7, 2012. (Dkt. 160, Ex. Q.) On April 10, 2012, the six former officers filed a Petition to Allow Claims, requesting the lifting of the stay to allow them to file and prosecute their claims. (Dkt. #147.) The Court entered an Order lifting the stay as to these claims on April 11, 2012. (Dkt. #145.) On May 8, 2012, the lower court entered a stipulated order deeming the claims filed, allowing the surplus note holders to participate, and setting forth a briefing schedule. (Dkt. #150.)

After oral argument, the lower court entered an Opinion and Order on August 24, 2012. (Dkt. #178.) The Final Order Denying Claims was entered on September 10, 2012. (Dkt. #185.) This appeal followed.

ARGUMENT

Standard of Review

The granting of a motion for summary disposition is reviewed de novo. The interpretation of a statute is also reviewed on a de novo basis. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). The arguments set forth herein were preserved in Trapeza's Brief and Reply Brief filed in the lower court. (Dkt. ## 163, 175.)

I. THE LOWER COURT PROPERLY INTERPRETED THE INSURANCE CODE WHEN IT HELD THAT THE FORMER OFFICER'S CLAIMS ARE LIMITED TO WAGE CLAIMS FOR SERVICES RENDERED PRIOR TO THE REHABILITATION ORDER.

A. Statutory Interpretation Principles

Michigan has adopted a comprehensive statutory framework to address the rehabilitation and liquidation of insurance companies. MCL 500.8101 *et seq*. When interpreting the statute, there are several principles of statutory interpretation that guide the Court. First, if the language of the statute is unambiguous, it must be interpreted as written. As stated in *City of Romulus v Mich Dept of Environmental Quality*, 260 Mich App 54, 65; 678 NW2d 444 (2003), "[w] e start by reviewing the language of the…statute. If the language is unambiguous on its face, the drafter is presumed to have intended the meaning plainly expressed and further judicial interpretation is not permitted." *Id. See also, Jarrad v Integon Nat'l Ins Co*, 472 Mich 207, 221; 696 NW2d 621 (2005) ("We emphasize that a court's fundamental interpretive obligation is to discern the legislative intent that may reasonably be inferred from the words expressed in the statute.")

The second guiding principle of statutory interpretation is that the insurance laws of Michigan are "enacted for the benefit of the public and insurance laws should be liberally construed in favor of policyholders, creditors and the public." *Murphy v Seed-Roberts Agency, Inc*, 79 Mich App 1, 9; 261 NW2d 198 (1977). *See also, Depyper v Safeco Ins Co of America*, 232 Mich App 433, 441; 591 NW2d 344 (1998). Given that the Legislature has specified the priority of claims in a receivership proceeding, the statutory provisions must be followed and construed to protect the policyholders, creditors and the public. *See e.g., In the Matter of Cadillac Ins Co in Liquidation*, unpublished decision of the Court of Appeals dated April 29, 2003 (Dkt. #234945)(interpreting Chapter 81's predecessor statute, Chapter 78 of the Code)(Ex. E hereto.) In this case, only one result is compelled by the statute and the public interest involved.

B. The Express Provisions Of Chapter 81 Disallow The Claims Asserted By The Former Officers.

Chapter 81 addresses claims made by officers and directors pursuant to employment contracts in unambiguous terms. Section 8137(4) of the Code, MCL 500.8137(4), expressly limits the claims that may be made by officers and directors against the insolvent estate to payment for services rendered prior to the issuance of the Rehabilitation Order. This statute states:

> Claims made under employment contracts by directors, principal officers, or persons in fact performing similar functions or having similar powers are limited to payment for services rendered prior to the issuance of an order of rehabilitation or liquidation under section 8113 or 8118.

MCL 500.8137(4)(emphasis added).

The claims asserted by the former officers here fall squarely within the limitations of Section 8137(4). Claimants assert that they are former officers of American Community, and assert claims for "breach of contract" based on their employment contracts. (*See,* Petition to Allow Claims, ¶¶ 9-15.) In particular, Claimants seek to recover under the "change of control" provisions in their employment agreements, all of which were entered into prior to rehabilitation. In the alternative, they seek to recover compensation in the form of severance payments. In either case, these payments are not being given for services rendered prior to the order of rehabiliation. The Legislature has plainly stated that there is no right for these former officers, who were at the helm of the sinking ship, to recover for anything other than the hours worked prior to the issuance of the order of rehabilitation on April 8, 2010. As a result, the claims must be denied under Section 8137(4).

While Trapeza disputes whether a "change of control" as defined in the employment agreements occurred, assuming *arguendo* that it did, the change of control payments are not being made for services rendered prior to the entry of the Rehabilitation Order. Each of the agreements provides a double trigger: (1) a change of control must occur, and (2) the employee must resign or be terminated within the next 2 years under defined circumstances. Prior to those two contingencies, the officer has no ability to recover under the employment contract as a result of a change of control because the required post-change of control services have not been rendered and then terminated to trigger payment. By contract, the claim cannot even exist prior to continued service <u>after</u> a change of control occurs. Pre-rehabilitation services alone do not trigger the contractual provision that forms the basis of the former officers' claims. This language reinforces the ruling of the lower court that the requirements of § 8137(4) are not satisfied with respect to the change of control provisions because, by contract, the services necessary to trigger the change of control provision were not and could not be rendered until a point after the Rehabilitation Order was entered and the employee thereafter resigned or was terminated.

Claimants argue that the lower court erred when it held that the services had to be "rendered" or "completed" before the Claimants are entitled to seek compensation under their change of control agreements. (Claimants' Brief, p. 6.) Claimants' argument distorts the lower court's rationale for its decision. The lower court properly stated that the Legislature only permitted compensation for services that were "rendered" "prior to issuance of the order of rehabilitation." (Dt. # 178, Opinion, p. 4.) That is the plain language of the statute. Yet the change of control agreements at issue here do not give the right to payment until after the second trigger has occurred – i.e., that there are services rendered after the change of control. Claimants ultimately concede this point in their Brief. (Claimants' Brief, p. 24 "...the benefits only became payable claims upon termination of their employment") Given the plain language of the agreements and the statute, the lower court got it exactly right.

The case law on whether there is consideration exchanged for a unilateral employment contract has no applicability here. Trapeza does not dispute that a contract was entered into between the Claimants and American Community. The issue here is whether that contract is payable by the Rehabilitator once the company has collapsed and, if so, at what priority level. That issue is not addressed in any of the cases cited by Claimants on unilateral contracts, which only address whether there is consideration for a unilateral contract.

Moreover, the case law cited by Claimants actually supports the lower court's decision. In *Holland v Earl G. Graves Publishing Co, Inc*, 46 F Supp 2d 681, 685-686 (ED Mich, 1998), for example, the Court relied on an excerpt from *Corbin on Contracts* which states that there is consideration given for a unilateral contract when an employee renders service, but that payment is not fully earned or triggered "until the service has continued for the full time..." That is consistent with the lower court's holding here that that the services for which payments are allegedly sought were not all rendered prior to the rehabilitation. Similarly, in *Cain v Allen Electric & Equipment Co*, 346 Mich 568; 78 NW2d 296 (1956) and *Gaydos v White Motor Co*, 54 Mich App 143, 220 NW2d 697 (1974), the Courts held only that there was a valid contract between the parties – not that the right to payment was triggered before a defined event, which is the issue here.

Claimants also assert that because they entered into contracts with self-serving language, they should be entitled to priority treatment in the liquidation of the same company that lost tens of millions of dollars after they were hired. The implications of such an argument are startling. If this interpretation is accepted, every insurance company can circumnavigate the limitations imposed by § 8137(4) of the Insurance Code by simply putting in lucrative "change of control" contracts that would be triggered by driving the company into the ground. Those contracts would become valid claims entitled to priority over those creditors buying surplus notes to help stabilize the company's surplus, and all that would need to be done is to recite in the agreement that the contracts are for "services rendered." There is no logic to interpreting the statute in this manner. Nor is it consistent with the Legislature's decision to exclude the officers from falling into priority categories that cover other employees. MCL 500.8142(a)(vii) and (b). The lower court's statutory interpretation was appropriate and should be affirmed.

C. Claimants' Claims Are Not Unsecured Claims, As They Are Not Recoverable Claims Under The Statute.

The Legislature's clear intent to limit claims of officers is further confirmed by Section 8142, which governs the priority of distributions from the insurer's estate. The statute establishes 9 categories of claimants that receive priority under the statute. Holders of surplus notes are Class 8 priority claimants pursuant to MCL 500.8142(1)(h). Employees who were officers and directors are expressly addressed in both § 8142(1)(a)(vii) and § 8142(1)(d).

In § 8142(1)(a)(vii), the Code states that employees that are owed compensation for services rendered are Class 1 claimants, but only for wage claims that do not exceed $1,000.00, and only for services rendered within 1 year before filing the petition of rehabilitation, for services reasonably necessary to the orderly administration of the Rehabilitation for the protection of class 2 claimants. The section continues, however, by expressly stating that "[o]fficers and directors are not entitled to the benefit of this priority." Because the claimants here are former officers, they cannot - by the plain language of the statute – qualify for Class 1 priority treatment.

Section 8142(1)(d) defines a Class 4 claimant for purposes of determining priority of claims. Like the Class 1 definition, the Legislature expressly excluded officers and directors from being treated as a Class 4 claimant, stating that "[o]fficers and directors are not entitled to the benefit of the priority for debts due to employees for services performed." Thus, the former officers are also not entitled to be treated as Class 4 claimants under the plain language of the statute. Indeed, they are not entitled to the benefit of any priority, which is consistent with Section 8137(4), which disallows all but pre-rehabilitation wage claims.

The former officers also contend that they are Class 5 "general creditors" or Class 7 "any other claims" creditors for purposes of the priority of distributions. This assumes, however, that they make it past the restriction in § 8137(4) that bars officer and director claims as a matter of law except as to services rendered prior to rehabilitation. Moreover, nothing in § 8142 mentions golden parachute claims based on an alleged change of control. Instead, both § 8142(a)(vii) and

§ 8142(b) do expressly mention officers and directors, but only to clearly disallow priority for such claims. While Claimants assert that § 8142 does not cap their recovery, it is difficult to understand their argument in light of the clear language of § 8137, which limits their claim to services rendered pre-rehabilitation.

As a result of the foregoing provisions, a former officer is barred by statute for seeking compensation for anything other than payment for services rendered prior to the rehabilitation. The millions of dollars sought by these former officers do not qualify under the statute for payment, nor do the claims receive a priority for payment under the priority scheme established by the Legislature. The plain language of the statutes must govern the outcome here, and it compels the denial of the former officers' claims.

D. The Case Law Does Not Support Claimants' Claim For Exorbitant Payments.

To the extent that claimants seek refuge in the Bankruptcy Code's handling of change in control agreements, they will find none. A recent decision from Delaware illustrates. During a Chapter 11 proceeding involving Verasun Energy Corporation, the former executives sought funds under a change in control agreement they signed in connection with a pre-bankruptcy merger. The issue before the Court was whether the compensation fell within the restrictions under 11 USC § 502(b), which drastically limits the claims of key executives. The Court noted the common sense answer to this question:

> Courts considering the policy behind § 502(b)(7) have said that the section "was designed to limit the claims of key executives who had been able to negotiate contracts with very beneficial terms." ... It should thus come as no surprise that senior executives' claims for severance pay, which is "money – apart from back wages or salary – paid by an employer to a dismissed employee," have been capped by § 502(b)(7). ... Unlike wages that are paid for services rendered, severance is meant "as compensation for the injury and losses resulting from the employer's decision to terminate the

> employment relationship." ... Because both the amount of severance employees receive and "the triggering events allowing [them] to receive [it] lie within the employer's control," *Matson*, 651 F.3d at 409, senior executives are particularly well-positioned to provide themselves with generous severance packages. They therefore enjoy a distinct advantage over other unsecured creditors, including other employees, who cannot easily adjust their claims to the company's assets. Congress enacted § 502(b)(7) in part to limit the effect of that advantage if the company files for bankruptcy.

In re Verasun Energy Corp, 467 BR 757, 765-766 (2012)(D Del, Ex. F)(emphasis added, internal citations omitted). The same result is appropriate here – these are not permissible claims for "services rendered prior to" rehabilitation.

Claimants rely on *In re FBI Distribution Corp*, 330 F3d 36 (CA1, 2003), a case which has no relevance here. The *FBI Distribution* case dealt with two prepetition contracts that provided for severance payments to an executive, Kathleen Mason, upon termination. The issue presented was whether those contracts were entitled to be treated as an administrative expense under bankruptcy law. The First Circuit held that the contracts were not entitled to priority, and further held that the severance payment claim was subject to the one-year cap pursuant to 11 USC §502(b)(7). *Id* at *7. This is analogous to the Michigan Insurance Code which reflects the legislative determination that payments to officers are entitled to no priority under the Code, and that are completely disallowed unless it is for services rendered prior to the rehabilitation.

The other case cited by Claimants, *Fix v Quantum Industrial Partners, LDC*, 374 F3d 549 (CA7, 2004), also fails to support their position. In *Fix*, the issue was whether the filing of the bankruptcy petition triggered the change of control agreements for the executives. The Court held that the bankruptcy did not trigger the change of control agreements – the same position argued by the Rehabilitator and the Trapeza here. *Id* at p 552. While *Fix* ultimately allowed the employees to collect on their agreements because the assets of the company were sold after it was placed in bankruptcy, the payment was permitted only because the bankruptcy code did not contain a provision like Michigan's that requires the services to be rendered prior to the issuance of the bankruptcy petition to be compensable. *Id.*

Once again, neither the statute nor the case law supports the position advocated by Claimants here.

II. THE REHABILITATION ORDER IS NOT A CHANGE OF CONTROL AS DEFINED BY THE EMPLOYMENT AGREEMENTS.

Claimants argue that the Rehabilitation Order, to which the company stipulated, constitutes a "change of control" under the terms of their employment agreements. Establishing that a triggering change of control occurred is a pre-requisite to any argument for payment of the severance benefits under those agreements. On this fundamental point, Claimants' arguments again fail.

Claimants argue that the first definition of "change in control" contained in the agreements (Section (b)(i)) is triggered because the Rehabilitation Order is a "similar transaction" involving American Community. (Claimants' Brief, p. 16.) The Rehabilitation is nothing like a demutualization, reorganization, consolidation, merger, combination, or sale of substantially all the assets. Each of the enumerated actions are voluntary actions taken by the management of the company to change its capital structure or method of conducting its business. The plain meaning of the word "similar" is "having characteristics in common: strictly comparable." *Merriam-Webster's on-line Dictionary.* The regulatory take-over of an insolvent insurance company is not "similar" to the enumerated items, which are all voluntary transactions undertaken by the management and Board of a company.

Claimants also make the argument that the voting power of more than 50% has changed, thereby triggering the first change of control definition in ¶(b)(i). This is a misreading of the language of the agreement. Rather than stating that a change of ownership or combined voting power changes control, this clause is instead a limitation on the words the precede it. In other words, a demutualization, reorganization, etc. would constitute a change of control "unless" the voting control does not change. The change of ownership alone does not trigger ¶(b)(i).

Claimants argue in the alternative that the second definition of a change in control set forth in ¶(b)(ii) is satisfied because the Rehabilitator has acquired the title to the assets. The employment agreement, however, states that voting power of American Community must be acquired by someone else. There is no longer any voting power to be acquired by anyone, including the Rehabilitator, as the company is out of business. No one else has acquired the voting rights. While claimants are correct that the directors, officers and managers of American Community lost their power upon the entry of the Order of Rehabilitation, this loss of power does not trigger the agreements – the change must be an acquisition of voting power by someone, which did not occur. The power to vote no longer exists.

As noted above, Claimants' own case, *Fix v Quantum Industrial Partners LDC*, *supra*, does not support their argument that a bankruptcy constitutes a triggering change of control. Indeed, *Fix* held just the opposite, finding that the bankruptcy filing did not trigger the executive severance agreements at issue in that case. Instead, the trigger to the agreements was the sale of the assets of the company, and was only recognized because nothing in the bankruptcy code barred severance payments under those circumstances. The Insurance Code does contain such a restriction on payments, and the lower court properly enforced it.[3]

[3] Claimants do not argue that the definition set forth in section (b)(iii) applies, nor could they. The Board of Directors of American Community did not adopt a resolution that a change in control has occurred.

III. THE REHABILITATION ORDER BARRED PAYMENT OF CHANGE OF CONTROL AND SEVERANCE BENEFITS TO THE CLAIMANTS: IT DID NOT CREATE RIGHTS THAT THE INSURANCE CODE PROHBITS.

Claimants postulate that the Rehabilitation Order somehow vests their entitlement to payment in paragraph 14 because it states that there will be no payment for goods or services "until further order of the Court." (Claimants' Brief, p. 23.) This language, Claimants assert, does not prohibit the payments, but only requires Court approval (which has never been obtained). This is not an accurate reading of Paragraph 14, which states in its entirety:

> Except as provided in this paragraph 14, the Rehabilitator shall not pay any Creditor claims for goods or services provided prior to the date of this Order until further order of the Court. In order to ensure the continuity of health care services to American Community's policyholders, and to minimize disruptions to American Community's business operations, the Rehabilitator shall pay: (a) all Creditor claims for health care services provide to American Community's policyholders prior to the date of this Order according to normal claims processing procedures; and (b) all Creditor claims for wages of American Community's officers, managers, and employees that were earned but unpaid as of the date of this Order. <u>This provision requiring payment of any pre-Rehabilitation employee wages does not apply to, and the Rehabilitator shall not pay, any severance or other non-wage payments otherwise due to an American Community officer, manager, or employee upon the termination of his or her employment contract entered into prior to the date of this Order</u>.

Rehabilitation Order, ¶ 14 (emphasis added). Although general creditor claims for goods or services can be brought before the Court for further consideration and orders, the claims of the former officers for any severance or other non-wage payments otherwise due are expressly barred by the Rehabilitation Order. The Court stated that claims for severance or other non-wage payments otherwise due shall not be paid.

Claimants argue that the cited language in ¶14 means the Court issued a "stay" of payments to them, rather than a prohibition (Claimants' Brief, p. 23). This argument has absolutely no basis in the Order. The Court clearly knew how to stay proceedings, and in fact ordered various things stayed, such as all actions or proceedings in which American Community was a plaintiff. (Order, ¶5). As to the severance payments, those were prohibited, not stayed. Moreover, the former officers did not challenge the Rehabilitation Order when it was entered. To the contrary, they waited almost two years before filing anything with the lower court even though two of the Claimants – the CEO and the General Counsel – admit to having at least reviewed it before their counsel was authorized to sign it. (Claimants' Brief, pp. 19-20.)

Similarly, paragraph 8 of the Rehabilitation Order does not provide Claimants with any relief. That paragraph confirms the termination of the employment agreements and permits the Rehabilitator to contract with the employees on new terms. The language stating that the agreements are terminated "subject to any contractual rights and applicable law" does not override the unambiguous language of paragraph 14 of the Rehabilitation Order which expressly terminates the right of any officer to receive severance payments. Moreover, because the termination is subject to "applicable law," the payments to be made at termination must comport with § 8137(4), which is the law that applies. Only by focusing on the language that the termination is subject to contractual rights, and ignoring the part that makes it subject to applicable law, can Claimants make such an argument to this Court. The argument does not withstand scrutiny.

IV. THE PUBLIC POLICY OF MICHIGAN, AS EXPRESSED IN MCL 500.8137(4), DISALLOWS THE CLAIMS ADVANCED BY THESE CLAIMANTS.

Citing to *Terrien v Zwit*, 457 Mich 56, 66-67; 648 NW2d 602 (2002), Claimants argue that the only public policy that should be applied by a court is the one embodied in the statutes passed by the Legislature. Trapeza agrees that the courts are bound by the legislative mandates absent a constitutional deficiency. In this case, however, the lower court followed the public policy of Michigan as embodied in § 8137(4) when it rejected compensation to the officers of an insolvent insurance company, except as to wages earned but unpaid as of the date of rehabilitation. None of the Appellees asked the lower court to disregard the statutory language: each requested that the Court enforce it.

Furthermore, the disallowance of the former officers' claims based on the plainly worded provisions of Chapter 81 is further reinforced by the need for relative uniformity in the application and interpretation of the model insolvency laws on a nationwide basis. Chapter 81 is based on a model law promulgated by the NAIC, which originally developed the NAIC Insurers Rehabilitation and Liquidation Model Act following the Great Depression, when it became clear that the states needed better mechanisms to handle insurance insolvencies. A 1935 Report of the Special Committee on Interstate Liquidation and Reorganization resolved, in pertinent part:

> WHEREAS, Although the institution of insurance is rapidly approaching a state of stabilization and there is ample reason to believe that the period of extensive liquidation and rehabilitation has been passed, it is desirable to have available adequate machinery to meet the emergencies that may arise in the future;
>
> NOW THEREFORE, BE IT RESOLVED, THAT the [NAIC] urges the enactment into law of the necessary statute or statutes whereby such unitary control of liquidations or rehabilitations may be effected by extending the authority and control of the appropriate Insurance Commissioner .. and the appropriate court. . . .

1 Proceedings of the Nat'l Ass'n of Ins. Comm'rs 97 (1935).

The Model Act, which was amended several times throughout the decades, thereafter served as a guide for state legislatures to use when regulating this complex area of the law. Since 1936, virtually every state has at some point adopted the Model Act in one of its various forms.[4] Because every state has some version of the Model Act, courts frequently look to

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[4] Attached as Exhibit G is a table published by the NAIC which tabulates the status of implementation of the Model Acts by the States. (Dkt. 163, Ex. 6.)

decisions of other states interpreting the act for guidance and uniformity. *See e.g.*, *Oxendine v Comm'r of Ins of NC*, 494 SE2d 545 (Ga Ct App 1997); *Four Stars Ins Agency v Hawaiian Elec Indus,* 974 P2d 1017 (Haw 1999); *State ex rel Sizemore v United Physicians Ins Risk Retention Group*, 56 SW3d 557 (Tenn Ct App 2001).

The implications for this Court's decision thus extend beyond just this case. Interpreting the statute to permit claims of the former officers, when those claims are expressly barred by statute, will interfere with the ability to coordinate Michigan receiverships with those of other states.

Moreover, permitting the claims of the former officers to have a higher priority than surplus notes in the distribution of an insolvent insurer's estate makes surplus note investments even less attractive to potential investors. Given that surplus notes are one of the very few ways for a mutual insurance company to raise capital, this potential implication also militates against the invocation of some sort of equitable exception to the plain language of the statute. As between a valid creditor who will receive the return of only a portion of its investment, and the former management of the now defunct company, the creditor who provided money for the company to survive while it attempted to improve its financial situation should be given the statutory preference to which it is entitled.

Claimants make wild, unsupported assertions that both surplus noteholders purchased the note at a "significant" discount for "perhaps pennies on the dollar," and that "94% of the principal" on the notes has been repaid. (Claimants' Brief, p. 27, *see also*, p. 25, n. 8 making the same claim.) Notably, no record cite is given for either statement, and neither statement is true. As noted in the Statement of Facts, Trapeza purchased the surplus notes immediately after the original sale and paid over 99.9% of the principal amount for the notes. This cannot be deemed to be a "significant" or "deep discount" by any stretch of Claimants' counsel's imagination. Moreover, Trapeza has yet to receive a single dollar of its principal back, and the interest payments were made only for a short period of time before American Community defaulted. Claimants' effort to paint themselves as the heroes who helped save the company for its creditors is not only unsupported by the record, but the falsity of it is demonstrated by the surplus loss of over $53 million in the year before American Community was placed into receivership, and years after Claimant Tobin assumed command of the ship.

V. NO CLAIMANT IS ENTITLED TO SEVERANCE PAY AS A RESULT OF THE PLACEMENT OF AMERICAN COMMUNITY INTO REHABILITATION ACCORDING TO THE PLAIN LANGUAGE OF CHAPTER 81.

Claimants argue in the alternative that if the Rehabilitation Order does not constitute a change of control, they are still entitled to severance payments under their employment contracts. In support of this argument, Claimants cite only to the language of their employment agreements, and ignore the statutory language in § 8137(4) that states that claims by officers "are limited to payment for services rendered prior to the issuance of an order of rehabilitation or liquidation under section 8113 or 8118." The fact that the Rehabilitation Order states that the termination is "subject to any contractual rights and applicable law" only reinforces this conclusion. The law, i.e., § 8137(4), overrides any contrary provision in the employment contract. *Rory*, *supra*, 473 Mich at 469. That law clearly prohibits the former officers from seeking anything but payment for services rendered prior to the issuance of the Rehabilitation Order. As stated in *In re Verasun Energy Corp,* 467 BR 757, 765-766 (D Del, 2012), *supra*, "unlike wages that are paid for services rendered, severance is meant 'as compensation for the injury and losses resulting from the employer's decision to terminate the employment relationship.'" The benefits sought here – whether it is the change of control payments or the severance claims – are barred.

Relief Requested

The claims of the former officers must be denied under the unambiguous language of Chapter 81. Distributions to the surplus note holders have priority and must be honored to the extent possible based on the remaining assets in the estate. The decision of the lower court should be affirmed.

Respectfully submitted,

DYKEMA GOSSETT PLLC

By: */s/ Lori McAllister*
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Dated: February 27, 2013

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STATUTORY ADDENDUM

500.8137 Contingent claims; discounting claims at legal rate of interest; claims made under employment contracts.

(4) Claims made under employment contracts by directors, principal officers, or persons in fact performing similar functions or having similar powers are limited for services rendered prior to the issuance of an order of rehabilitation or liquidation under section 8113 or 8118.

INDEX TO EXHIBITS

A. Rehabilitation Petition

B. June 17, 2012 Affidavit of Carolyn Thagard

C. August 3, 2012 Affidavit of Carolyn Thagard

D. Excerpts of Cox and Zhang, *The Securitization of Surplus Notes by Property and Casualty Insurers: Empirical Evidence* (July 7, 2006)

E. *In the Matter of Cadillac Ins Co in Liquidation*, unpublished decision of the Court of Appeals dated April 29, 2003 (Dkt. #234945)

F. *In re Verasun Energy Corp,* 467 BR 757 (D Del, 2012)

G. Table published by the NAIC

Exhibit A

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

KEN ROSS, COMMISSIONER OF THE OFFICE
OF FINANCIAL AND INSURANCE
REGULATION,

Petitioner,

Case No. 10-397 -CR

v

Hon. WILLIAM E. COLLETTE

AMERICAN COMMUNITY MUTUAL
INSURANCE COMPANY,

Respondent.

_______________________________________/

STIPULATED PETITION OF THE COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE REGULATION FOR AN ORDER PLACING AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY INTO REHABILITATION, APPROVING APPOINTMENT AND COMPENSATION OF SPECIAL DEPUTY REHABILITATORS, AND PROVIDING INJUNCTIVE RELIEF

Ken Ross, Commissioner of the Office of Financial and Insurance Regulation ("Commissioner"), by and through his attorneys, Michael A. Cox, Attorney General, and David W. Silver and Christopher L. Kerr, Assistant Attorneys General, petitions the Court for an order authorizing the Commissioner to rehabilitate American Community Mutual Insurance Company, approving the appointment and compensation of Special Deputy Rehabilitators, and providing certain injunctive relief. In support of this Petition, the Commissioner states as follows:

THE PARTIES

1. American Community Mutual Insurance Company ("American Community") is a life, accident, and health insurance company authorized to transact insurance in Michigan.

2. Ken Ross is the duly appointed Commissioner of the Office of Financial and Insurance Regulation ("OFIR").

JURISDICTION

3. MCL 500.8102 provides that a proceeding under Chapter 81 of the Michigan Insurance Code of 1956, MCL 500.8101 – 500.8159 ("Chapter 81"), including a rehabilitation proceeding, may be applied to an insurer who: (a) is or has been transacting insurance business in this state and against whom claims arising from that business may exist now or in the future; or (b) who has insureds resident in this state. American Community satisfies both criteria and is therefore subject to rehabilitation or any other proceeding authorized by Chapter 81.

4. Pursuant to MCL 500.8112, the Ingham County Circuit Court is the proper court to petition for an order of rehabilitation.

REHABILITATION IS APPROPRIATE BASED ON AMERICAN COMMUNITY'S BOARD OF DIRECTORS CONSENTING TO REHABILITATION AND BASED ON THE COMPANY'S IMPAIRED FINANCIAL CONDITION

5. MCL 500.8112 authorizes the Commissioner to petition this Court for an Order authorizing the Commissioner to rehabilitate American Community based on one or more of thirteen (13) listed grounds. These grounds include:

> (a) The insurer is in such condition that the further transaction of business would be hazardous financially to its policyholders, creditors, or the public.
>
> * * *
>
> (*l*) The board of directors . . . request[s] or consent[s] to rehabilitation under this chapter.

6. Pursuant to MCL 500.8112(*l*), entry of an Order authorizing the Commissioner to rehabilitate American Community is proper because American Community's Board of Directors has consented to rehabilitation under Chapter 81.[1] Toward this end, American Community, by

[1] Exhibit A, Certificate of Resolution of American Community Board of Directors dated March 31, 2010.

and through its legal counsel, has stipulated to the relief sought in this Rehabilitation Petition and to the entry of the Order attached hereto as Exhibit B.

7. Pursuant to MCL 500.8112(a), entry of an Order authorizing the Commissioner to rehabilitate American Community is also proper because American Community's financial condition is such that further transaction of business would be hazardous financially to its policyholders, creditors, or the public.

8. Specifically, American Community reported a 2009 net loss of $49,135,134. This 2009 net loss resulted in a $53,404,628 decrease in American Community's capital and surplus, or a 72% decrease, from the prior year-end. The company's year-end 2009 capital and surplus stood at $21,101,431, down from $74,506,058 as of year-end 2008. American Community also has surplus note obligations of $30,000,000; however, these surplus notes are repayable only out of the surplus earnings of American Community and only with the prior written approval of OFIR.

9. As of December 31, 2009, American Community's Risk-Based Capital level was 155.5%, which represented a significant decline from its 564% Risk-Based Capital level one year earlier on December 31, 2008. Pursuant to OFIR Bulletin No. 98-02, American Community's 155.5% Risk-Based Capital level is a "Company Action Level Event" that requires the submission of an RBC Plan.[2]

10. American Community has reported negative cash flow from operations the last five years. The company's 2009 negative cash flow from operations was equal to 85% of its total capital and surplus.

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[2] Exhibit C, OFIR Bulletin No. 98-02.

11. Further, on March 8, 2010, A.M. Best Co. downgraded its financial strength rating of American Community to "D" (poor) from "C+" (marginal), and downgraded its issuer credit rating to "C" from "B-." According to A.M. Best Co., the outlook for both ratings is negative.

12. Immediate action placing American Community into rehabilitation is necessary to protect the interest of American Community's policyholders, creditors, and the public.

13. Based upon the existence of the above-described statutory grounds for rehabilitation, and based upon American Community's stipulation to the relief sought by this Petition, the Court should enter the Rehabilitation Order attached as Exhibit B.

APPOINTMENT OF SPECIAL DEPUTY REHABILITATORS

14. The Commissioner, as Rehabilitator, is authorized to appoint Special Deputy Rehabilitators, who shall have all the powers and responsibilities of the Rehabilitator granted under Section 8114 of the Insurance Code and shall serve at the pleasure of the Commissioner.[3]

15. Pursuant to MCL 500.8114(1), the compensation of Special Deputy Rehabilitators and all expenses of taking possession of the insurer and of conducting the proceedings shall be fixed by the Commissioner, with the approval of the Court, and shall be paid out of the funds or assets of the insurer.

16. The Commissioner, as Rehabilitator, seeks approval of the appointment of James Gerber, the Director of Receiverships at OFIR, as a Special Deputy Rehabilitator for American Community. The Commissioner, as Rehabilitator, also seeks approval of the appointment of Michael Hogan, the Auditor-In-Charge at OFIR, as a Special Deputy Rehabilitator for American Community, who will work under Mr. Gerber's direction and supervision. The Commissioner

[3] MCL 500.8114(1).

further reserves the right to appoint other Special Deputy Rehabilitator(s) to replace and/or serve with Mr. Gerber and Mr. Hogan in the future as the need arises.

17. The Commissioner, as Rehabilitator, has fixed the compensation of Special Deputy Rehabilitators Gerber and Hogan pursuant to the terms set forth in the Order attached as Exhibit B. The Commissioner requests that the Court approve this compensation arrangement.

18. The Commissioner, as Rehabilitator, has determined that it is appropriate and necessary for the success of the rehabilitation that the services and compensation of James Gerber and Michael Hogan be approved so that this Rehabilitation may proceed effectively, efficiently, and provide the maximum protection of creditors, policyholders, and the public.

RELIEF REQUESTED

Based upon the foregoing, the Commissioner requests that the Court issue an Order, in the form attached as Exhibit B, that grants the Commissioner the following, nonexclusive relief:

1. Places American Community into rehabilitation pursuant to Chapter 81;

2. Grants the Commissioner, as Rehabilitator, possession, title, and control of American Community, its assets, resources, and business to the fullest extent allowed by law.

3. Approves the appointment and compensation of James Gerber and Michael Hogan as Special Deputy Rehabilitators.

4. Grants the injunctive relief necessary to protect American Community's business, assets, policyholders, creditors, the public, and the rehabilitation process

5. Grants the Commissioner such other and further relief that is necessary and appropriate for the rehabilitation of American Community.

Respectfully submitted,

Michael A. Cox
Attorney General

Christopher L. Kerr (P57131)
David W. Silver (P24781)
Assistant Attorneys General
Attorneys for Petitioner
Ken Ross, OFIR Commissioner
Corporate Oversight Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-1160

Dated: April 8, 2010

American Community Mutual Insurance Company stipulates to the facts and law recited above, to the relief sought by this Petition, and to the existence of the statutory bases for the entry of an Order placing American Community into rehabilitation. Further, American Community waives any right to a hearing on this Petition:

John D. Pirich (P23204)
Attorney for Respondent American Community Mutual Insurance Company

4.8.10
Date

Exhibit B

STATE OF MICHIGAN

IN THE CIRCUIT COURT OF THE COUNTY OF INGHAM

KEN ROSS, COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE REGULATION,

Petitioner,

Case No. 10-397-CR

Hon. William E. Collette

vs.

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Respondent.

State of Alabama)
)
County of Jefferson)

AFFIDAVIT OF CAROLYN R. THAGARD

Carolyn Thagard, being first duly sworn, deposes and states:

1. I have personal knowledge of the facts stated herein and am competent to so testify.

2. A true copy of the original surplus note that is at issue in this receivership proceeding is attached to this Affidavit.

3. The surplus note was originally purchased by Credit Suisse, Cayman Islands Branch.

4. Trapeza CDO IX, Ltd. and Trapeza CDO X, Ltd. are the current beneficial holders of the surplus note, the aggregate principal amount of which is ten million dollars ($10,000,000.00). The note remains due and owing.

Further affiant sayeth not.

Carolyn R. Thagard
Trapeza Capital Management, LLC

Subscribed before me this
19 day of June, 2012.

Notary Public

Sara Marshall Diruscio

MY COMMISSION EXPIRES
AUGUST 11, 2013

SURPLUS NOTE

THIS SURPLUS NOTE IS A GLOBAL SECURITY AND IS REGISTERED IN THE NAME OF THE DEPOSITORY TRUST COMPANY ('DTC") OR A NOMINEE OF DTC. THIS SURPLUS NOTE IS EXCHANGEABLE FOR A SURPLUS NOTE REGISTERED IN THE NAME OF A PERSON OTHER THAN DTC OR ITS NOMINEE ONLY IN THE LIMITED CIRCUMSTANCES DESCRIBED IN THE INDENTURE, AND NO TRANSFER OF THIS SURPLUS NOTE (OTHER THAN A TRANSFER OF THIS SECURITY AS A WHOLE BY DTC TO A NOMINEE OF DTC OR BY A NOMINEE OF DTC TO DTC OR ANOTHER NOMINEE OF DTC) MAY BE REGISTERED EXCEPT IN LIMITED CIRCUMSTANCES.

THE SURPLUS NOTES REPRESENTED BY THIS CERTIFICATE WAS ORIGINALLY ISSUED IN A TRANSACTION EXEMPT FROM REGISTRATION UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), AND SUCH SURPLUS NOTE, AND ANY INTEREST THEREIN, MAY NOT BE OFFERED, SOLD OR OTHERWISE TRANSFERRED IN THE ABSENCE OF SUCH REGISTRATION OR AN APPLICABLE EXEMPTION THEREFROM. EACH PURCHASER OF ANY SURPLUS NOTES IS HEREBY NOTIFIED THAT THE SELLER OF THE SURPLUS NOTES MAY BE RELYING ON THE EXEMPTION FROM THE PROVISIONS OF SECTION 5 OF THE SECURITIES ACT PROVIDED BY RULE 144A UNDER THE SECURITIES ACT.

THE HOLDER OF THE SURPLUS NOTES REPRESENTED BY THIS CERTIFICATE AGREES FOR THE BENEFIT OF THE COMPANY THAT (A) SUCH SURPLUS NOTES MAY BE OFFERED, RESOLD OR OTHERWISE TRANSFERRED ONLY (I) TO THE COMPANY, (II) TO A PERSON WHOM THE SELLER REASONABLY BELIEVES IS A "QUALIFIED INSTITUTIONAL BUYER" (AS DEFINED IN RULE 144A UNDER THE SECURITIES ACT) IN A TRANSACTION MEETING THE REQUIREMENTS OF RULE 144A, (III) TO AN INSTITUTIONAL "ACCREDITED INVESTOR" WITHIN THE MEANING OF SUBPARAGRAPH (a) (1), (2), (3) OR (7) OF RULE 501 UNDER THE SECURITIES ACT THAT IS ACQUIRING THE SURPLUS NOTE FOR ITS OWN ACCOUNT, OR FOR THE ACCOUNT OF AN "ACCREDITED INVESTOR," FOR INVESTMENT PURPOSES AND NOT WITH A VIEW TO, OR FOR OFFER OR SALE IN CONNECTION WITH, ANY DISTRIBUTION IN VIOLATION OF THE SECURITIES ACT, (IV) PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE SECURITIES ACT OR (V) PURSUANT TO AN EXEMPTION FROM THE SECURITIES ACT, IN EACH CASE IN ACCORDANCE WITH ANY APPLICABLE SECURITIES LAWS OF ANY STATE OF THE UNITED STATES OR ANY OTHER APPLICABLE JURISDICTION AND, IN THE CASE OF (III) OR (V), SUBJECT TO THE RIGHT OF THE COMPANY TO REQUIRE AN OPINION OF COUNSEL AND OTHER INFORMATION SATISFACTORY TO IT AND (B) THE NOTE HOLDER WILL NOTIFY ANY PURCHASER OF ANY SURPLUS NOTES FROM IT OF THE RESALE RESTRICTIONS REFERRED TO IN (A) ABOVE.

THE SURPLUS NOTES WILL BE ISSUED AND MAY BE TRANSFERRED ONLY IN BLOCKS HAVING AN AGGREGATE PRINCIPAL AMOUNT OF NOT LESS THAN $100,000. TO THE FULLEST EXTENT PERMITTED BY LAW, ANY ATTEMPTED

TRANSFER OF SURPLUS NOTES, OR ANY INTEREST THEREIN, IN A BLOCK HAVING AN AGGREGATE PRINCIPAL AMOUNT OF LESS THAN $100,000 AND MULTIPLES OF $1,000 IN EXCESS THEREOF SHALL BE DEEMED TO BE VOID AND OF NO LEGAL EFFECT WHATSOEVER. TO THE FULLEST EXTENT PERMITTED BY LAW, ANY SUCH PURPORTED TRANSFEREE SHALL BE DEEMED NOT TO BE THE HOLDER OF SUCH SURPLUS NOTES FOR ANY PURPOSE, INCLUDING, BUT NOT LIMITED TO, THE RECEIPT OF PRINCIPAL OF OR INTEREST ON SUCH SURPLUS NOTES, OR ANY INTEREST THEREIN, AND SUCH PURPORTED TRANSFEREE SHALL BE DEEMED TO HAVE NO INTEREST WHATSOEVER IN SUCH SURPLUS NOTES.

THE HOLDER OF THIS SURPLUS NOTE, OR ANY INTEREST THEREIN, BY ITS ACCEPTANCE HEREOF OR THEREOF ALSO AGREES, REPRESENTS AND WARRANTS THAT IT IS NOT AN EMPLOYEE BENEFIT, INDIVIDUAL RETIREMENT ACCOUNT OR OTHER PLAN OR ARRANGEMENT SUBJECT TO TITLE I OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED ("*ERISA*"), OR SECTION 4975 OF THE INTERNAL REVENUE CODE OF 1986, AS AMENDED (THE "*CODE*") (EACH A "*PLAN*"), OR AN ENTITY WHOSE UNDERLYING ASSETS INCLUDE "PLAN ASSETS" BY REASON OF ANY PLAN'S INVESTMENT IN THE ENTITY, AND NO PERSON INVESTING "PLAN ASSETS" OF ANY PLAN MAY ACQUIRE OR HOLD THIS SURPLUS NOTE OR ANY INTEREST THEREIN. ANY PURCHASER OR HOLDER OF THE SURPLUS NOTES OR ANY INTEREST THEREIN WILL BE DEEMED TO HAVE REPRESENTED BY ITS PURCHASE AND HOLDING THEREOF THAT IT IS NOT AN EMPLOYEE BENEFIT PLAN WITHIN THE MEANING OF SECTION 3(3) OF ERISA, OR A PLAN TO WHICH SECTION 4975 OF THE CODE IS APPLICABLE, A TRUSTEE OR OTHER PERSON ACTING ON BEHALF OF AN EMPLOYEE BENEFIT PLAN OR PLAN, OR ANY OTHER PERSON OR ENTITY USING THE ASSETS OF ANY EMPLOYEE BENEFIT PLAN OR PLAN TO FINANCE SUCH PURCHASE.

No. 1 $10,000,000

SURPLUS NOTE

Issued: December 1, 2005

American Community Mutual Insurance Company, a Michigan mutual insurance company (the "Company"), for value received, hereby promises to pay to Cede & Co. or registered assigns (the "Note Holder"), the principal amount of $10,000,000 on April 15, 2026 and to pay interest on the outstanding principal amount at the rate of 8.95% percent per annum from the date of issuance until the principal amount is paid in full. Interest which accrues between January 1 through March 31 of a calendar year shall be paid on July 15 of such calendar year; interest which accrues between April 1 and June 30 of a calendar year shall be paid on October 15 of such calendar year; interest which accrues between July 1 and September 30 of a calendar year shall be paid on January 15 of the following calendar year; interest which accrues between October 1 and December 31 of a calendar year shall be paid on April 15 of the following calendar year. Each January 15, April 15, July 15 and October 15 shall be an "Interest Payment" date. All accrued but unpaid interest on the amount of principal which is paid at maturity shall be paid on the date such principal payment is made. Payment shall be on the terms and subject to the conditions set forth in this Surplus Note. Interest shall not compound and shall be computed on the basis of a year of twelve thirty-day months. Notwithstanding the foregoing or anything to the contrary herein contained or implied, principal of and any interest on this Surplus Note shall be (i) payable solely from "surplus earnings" (as such term is defined by the Michigan Office of Financial and Insurance Services, hereinafter "OFIS"), (ii) subject to the prior approval of the Board of Directors of the Company and the OFIS therefor, and (iii) subject to any other restrictions set forth under the applicable insurance laws of the State of Michigan (the foregoing, collectively, the "Payment Restrictions"). Subject to satisfaction of the Payment Restrictions, payment of principal and any interest then due shall be made to the Trustee for the benefit of the Note Holders at the place and in the manner set forth in the Indenture.

This Surplus Note shall not be a liability or claim against the Company or any of its assets, except as provided in this Surplus Note. This Surplus Note does not confer any rights upon the Note Holder other than the right to receive payment of principal and interest on the terms and subject to the conditions set forth in this Surplus Note, including the Payment Restrictions.

This Surplus Note is one of a duly authorized issue of surplus notes of the Company (collectively, the "Surplus Notes") issued under the Indenture, dated as of December 1, 2005 (the "Indenture"), between the Company and JPMorgan Chase Bank, National Association, as Trustee (in such capacity, the "Trustee," which term includes any successor trustee under the Indenture), to which Indenture and all indentures supplemental thereto reference is hereby made for a statement of the respective rights, limitations of rights, duties and immunities thereunder of the Company, the Trustee, the holders of Senior Obligations (as defined below) and the Note Holders and of the terms upon which the Surplus Notes are, and are to be, authenticated and delivered.

Subject to the Payment Restrictions, the Company at its option, may repay all or any part of this Surplus Note on any Interest Payment Date on or after April 15, 2016 at the outstanding principal amount plus the interest accrued thereon to the date of repayment fixed by the Company in accordance with the Indenture. All partial payments of principal and interest shall be made by the Company to the Note Holder without presentment of this Surplus Note or endorsement of such payment. The final payment of principal and interest shall be made only on surrender of this Surplus Note at the office of the Trustee. If the Company gives notice to the Note Holder setting forth a date and place for such final payment and surrender of the Surplus Note, this Surplus Note shall not bear interest after such date. All payments and notices shall be mailed to the Note Holder as provided in the Indenture.

By acceptance of this Surplus Note, the Note Holder agrees that the payment of principal and interest hereunder is expressly subordinated to claims of creditors and members of the Company and any other priority claims provided by Chapter 81 of the Insurance Code (the "Senior Obligations") which provides that surplus notes are at the eighth level of priority. If the Company is dissolved and there are insufficient assets to pay in full the principal and interest due on all outstanding Surplus Notes, then the Company shall pay on the Surplus Notes pro rata on the basis of the outstanding principal amount of each Surplus Note and the interest accrued thereon. Regardless of the issuance date of this Surplus Note or any other surplus note of the Company this Surplus Note shall be of equal rank with any other surplus note, unless such other surplus note is expressly subordinated to this Surplus Note. Each Note Holder (a) agrees to be bound by such provisions, (b) authorizes and directs the Trustee on his or her behalf to take such actions as may be necessary or appropriate to effectuate the subordination so provided and (c) appoints the Trustee his or her attorney-in-fact for any and all such purposes.

No recourse under this Surplus Note shall be had against any member, officer or director of the Company, either directly or through the Company, by virtue of any statutes, by enforcement of any assessment or otherwise. By acceptance of this Surplus Note, the Note Holder waives and releases any liability of or claims against such members, officers, and directors under this Surplus Note.

The Company, the Trustee and any agent of the Company or the Trustee may treat the person in whose name this Surplus Note is issued as the owner of this Surplus Note for all purposes including payment of principal and interest. No transfer of this Surplus Note shall be valid for any purpose until all transfer restrictions have been satisfied and such transfer shall have been recorded as provided in the Indenture.

Unless the Certificate of Authentication hereon has been executed by the Trustee by manual signature, this Surplus Note shall not be entitled to any benefit under the Indenture or be valid or obligatory for any purpose.

The Company and, by its acceptance of this Surplus Note or a beneficial interest herein, the Note Holder of, and any Person that acquires a beneficial interest in, this Surplus Note agree

IN WITNESS WHEREOF, American Community Mutual Insurance Company has caused the Surplus Note to be executed by its duly authorized officer as of this 1st day of December, 2005.

Attest

By ____________________
Its Treasurer and Chief Financial Officer

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY

By: ____________________
Its: Chief Executive Officer

This is one of the Surplus Notes referred to in the within mentioned Indenture.

Dated: December 1, 2005

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,
as Trustee

By:__________________________

Authorized Signatory

CHI 3387142v 1

II(A)

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY
OFFICERS' CERTIFICATE

Each of the undersigned hereby certifies that the undersigned is the President and Chief Executive Officer of American Community Mutual Insurance Company, a Michigan insurance company (the "Company"), or the Chief Financial Officer and Treasurer of the Company, and further certifies on behalf of the Company, pursuant to Section 5(b) of the Placement and Purchase Agreement, dated as of December 1, 2005 (the "Purchase Agreement"), among Cochran Caronia Securities LLC, the Company, and Credit Suisse, acting through its Cayman Islands Branch (the "Purchaser"), as follows:

1. Since the dates as to which information is given in the most recent Financial Statements, except as disclosed in the Schedules to the Purchase Agreement, there has been no Material Adverse Effect.

2. The representations and warranties contained in Section 1 of the Purchase Agreement were true and correct when made and are true and correct with the same force and effect as though expressly made on and as of the Closing Date.

3. The Company has complied with all agreements and satisfied all conditions on its part to be performed or satisfied as contemplated by the Transaction Documents on or prior to the Closing Date.

Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Purchase Agreement.

IN WITNESS WHEREOF, each of the undersigned has executed this certificate as of this 1st day of December, 2005.

Name: GERALD MEACH
Title: President and Chief Executive Officer

Name: MICHAEL GRANDSTAFF
Title: Senior Vice-President, Treasurer and Chief Financial Officer

Exhibit C

STATE OF MICHIGAN

IN THE CIRCUIT COURT OF THE COUNTY OFINGHAM

KEN ROSS, COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE REGULATION,

Petitioner,

Case No.10-397-CR

Hon.William E. Collette

vs.

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Respondent.

State of Alabama)
)
County of Jefferson)

AFFIDAVIT OF CAROLYN R. THAGARD

Carolyn Thagard, being first duly sworn, deposes and states:

1. I have personal knowledge of the facts stated herein and am competent to so testify.

2. A copy of the surplus note was previously submitted to this Court. The surplus note was originally issued by American Community to a Credit Suisse affiliate, which held the note briefly before transferring it to Trapeza CDO IX, Ltd. and Trapeza CDO X, Ltd. ("Trapeza") at a price in excess of 99% of par value. Therefore, the statement on page 2 of the Former Officers' Brief in Response to Trapeza's Brief that "it must be assumed that the purchase was at a substantial discount from face value" is false.

3. Trapeza purchased surplus notes and other securities issued by insurance companies and banks that sought additional capital and surplus for growth or other strategic

initiatives. At no time did it sell mortgage-backed collateralized debt obligations of the type disparaged by the Former Officers on page 1 of their Brief.

Further affiant sayeth not.

Carolyn R. Thagard
Trapeza Capital Management

MEAGAN HUGHES
NOTARY PUBLIC
ALABAMA STATE AT LARGE

Subscribed before me this
3rd day of August, 2012.

Notary Public

LAN01\265622.2
ID\LMSI - 108784\0001

Exhibit D

The Securitization of Surplus Notes by Property and Casualty Insurers: Empirical Evidence

Tao Zhang
Cohen Bros. & Company
1818 Market St., 28th Floor
Philadelphia, PA 19103

Larry A. Cox
School of Business
University of Mississippi
University, MS 38677

This version: July 7, 2006

The Securitization of Surplus Notes by Property and Casualty Insurers: Empirical Evidence

Abstract

Surplus notes have been utilized by insurers for decades, although large insurers dominated in this market long ago. Lately popular securitization deals revive surplus notes as an efficient financing device for small and mid-sized insurers to tap capital markets at a reasonable cost. This paper intends to fill in the gap never touched by the prior studies by investigating what factors determine the insurers' decisions to securitize their surplus notes and what are the underlying rationales of surplus notes securitization. After implementing several models on censoring data, our results show that insurers' size, organization form, and risk-based capital position significantly affect the participation decision made by insurers to securitize surplus notes, while the size and organization form impact the volume decision in a different way from they do the participation decision. In addition, the rating agency's ratings significantly affect both participation and volume decisions. Overall, our results suggest that deductions of financial distress costs and agency costs are important incentives for insurers to securitize their assets/liabilities.

Keywords: surplus notes, hybrid capital, insurance company, securitization

JEL Classification: G22, G32

1. Introduction

One important trend occurred recently in insurance industry is the convergence of insurance markets and financial markets by securitization. Several studies (Doherty, 1997; Doherty and Schlesinger, 2002; Cummins, Lalonde, and Philips, 2004; Cowley and Cummins, 2005; Iacobucci and Winter, 2005) have intended to analyze the economics of innovations regarding catastrophic risk (CAT) securitization, assets-backed securitization (ABS), and XXX reserve securitization by life insurers.

Since the year of 2002, securitization of surplus notes has sparked resurgence in the issuance of these hybrid notes by insurers. As unsecured indenture deeply subordinated to policyholder claims and other indebtedness, surplus notes have been widely used by insurers for several decades. However, based on a study by A.M. Best in 2003 (A.M. Best, 2003), issuers of surplus notes with large face amount and long maturity in 1990's were usually biggest insurers that had more access to capital markets, while small or mid-size insurers could only issue surplus notes in relatively small denomination and short maturity. At the same time, surplus notes are not regarded as an effective financing device to raise capital for small or mid-sized insurers, who traditionally lack channels to capital markets. With the inception of the first insurance collateralized debt obligation (CDO), the securitized interest in the pool of collaterals such as bonds and loans in 2002, the securitization of surplus notes receives warm welcome in small and mid-sized insurers as they obtain a sesame door to capital markets at reasonable costs. According to Fitch Ratings' survey (Fitch Ratings, 2005), thirteen insurance CDO offerings with $3.76 billion assets had been completed from December

2002 to December 2004, of which surplus notes and trust preferred securities account for 30% and 70%, respectively.

Dumm and Hoyt (1999) provide the first empirical study about surplus notes issuance by life insurers during 1992 to 1995, but this unique hybrid security receives little attention in the academia under the background of securitization. Therefore, the reasons for insurers' renewed interest in issuing surplus notes are unclear based upon both scholarly research and industry reports. Under the assumptions of perfectly efficient capital markets, securitization of surplus notes would not add insurers' value and therefore insurers should have no incentives to securitize. Nevertheless, if any assumption underlying perfect markets is violated in the reality, insurers are willing to securitize driven by friction reduction and utility maximization. Several hypotheses have been proposed by researchers (Doherty, 1997; Doherty and Schlesinger, 2002; Cummins, Lalonde, and Philips, 2004; Cowley and Cummins, 2005; Iacobucci and Winter, 2005) about incentives of securitization by insurers and other financial institutes. They argue that in the presence of bankruptcy costs, information asymmetry, agency costs, and regulation costs, securitization may help insurers mitigate these costs and add some value to firms. Empirical studies on hybrid securities in the banking industry deliver supports to these hypotheses to some extents, and they find that banks use securitization generally to mitigate tax burdens (Engel, Erickson, and Maydew, 1999), financial distress costs (Benston, Irvine, Rosenfeld and Sinkey, 2003; Harvey, Collins, and Wansley, 2003; Sironi, 2003), and regulatory scrutiny (LaCour-Little, and Sander, 2004).

The increasing popularity of surplus notes securitization over last four years prompt us to explore the logic behind the phenomenon and examine the above hypotheses for the insurer universe. Hence, the significant relation between surplus notes securitization and firm characteristics related to financial distress costs, information asymmetry, agency costs, and regulatory costs, will illustrate how the surplus notes securitization is motivated. However, little work has been done on how surplus notes securitization is driven by firm characteristics, especially for property-casualty (P-C) insurers, although P-C insurers issued 75% total assets of insurance CDOs from December 2002 to June 2004 (Fitch Ratings, 2005). Therefore, P-C insurers provide a good arena to study factors driving securitization of surplus notes.

In this paper, we examine the characteristics of insurers that lead to activity in the issuance of securitized surplus notes issues. The purpose of this study is to investigate what factors determine insurers' decision to participate in securitization of surplus notes, and furthermore, how these factors affect issuers' decision - how much surplus notes they should issue in the pool. Following Cummins, Philips, and Smith's (2001) study on derivative usage by insurers, we distinguish the participation and volume decision in the securitization of surplus notes issuance. Moreover, our study will shed some lights on the economic rationale of surplus notes securitization by insurers. Using a sample of 1686 P-C insurers consisting of 45 surplus notes issuers and 1641 non-issuers in insurance CDO deals during year 2003, we empirically test the effects of firm characteristics, including size, financial strength rating, organization form, leverage, and risk-based capitalization, on the insurers' decisions to engage in surplus notes securitization.

Our results indicate that insurers with larger size, weaker risk-based capital position, and mutual insurers are more likely to issue surplus notes. On the other hand, we find that smaller insurers, stock insurers, group affiliated insurers, and insures with marginal A.M. Best's ratings issue more surplus notes after deciding to issue. Overall, our results provide strong support to the financial distress hypothesis, and marginal support to the agency costs and asymmetric information hypotheses. Our analysis has important implication for how regulators should regulate the issuance of surplus notes and how rating agencies control credit risk of issuers by insurer's characteristics such as size and organization form.

The rest of paper is organized as follows. In part 2, we introduce the background about securitization of surplus notes and review the previous research on the surplus notes issuance. We disclose the potential determinants of securitized surplus notes issuance in part 3. We then describe our data and methodology in part 4. Empirical results are presented in the part 5, and we conclude in part 6.

2. Background and Literature Review

2.1. Standalone Surplus Notes Issues

Surplus notes are unsecured debt obligation issued directly by insurance operating companies and thereby provide double advantages to issuers: the interest payments are tax deductible as surplus notes are reported as debt on a GAAP basis, and at the same time, they are treated as statutory surplus by state regulator and included in the calculation of total adjusted capital (TAC) of RBC ratio by NAIC. Regulators usually treat surplus notes as statutory capital on the basis of not only its deep subordination and unsecured, but also regulator's control on payments to surplus notes. Under the most restrictive condition, some state regulators (e.g. New York and California) require approval for any interest payment and principal repayment of surplus notes before insurers want to do so[1]. As a less rigid form, some state regulators (e.g. New Jersey) permit pre-approval for interest and principal payments on case that insurers have met some explicit requirements[2]. Because of the equity-like nature of surplus notes, the disapproval of interest or principal payments on both two types of surplus notes by regulators is not regarded as default, and interest is cumulative and payable once obtaining approval.

Despite some dividing opinions regarding pre-approval surplus notes between regulators[3], major rating agencies view both types as equity as long as they meet certain criterion on maturity, subordination, and payment restriction. For instance, A.M. Best requires equity-like surplus notes: (1) have a stated maturity of 10 to 30 years; (2) subordinate to policyholders, claimants, beneficiary claims and other classes of creditors; (3) any interest and principal payment is subject to approval of state regulators. Similarly, S&P's considers long maturity (at least 10 years) and structure (subordination and no ongoing payments leading to bankruptcy) to be two basic requisites of equity treatment for surplus notes. On the other hand, to address the hybrid nature of surplus notes, rating agencies only taking account certain percentage of surplus notes in calculating financial ratios. Based on the A.M. Best's continuum, surplus notes usually receive 25% to 50% equity credit of their face amounts. The major three rating agencies (S&P's, Moody's, and Fitch) do not explicitly indicate the amount of equity credit

[1] Despite no specific guideline or interpretation regarding how state regulators determine the payment approval, it is widely held that the insurers' own financial conditions are the underlying bottom line for decision.

[2] Most common requirements include: (1) insurers has not defaulted any claim or indebtedness; (2) no federal or state agency has filed any action (e.g. rehabilitation, liquidation, conservation, or dissolution) on insurers; (3) insurers' RBC ratio must exceed the minimum level after principal repayments.

[3] In December 2003, a NAIC subcommittee tentatively voted that the second form of surplus notes should be accounted for as liability as a result of its pre-approval feature and nominal requirements. However, this decision is never finalized since then.

surplus notes will receive, but they publicly provide their own debt-equity continuum or equity credit list as a reference.

Historically, surplus notes were mainly issued by troubled insurers to policyholders for additional surplus since they usually had no other access to capital. Crippled by their limited access to capital markets, mutual insurers also used surplus notes to relieve the sole dependence on retained earnings to grow their statutory equity. In addition, insurers directed their proceeds from surplus notes towards mitigating operating leverage pressures, retaining additional profitable business in lieu of quota share participations from their reinsurers, funding acquisitions, and refinancing more expensive debt that may not receive equity-like treatment from the rating agencies.

In 1990's, large insurers such as Prudential, MetLife, and New York Life dominated the surplus notes issuance market (Dumm and Hoyt, 1999), as scale of economy made them more efficient to finance externally. Unfortunately, the trickle down effect originating from this large company syndrome became tenuous for small and mid-sized insurers because the hurdles of traditional financing still plagued with the rise of surplus notes. From the issuer's view, fees paid to investment bankers and rating agencies[4] made the costs of standalone debt issuance in small size unaffordable. Vicissitudes of debt markets also made pricing of individual issuance very difficult. From the investor's perspective, surplus notes tend to be rather illiquid instruments due to the absence of an exchange listing and private placement to institutional investors. Therefore, investments on surplus notes issued by small and mid-sized insurers without proven track records were confined to the most sophisticated investors.

[4] A large proportion of small and mid-sized insurers do not obtain public ratings from major rating agencies, so investors usually require rating before the issuance. Furthermore, unfavorable rating change may deteriorate the insurers' financing burden.

Exhibit E

STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of CADILLAC INSURANCE COMPANY In Liquidation.

JENNIFER GRANHOLM, Attorney General of the State of Michigan, ex rel FRANK M. FITZGERALD, Commissioner of Insurance of the State of Michigan,

Petitioner-Appellee,

and

CALIFORNIA INSURANCE GUARANTEE ASSOCIATION; and MICHIGAN PROPERTY & CASUALTY GUARANTEE ASSOCIATION,

Appellees,

v

CADILLAC INSURANCE COMPANY, a Michigan Corporation,

Respondent,

and

EMS ENTERPRISES, INC; ERNEST SOLOMON; PRICE BROTHERS COMPANY; GRIFFIN PIPE PRODUCTS COMPANY; and J. WEBB, INC.,

Respondents-Appellants.

UNPUBLISHED
April 29, 2003

No. 234945
Ingham Circuit Court
LC No. 89-064126-CK

In re CADILLAC INSURANCE COMPANY In Liquidation.

JENNIFER GRANHOLM, Attorney General of the State of Michigan, ex rel FRANK M. FITZGERALD, Commissioner of Insurance of the State of Michigan,

Petitioner-Appellee,

v

No. 237336
Ingham Circuit Court
LC No. 89-064126-CK

CADILLAC INSURANCE COMPANY, a Michigan Corporation,

Respondent,

and

EMS ENTERPRISES, INC; and ERNEST SOLOMON,

Respondents-Appellants.

Before: Donofrio, P.J., and Markey and Murray, JJ.

PER CURIAM.

In Docket No. 234945, respondents, EMS Enterprises, Inc., Ernest Solomon, Price Brothers Company, Griffin Pipe Products Company, and J. Webb, Inc., appeal as of right an opinion and order granting a petition authorizing the processing of insurance claims. In Docket No. 237336, respondents,[1] EMS Enterprises, Inc., and Ernest Solomon, appeal as of right an order approving the associated proposed claims adjudication procedures.

This case arises out of the insolvency of the former Cadillac Insurance Company (Cadillac). Ernest M. Solomon solely owned EMS Enterprises, Inc., which in turn entirely owned Cadillac. Cadillac conducted business in several states including Michigan, Arizona, California, and Mississippi at the time of the insolvency. Conservatorship proceedings

[1] We will use the word "respondents" throughout this opinion to refer to both sets of respondents simply for ease and clarity, despite the fact that the parties constituting respondents in each of the cases are not identical.

commenced in 1989, and the receivership was required to marshal Cadillac's assets, continue operations, and pay appropriate claims pursuant to the then in effect Chapter 78.[2] After a liquidation order was entered, the receiver sent notice of Cadillac's liquidation and proof of claim forms to "all insureds and other persons known or reasonably expected to have or be interested in claims against the Cadillac estate."

The receiver "maintained regular and consistent contact" with guaranty associations including, the California Insurance Guarantee Association (CIGA), the Mississippi Insurance Guaranty Association (MIGA), and the Arizona Property and Casualty Insurance Guaranty Association (APCIGA) (collectively the "CAM Associations") beginning in early 1990 at the inception of the insolvency proceedings. The contacts included conversations concerning the status and amount of ongoing claims paid by the guaranty funds on behalf of the Cadillac estate. Years later, on June 17, 1998, the receiver filed a petition for an order authorizing the receiver to accept for processing the claims of CIGA, MIGA, and APCIGF. The receiver further sought an order declaring that the claims of CIGA, MIGA, and APCIGF were not barred as untimely. The circuit court held that the CAM Associations need not have filed any proof of claim in order to be reimbursed by the receiver. The appeal in docket no. 234945 followed. Subsequently, the circuit court approved the claims adjudication procedures. The appeal in docket no. 237336 followed. As it relates to the CAM Associations and covered claims, the issues in both appeals are the same or equally resolved in the opinion of this Court. With respect to late filed non-covered claims, the issue of timely proof of loss is dealt with separately.

On appeal, respondents argue that the CAM Associations did not file timely claims to Cadillac's assets during the liquidation proceedings, and therefore, dispute the distribution of Cadillac's assets. Respondents further argue that the circuit court erred when it approved the associated proposed adjudication procedures claiming Chapter 78's language bars untimely claims, the deadline was binding, and that assignees and subrogees are subject to the same filing requirements.

Questions of law are reviewed de novo on appeal. *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 528 NW2d 491 (2001). This Court reviews de novo the trial court's interpretation of a statute, which constitutes a question of law. *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 468; 633 NW2d 418 (2001); *Saginaw Co v John Sexton Corp of Michigan*, 232 Mich App 202, 214; 591 NW2d 52 (1998). Furthermore, the circuit court's decisions on the motions below effectively constituted a decision on cross-motions for summary disposition in the case. Thus, this Court reviews a trial court's grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

The distribution of assets of an insolvent insurance company is controlled by statute. When Cadillac began the liquidation process in 1989, the statute in effect was Chapter 78 of the Insurance Code, MCL 500.7800 through MCL 500.7868. As noted above, Chapter 78 was

[2] Chapter 78 was repealed by 1989 PA 302 and required receiverships initiated after January 1, 1990 to commence under the newly enacted Chapter 81. MCL 500.8101. We note that MCL 500.8101(4) specifically directs that proceedings commenced prior to January 1, 1990 "shall be conducted pursuant to former Chapter 78." MCL 500.8101(4).

repealed by PA 1989, No. 302, § 2, effective immediately on January 3, 1990, and was replaced with Chapter 81 of the Insurance Code, MCL 500.8101 *et seq.*[3] Accordingly, the circuit court has applied, and we will review the issue under the former Chapter 78 of the Insurance Code. MCL 500.8101(4).

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). The first criterion in determining intent is the specific language of the statute. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). The fair and natural import of the terms employed, in view of the subject matter of the law, should govern. *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998). The Legislature is presumed to have intended the meaning it plainly expressed. *Nation v WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). Courts may not speculate as to the probable intent of the Legislature beyond the language expressed in the statute. *Cherry Growers, Inc v Michigan Processing Apple Growers, Inc*, 240 Mich App 153, 173; 610 NW2d 613 (2000). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999); *Toth v AutoAlliance International (On Remand)*, 246 Mich App 732, 737; 635 NW2d 62 (2001).

Specifically regarding insurance laws in Michigan, "[t]he Michigan Insurance Code was enacted for the benefit of the public and the insurance laws should be liberally construed in favor of policy holders, creditors and the public." *Murphy v Seed-Roberts Agency, Inc*, 79 Mich App 1, 9; 261 NW2d 198 (1977) citing *Dearborn National Ins Co v Comm'r of Ins*, 329 Mich 107, 118, 44 NW2d 892 (1950); *Comm'r of Ins v American Life Ins Co*, 290 Mich 33, 43-44, 287 NW 368 (1939). As recently as 1998, this Court has followed this longstanding principle when construing insurance laws and policies. *Depyper v Safeco Ins Co of America*, 232 Mich App 433, 441; 591 NW2d 344 (1998).

In order to transact business in the state of Michigan at the time of this case, insurers were statutorily required to be members of the Michigan Property and Casualty Guaranty Association (the association). MCL 500.7911; *Satellite Bowl v MPCGA*, 165 Mich App 768, 771; 419 NW2d 460 (1988).

At the heart of both cases on appeal is respondents argument that the CAM Associations were required, under Chapter 78 of the Insurance Code, specifically MCL 500.7842(1), to file a proof of claim form in addition to those claim forms filed by assigned claimants in order to be reimbursed for amounts they spent on covered claims on behalf of the receiver. We find that the plain language of Chapter 78 is contrary to this assertion.

The applicable statutes demonstrate no requirement of guaranty associations to file any proof of claim to protect their reimbursement rights. It is true that MCL 500.7842(1) does require claimants to file claims "on or before the last date fixed for the filing of claims in the domiciliary proceedings" and it is undisputed that the CAM Associations did not file separate or

---

[3] P.A. 1989, No. 302, § 3, provides in regard to the replacement provisions, "[t]his amendatory act shall take immediate effect, and was approved January 2, 1990 and filed January 3, 1990."

"blanket" proof of claim forms. However, respondents ignore the interplay of the language of MCL 500.7842(1) with other relevant statutes.

The interaction of the relevant statutes reveals that guaranty associations are statutorily assigned the rights of the timely-filed claimants whose claims it thereafter adjusted. In other words, guaranty associations actually stand in the shoes of those individual covered claimants pursuant to MCL 500.7935(2). It clearly states, that:

> *An insured or claimant* entitled to the benefits of this chapter *shall be considered to have assigned to the association,* to the extent of any payment received from the association, *his or her rights against the estate of the insolvent insurer, rights under the policy under which his or her claim arose, and any other rights the insured or claimant may have against another person for payment of the covered claim paid by the association.* MCL 500.7935(2). [Emphasis added.]

By definition, a "covered claim" is a claim that is filed in a timely manner pursuant to MCL 500.7925. Therefore, by operation of MCL 500.7842(1), MCL 500.7925, MCL 500.7935(2), each individual claimant whose claims the CAM Associations paid had filed a timely proof of claim form, and thus the associations succeed to the rights of the underlying individual covered claimant, including the right to recover from the receivership estate. Hence, the CAM Associations need not re-file individual proof of claims forms or "blanket" proof of claim forms.

Moreover, respondents argument that MCL 500.7935 does not support the court's result because it does not provide for the assignment of any rights to out-of-state guaranty associations is error. Clearly, respondent has ignored the plain language of MCL 500.7832 and MCL 500.7837 that together specifically describe and provide for the approval and payment of covered claims, and related expenses incurred by the receiver or ancillary receiver in this state or another.

Respondent also argues that the circuit court erred when it retroactively applied Chapter 81 to this case when Chapter 78 governs the case at bar. As stated above, by operation of MCL 500.8101(4), Chapter 81 does not apply to this case. However, our reading of the circuit court's opinion and order does not support respondents' contention. We find that although the trial court did make a reference to Chapter 81 in the order, the reference was cursory and the trial court in its analysis actually applied Chapter 78. Due to the marginal extent the lower court applied Chapter 81, it is insignificant and does not change the result of this case.

By application of the interaction of the relevant statutes in this case, the circuit court erred in part when it approved the proposed claims adjudication procedures. The circuit court correctly applied Chapter 78 of the Insurance Code and did not deviate from the statutory guidelines concerning covered claims through the CAM Associations. However, respondents correctly point out the limitation of MCL 500.7842(1) as that statute is applied to late filed non-covered claims. Covered claims as defined in MCL 500.7925 do not include claims presented to the receiver after the last date fixed for the filing of claims. MCL 500.7925(1)(c). Therefore, the specific portion of the trial court's order that approves the claims adjudication procedures regarding late non-covered claims violates MCL 500.7342(1) and is vacated. The remaining portion of the order approving the procedures for covered claims is affirmed.

Affirmed in part, vacated in part. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Christopher M. Murray

Exhibit F

467 B.R. 757, 56 Bankr.Ct.Dec. 69
(Cite as: 467 B.R. 757)

H

United States Bankruptcy Court,
D. Delaware.
In re VERASUN ENERGY CORP., et al., Debtors.

No. 08–12606 (BLS).
March 26, 2012.

Background: Chapter 11 debtor objected to proofs of claim filed by four of its former high-level executives who claimed to be owed money under "change in control agreements" that they signed in connection with a pre-bankruptcy merger.

Holdings: The Bankruptcy Court, Brendan Linehan Shannon, J., held that:
(1) the "change in control agreements" were "employment contracts" within meaning of the section of the Bankruptcy Code imposing a cap on claims resulting from the termination of employment contracts, and
(2) the executives' claims resulted from "termination" of those contracts.

Objection sustained.

West Headnotes

[1] Bankruptcy 51 2834

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2832 Post-Petition Claims
51k2834 k. Rejection of executory contract or lease. Most Cited Cases

Bankruptcy Code caps claims resulting from the termination of employment contracts at one year's salary and fringe benefits, plus any earned but unpaid compensation. 11 U.S.C.A. § 502(b)(7).

[2] Bankruptcy 51 2921

51 Bankruptcy
51VII Claims
51VII(E) Determination
51k2921 k. In general. Most Cited Cases

When a claim filed in a bankruptcy case is objected to, the Bankruptcy Code instructs courts to decide if the claim should be allowed against the bankruptcy estate and, if so, in what amount. 11 U.S.C.A. § 502(b).

[3] Bankruptcy 51 2834

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2832 Post-Petition Claims
51k2834 k. Rejection of executory contract or lease. Most Cited Cases

"Damages," as that term is used in the section of the Bankruptcy Code capping claims of an employee for damages resulting from the termination of an employment contract, span the full range of damages known to nonbankruptcy law that result from termination of the contract. 11 U.S.C.A. § 502(b)(7).

[4] Bankruptcy 51 2834

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2832 Post-Petition Claims
51k2834 k. Rejection of executory contract or lease. Most Cited Cases

Term "compensation," as used in the section of the Bankruptcy Code imposing a cap, not to exceed the compensation provided by the employment contract, without acceleration, for one year, plus any unpaid compensation due under the contract, on claims resulting from the termination of employment contracts, encompasses more than mere wages, salaries, or commissions; it also extends to benefits. 11 U.S.C.A. § 502(b)(7).

[5] Bankruptcy 51 2834

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2832 Post-Petition Claims
51k2834 k. Rejection of executory contract or lease. Most Cited Cases

Term "employment contract," as used in the section of the Bankruptcy Code imposing a cap on claims resulting from the termination of employment contracts, refers to a writing that establishes the terms and conditions of an employment relationship. 11 U.S.C.A. § 502(b)(7).

[6] Bankruptcy 51 ⚿2834

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2832 Post-Petition Claims
51k2834 k. Rejection of executory contract or lease. Most Cited Cases

"Change in control (CIC) agreements" executed prepetition by Chapter 11 debtor's high-level executives were "employment contracts" within meaning of the section of the Bankruptcy Code imposing a cap on claims resulting from the termination of employment contracts; before executing CIC agreements, executives had employment contracts with debtor, and these new CIC agreements were part of those contracts, as debtor and executives were parties to both agreements, agreements clearly related to the same subject matter, namely, executives' employment with debtor, even though they were physically separate documents and were signed at different times, CIC agreements, whose purpose was to induce executives to remain in debtor's employ, set forth new terms and conditions that affected the parties' employment relationship, and CIC agreements' key compensation-related provisions and terms were ambiguous on their own and needed the earlier employment contracts for context. 11 U.S.C.A. § 502(b)(7).

[7] Labor and Employment 231H ⚿47

231H Labor and Employment
231HI In General
231Hk47 k. Modification or rescission of contract. Most Cited Cases

Under South Dakota law, employment contracts, like any contract, may be modified by later agreements through adding, subtracting, or altering terms. SDCL § 53–8–7.

[8] Contracts 95 ⚿164

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k164 k. Construing instruments together. Most Cited Cases

Under South Dakota law, a contract and any agreement modifying it may be considered together.

[9] Contracts 95 ⚿236

95 Contracts
95III Modification and Merger
95k236 k. Contracts subject to modification. Most Cited Cases

Contracts are modified by changes in one or more respects which introduce new elements into the details of the contract and cancel others but leave the general purpose and effect undisturbed.

[10] Courts 106 ⚿96(7)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k96 Decisions of United States Courts as Authority in Other United States Courts
106k96(7) k. Particular questions or subject matter. Most Cited Cases

Bankruptcy court decisions from other jurisdictions were not binding on Delaware bankruptcy court.

[11] Labor and Employment 231H ⚿217

231H Labor and Employment
231HIV Compensation and Benefits

231HIV(A) In General
231Hk217 k. Severance pay. Most Cited Cases

Unlike wages that are paid for services rendered, "severance" is meant as compensation for the injury and losses resulting from the employer's decision to terminate the employment relationship.

[12] Bankruptcy 51 2834

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2832 Post-Petition Claims
51k2834 k. Rejection of executory contract or lease. Most Cited Cases

Congress enacted the section of the Bankruptcy Code imposing a cap on claims resulting from the termination of employment contracts in part to limit the effect of the advantage of senior executives, who are particularly well-positioned to provide themselves with generous severance packages, over other unsecured creditors if the company files for bankruptcy. 11 U.S.C.A. § 502(b)(7).

[13] Bankruptcy 51 2834

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2832 Post-Petition Claims
51k2834 k. Rejection of executory contract or lease. Most Cited Cases

Claims of Chapter 11 debtor's former high-level executives, who allegedly were owed money under "change in control (CIC) agreements" executed in connection with pre-bankruptcy merger, resulted from "termination" of their employment contracts, within meaning of section of the Bankruptcy Code imposing a cap on claims resulting from termination of such contracts; CIC agreements explicitly defined what executives were getting as "Severance Benefits" and, beyond the label, contained provisions that commonly appeared in contracts for severance benefits, in that benefits triggered upon executives' termination without cause or upon their leaving for good cause, and to get benefits executives had to release all claims to any further salary or bonus from debtor, and CIC agreements stated that executives received severance pay in lieu of any further salary for periods subsequent to their termination date, such that the pay was not compensation for services already rendered. 11 U.S.C.A. § 502(b)(7).

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OPINION[FN1]

FN1. The Court's jurisdiction over this matter is not in dispute. It exists under 28 U.S.C. §§ 157 and 1334. Venue is also proper here. 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

BRENDAN LINEHAN SHANNON, Bankruptcy Judge.

Before the Court are proofs of claim filed by four former high-level executives at VeraSun Energy Corp., the debtor in these chapter 11 cases. The executives claim to be owed money under "change in control agreements" that they signed in connection with a pre-bankruptcy merger. VeraSun objects to the executives' claims,[FN2] *760 arguing that they exceed the cap that § 502(b)(7) of the Bankruptcy Code imposes on claims resulting from the termination of employment contracts.

FN2. The true objecting party is KDW Restructuring & Liquidation Services LLC, which is the entity empowered to administer VeraSun's plan of liquidation on a post-confirmation basis. But for simplicity's sake the Court uses "VeraSun."

The objection is sustained. The Court holds that the § 502(b)(7) cap applies to the executives' claims because the change in control agreements are part of the executives' employment contracts with VeraSun and the claims flow from the termination of those contracts. The executives' claims must therefore be disallowed to the extent they exceed the cap.

I. BACKGROUND[FN3]

FN3. For the most part, the background facts that follow are meant to provide context. The Court need not, and does not, make any findings of fact beyond those discussed in the "Legal Analysis" section. *See* Fed. R. Bankr.P. 7052 ("The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on *any other motion.*") (emphasis added); *see e.g.* Baker's Carpet Gallery, Inc. v. Mohawk Indus., Inc., 942 F.Supp. 1464, 1468 (N.D.Ga.1996) (noting recital of facts in summary judgment opinion did "not represent actual findings of fact ... [but was] presented simply to place the [c]ourt's legal analysis within the context of a specific case or controversy").

In 2007, South Dakota-based VeraSun was a leading ethanol producer looking to increase its production capacity by acquiring a competitor. One potential target stood out: U.S. BioEnergy, another large ethanol producer based in the Midwest.

A. The Run-up to the Merger

In mid-November 2007, VeraSun's board of directors met for an update on the merger talks between VeraSun and U.S. BioEnergy. Pleased with what they heard, the board directed VeraSun's management to keep working towards a deal. The board then turned to other matters, including a report from the committee on compensation, which had met earlier that day. The committee recommended that, in light of the potential merger, VeraSun should enter into change in control agreements ("CIC Agreements") with some of its senior managers. Under those agreements key managers would commit to stay at VeraSun and see the merger through in exchange for receiving compensation packages if they were later terminated. According to the committee, the CIC Agreements would "reinforce and encourage" management's "attention and dedication" to their jobs without the "distraction arising from the possibility of a change in control" at VeraSun. (Dickey Dec. Ex. 3 pp. 3, 5.) The board agreed and authorized the company to enter into the agreements.

Two weeks later, on November 28, 2007, VeraSun's board met again. The negotiations with U.S. BioEnergy had borne fruit; the board had before it the proposed final terms of a merger. After reviewing the details, the board blessed the transaction, resolving unanimously to approve it. That same day, and "in connection with the merger," (Dickey Dec. Ex 1 p. 84), eight of VeraSun's senior executives signed CIC Agreements with the company. Among them were Donald Endres, VeraSun's Chief Executive Officer, Danny Herron, its Chief Financial Officer,[FN4] and William Honnef and Barry Schaps, both Senior Vice Presidents (together, the "Executives"). Each of these individuals worked at VeraSun under an at-will employment contract (the "Employment Contracts"; *see* Endres Dec. Exs. 1–5) that described his job responsibilities, salary, and benefits. And each had participated to some degree in the meetings that led to the board approving both the merger and the CIC Agreements.

FN4. In addition to being CFO, Herron became President of VeraSun in January 2008.

*761 *B. The Change in Control Agreements*

The CIC Agreements themselves were virtually identical. They began by recognizing that "the possibility of a change in control" at VeraSun could create enough "uncertainty and questions" among management to cause managements' "departure or distraction," and thus harm the company. (CIC Agr. p. 1.[FN5]) To stave off that threat, the CIC Agreements provided the Executives with compensation packages—defined in the agreements as "Severance Benefits"—generous enough to "induce [them] to remain" at VeraSun until the merger with U.S. BioEnergy was either completed or called-off. (*Id.*) If the Executives were terminated without cause within two years of the merger closing, the benefits under the CIC Agreements came due.

FN5. For an example of a CIC Agreement see Exhibit 1 to the Executives' Response. [Dkt. No. 2542.]

Those benefits included a cash payment from VeraSun to the Executives equal to two times—or three times in the case of CEO Endres—their base salary and target annual bonus. That payment represented "severance pay and [was] in lieu of any further salary for periods subsequent to the Date of Termination." (*Id.* § 5(iii)(B).) The Executives were also guaranteed continued medical benefits and payment for unused vacation. Any unvested equity awards would vest, as would VeraSun's matching contributions under the company's 401(k) plan.

The CIC Agreements further guaranteed that once the merger occurred VeraSun could not change an Executive's position, duties, compensation, benefits, or work location, without entitling him to end his employment for "good reason" and to collect his compensation package. (*Id.* § 4.) Conversely, an Executive terminated "for cause" would forfeit his compensation package. (*Id.* §§ 4(iii), 5(ii).)

C. The Merger and VeraSun's Bankruptcy Filing

On the morning of November 29, 2007, less then twenty-four hours after the Executives signed the CIC Agreements, VeraSun and U.S. BioEnergy executed the final merger documents. The companies then issued a press release announcing their intended union. That event qualified as a "Potential Change in Control" under the CIC Agreements, triggering the Executives' commitment not to leave the company. Six months later, a shareholder vote made the merger official, putting VeraSun on the fast-track to becoming the largest producer of corn-based ethanol in the world.

Unfortunately, by the fall of 2008 a worldwide economic crisis had set-in, severely contracting demand for VeraSun's ethanol. With its fuel fetching dramatically lower prices in the marketplace, VeraSun could not afford to buy corn at the prices it had previously agreed to pay. That Halloween, VeraSun filed a chapter 11 bankruptcy petition in this Court.

After ruling out a bankruptcy reorganization, VeraSun's representatives proposed, and the Court permitted, a series of sales to take place that disposed of substantially all of the company's assets. Leftover assets were to be liquidated and the proceeds distributed to VeraSun's creditors through its plan of liquidation.

As for the Executives, Herron and Schaps were terminated soon after the petition date. Endres and Honnef, stayed on at VeraSun until May 2009, when they too were let go. All four men filed timely *762 proofs of claim in VeraSun's bankruptcy case [FN6] asserting that they are owed money under the CIC Agreements. Taken together the Executives' claims exceed $7.3 million. VeraSun timely objected to all four proofs of claim.

FN6. The proofs of claim at issue are Claim No. 2976 (Herron), Claim No. 1915 (Endres), Claim No. 2680 (Honnef), and Claim No. 3219 (Schaps).

II. THE PARTIES' ARGUMENTS

[1] VeraSun does not dispute that its merger with U.S. BioEnergy qualifies as a "change in control" as that term is defined in the CIC Agreements. Nor does it take the position, for today at least, that the Executives should get nothing for their claims. Rather, VeraSun contends that the Executives are asking for more money than what the Bankruptcy Code allows them to recover. It posits that the CIC Agreements are employment contracts, and points out, correctly, that § 502(b)(7) of the Code caps claims resulting from the termination of employment contracts at one year's salary and fringe benefits (plus any earned but unpaid compensation). Because the Executives' claims exceed that amount, VeraSun reasons that they must be reduced and the surplus disallowed.

The Executives quarrel with that logic, especially the notion that the CIC Agreements are employment contracts. The CIC Agreements do not, according to the Executives, contain the usual marks of such a contract. For instance, "[t]hey do not address pay ... define duties ... [or] set forth a term of employment." (Exec. Resp. ¶ 13.) They are instead "stand-alone 'stay in place' agreements, designed to keep" key managers in place and working hard during an uncertain time at the company. (*Id.*) This the Executives say they did by remaining at VeraSun until the merger closed. They figure their claims "are for amounts already earned, ... services already performed, ... consideration already received," (*Id.* ¶ 23) and so do not "fall within the forward looking scope of § 502(b)(7)." (*Id.* ¶ 32.)

III. LEGAL ANALYSIS

[2] When, as here, a claim filed in a bankruptcy case is objected to, the Bankruptcy Code instructs courts to decide if the claim should be allowed against the bankruptcy estate, and if so, in what amount. 11 U.S.C. § 502(b). The vast majority of claims are allowed in the full amount permitted under nonbankruptcy law. *See In re S. Side House, LLC,* 451 B.R. 248, 260 (Bankr.E.D.N.Y.2011). Others are capped at amounts set by the Bankruptcy Code itself, regardless of what non-bankruptcy law would permit.[FN7]

FN7. While a "*claim* is for the total available under substantive nonbankruptcy law[,] ... the *cap* ... defines how much of the ... claim will be allowed to be paid by the bankruptcy estate[.]" *Young v. Condor Sys., Inc. (In re Condor Sys., Inc.)*, 296 B.R. 5, 12 (9th Cir. BAP 2003) (emphasis in original, quotation marks omitted).

[3][4] For instance, Bankruptcy Code § 502(b)(7) caps "claim[s] of an employee for damages [FN8] resulting from the termination of an employment contract." 11 U.S.C. § 502(b)(7).[FN9] Those claims cannot *763 exceed "the compensation [FN10] provided by [the employment] contract, without acceleration, for one year ... [plus] any unpaid compensation due under [the] contract, without acceleration...." *Id.*

FN8. "Damages," under § 502(b)(7) "span[ ] the full range of damages known to nonbankruptcy law that 'result' from 'termination of an employment contract.' " *Condor*, 296 B.R. at 12.

FN9. In pertinent part, § 502(b)(7) provides:

> If [an] objection to a claim is made, the court ... shall determine the amount of such claim as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—
>
> (7) if such claim is the claim of an employee for damages resulting from termination of an employment contract, such claim exceeds—
>
> (A) the compensation provided by such contract, without acceleration, for one year following the earlier of—
>
> (i) the date of the filing of the petition; or
>
> (ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus
>
> (B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates.

FN10. "Compensation" under § 502(b)(7) encompasses more than mere wages, salaries, or commissions; it also extends to benefits. *In re Condor*, 296 B.R. at 12; *see Anthony v. Interform Corp.*, 96 F.3d 692, 695 (3d Cir.1996) (citing *In re Johnson*, 117 B.R. 461, 465 (Bankr.D.Minn.1990)) (finding a terminated employee's claim for damages limited by § 502(b)(7) to "one year's pay plus benefits").

To decide whether the § 502(b)(7) cap applies to the Executives' claims here, the Court first considers whether the CIC Agreements are "employment contracts" under § 502(b)(7). If they are, the next question is whether the Executives' claims result from the termination of those contracts. For the reasons that follow, the Court finds that the answer to both questions is yes. The § 502(b)(7) cap therefore applies to the Executives' claims and they must be reduced accordingly.

A. The CIC Agreements and the Employment Contracts Form a Single Contract

[5][6] Section 502(b)(7) concerns claims resulting from the termination of an employment contract. Although the Bankruptcy Code does not define the term "employment contract," courts have defined it as a writing that "establishes the terms and conditions of an employment relationship." *In re FairPoint Commc'ns, Inc.*, 445 B.R. 271, 273 (Bankr.S.D.N.Y.2011) (quoting *In re The Charter Co.*, 82 B.R. 144, 146 (Bankr.M.D.Fla.1988)); *see also In re WorldCom, Inc.*, 361 B.R. 675, 682 (Bankr.S.D.N.Y.2007) (providing non-exhaustive list of factors [FN11] to determine if an employment contract exists under § 502(b)(7), typically used where claimant professes to be an independent contractor). Here, the parties agree that the Executives had employment contracts with VeraSun (*i.e.*, the Employment Contracts). But they disagree over whether the CIC Agreements are a part of those contracts. The Court finds that they are.

FN11. Those factors include (a) how the agreement is titled, (b) if the agreement identifies job responsibilities, (c) if the agreement provides the terms for compensa-

> tion and benefits, (d) if withholding taxes and social security benefits are deducted from pay, (e) if the agreement constrains the "employee" from certain other activities, (f) if the agreement is not assignable, (g) if the debtor had the right to control the activities of the "employee," and (h) the amount of hours the "employee" needed to devote to the debtor's business per year. *In re WorldCom, Inc.*, 361 B.R. at 682.

[7][8] Employment contracts, like any contract, may be modified by later agreements through adding, subtracting, or altering terms. South Dakota law, which governs both the CIC Agreements and the Employment Contracts, recognizes this. S.D. Codified Laws § 53–8–7 (2011) ("a contract in writing may be altered by a[nother] contract in writing...."). And it is black letter law that a contract and any agreement modifying it may be considered together. As one treatise puts it, "When the same parties execute two instruments concerning the same subject matter, they may, under some circumstances, be regarded as one contract and construed together, whether made simultaneously*764 or on different days." 11 R. Lord, *Williston on Contracts* § 30:4 (4th ed. 2011) (citing *Baltzer v. Raleigh & A.A.L.R. Co.*, 115 U.S. 634, 6 S.Ct. 216, 29 L.Ed. 505 (1885)); *see also Talley v. Talley*, 566 N.W.2d 846, 851 (S.D.1997) (recognizing that "writings connected by internal references to each other and involving the same subject matter constitute a single contract for the entire transaction").

The circumstances of this case warrant considering the Employment Contracts and the CIC Agreements as one contract. The Executives and VeraSun were parties to both agreements. Though physically separate documents and signed at different times, they clearly relate to the same subject matter: the Executives' employment at VeraSun. Indeed, the point of the CIC Agreements was to "induce [the Executives] to remain in [VeraSun's] employ" and committed to their "assigned duties." (CIC Agr. p. 1.) But the CIC Agreements do more than passingly refer to a pre-existing employment relationship, they also set forth new terms and conditions that affect that relationship. For example, the Executives agreed they would not "leave the employ of the [c]ompany" and would to continue to serve as officers during the run-up to the merger. (*Id.* § 1(ii).) They also signed a "Confidentiality and Assignment Agreement," which was explicitly incorporated by reference into the CIC Agreements, and which included non-compete and non-solicitation provisions. And they agreed to release any future claims against VeraSun for salary or benefits. In return, the Executives became eligible for a generous compensation package if they were terminated after a change in control. They also received certain guarantees that, even if they were not terminated, their current positions, duties, compensation, and work location would not change much. If they did change, the Executives could unilaterally terminate their employment for "good cause" and walk away with their full compensation packages. In at least these ways the CIC Agreements altered—not entirely, but significantly—the employee-employer relationship between the Executives and VeraSun.

Moreover, the CIC Agreements' key provisions and terms—the ones describing compensation—are ambiguous on their own; they need the Employment Contracts for context. For example, the Executives were promised a cash payment based on a multiple of their "annual base pay at the rate in effect" just before they received their termination notices. (CIC Agr. § 5(iii)(B).) But the CIC Agreements do not say what that rate is. The same thing goes for terms like "salary," "bonus," "benefits," and "assigned duties," which also appear undefined in key provisions of the CIC Agreements. Indeed, how would VeraSun know the amount to pay the Executives for "any vacation time earned but not taken," (*id.* § 5(iii)(C)), when the CIC Agreements are otherwise silent on the issue of how much vacation time the Executives "earned?" To figure out what those terms mean, to give them content, one must look elsewhere—to the Employment Contracts. The Executives themselves admit this:

> Job responsibilities are not defined or described [in the CIC Agreements]; they can only be determined by reference to actual employment contracts. The terms of compensation and benefits are also not defined or described. They, too, are created by other documents, and can only be determined by reference to those documents.

(Exec. Reply ¶ 45.)

The CIC Agreements also contain a "Related Agreements" section, which states that all "other agreements" between the Executives and VeraSun—Employment Contracts included—"shall remain in force." (CIC Agr. § 13.) If provisions conflict, the CIC Agreements trump the *765 Employment Contracts "as if [the latter] had been formally amended to the extent necessary to" fix the conflict. (*Id.*)

[9] For all these reasons, the Court finds that the CIC Agreements merely modify the Employment Contracts. Contracts are modified by "changes in one or more respects which introduce[ ] new elements into the details of the contract and cancel[ ] others but leave[ ] the general purpose and effect undisturbed." *Intn'l Bus. Lists, Inc. v. AT & T,* 147 F.3d 636, 641 (7th Cir.1998) (applying Illinois law). Just so here. The CIC Agreements introduced a slew of "new elements" and provisions into the employment relationship between the Executives and VeraSun. Those provisions implicitly refer back to the Employment Contracts to fill-in key details that the CIC Agreements themselves omit. On top of that, the CIC Agreements acknowledge other agreements between the parties and provide for them to be reconciled with the CIC Agreements. Under these circumstances, the Court concludes that the CIC Agreements and the Employment Contracts should be read together as one contract.

[10] The Executives say that no other court has found a stand-alone change in control agreement to be an employment contract. They highlight instead the First Circuit's opinion in *Mason v. Official Comm. of Unsecured Creditors (In re FBI Distribution Corp.),* 330 F.3d 36, 41 (1st Cir.2003), which notes that bankruptcy court below refused to apply the § 502(b)(7) cap to an executive's claim under a retention agreement because that agreement was separate from her employment contract. While the facts in *FBI* appear to align with the facts here, relying on that case has its problems. First, the bankruptcy court's decision against applying the cap to the retention agreement claim was not before the court on appeal, so the opinion has nothing of substance to say about it. *Id.* at 41 n. 7; *see also Condor,* 296 B.R. at 19 (noting that the issue was "present but not resolved" in *FBI*). Second, bankruptcy court decisions from other jurisdictions do not bind this Court.

Having found that the CIC Agreements are "employment contracts" as contemplated by § 502(b)(7), the Court next explains why the Executives' claims under those agreements are claims for "damages resulting from the termination" of that contract, such that the cap applies to them.

B. The Executives' Claims are for Unpaid Severance Benefits and so are Subject to the § 502(b)(7) Cap

[11][12] Courts considering the policy behind § 502(b)(7) have said that the section "was designed to limit the claims of key executives who had been able to negotiate contracts with very beneficial terms." *Protarga Inc. v. Webb (In re Protarga Inc.),* 329 B.R. 451, 465 (Bankr.D.Del.2005) (quoting *In re Cincinnati Cordage & Paper, Co.,* 271 B.R. 264, 269 (Bankr.S.D.Ohio 2001)); *accord In re CPT Corp.,* No. 4–90–5759, 1991 WL 255679, at *5 (Bankr.D.Minn. Nov. 26, 1991) ("[S]ection 502(b)(7) was intended to protect the estate from the burdensome claims of key executive employees who were able to exact high salaries and favorable terms in their employment contracts."). It should thus come as no surprise that senior executives' claims for severance pay, which is "money—apart from back wages or salary—paid by an employer to a dismissed employee," have been capped by § 502(b)(7). *Black's Law Dictionary* 1498 (9th ed. 2009) (defining "severance pay" and noting that severance "may be made in exchange for a release of any claims that the employee might have against the employer"). Unlike wages that are paid for services rendered, severance is meant "as compensation for the injury and losses resulting from the employer's decision to *766 terminate the employment relationship." *Matson v. Alarcon,* 651 F. 3d 404, 409 (4th Cir. 2011) (discussing severance pay under § 507 of the Bankruptcy Code); *see Harrington v. Dornier Aviation, Inc. (In re Dornier Aviation, Inc.,)* 305 B.R. 650, 654 (E.D.Va.2004) (discussing policy behind cap and observing it "clearly limits an employee's claim for severance pay, as this is in effect a claim for prospective compensation that is accelerated as a result of the termination."). Because both the amount of severance employees receive and "the triggering events allowing [them] to receive [it] lie within the employer's control," *Matson,* 651 F. 3d at 409, senior executives are particularly well-positioned to provide themselves with generous severance packages. They therefore enjoy a distinct advantage over other unsecured creditors, including other employees, who cannot easily adjust their claims to the company's assets. Congress enacted § 502(b)(7) in part to limit the effect of that advantage if the company files for bankruptcy.

For example, in *Protarga* the debtor's CEO had a provision in his employment contract entitling him to "a severance benefit equal to 300% of the sum of his then current Base Salary; and his then-applicable Bonus Opportunity," plus more, if he was terminated after a change in control at the company. When that change came about, the CEO filed a proof of claim in the bankruptcy case for roughly $2.6 million in unpaid severance benefits. The court held that § 502(b)(7)'s cap applied and allowed only about $400,000 of the claim. *See also* Cincinnati Cordage, 271 B.R. at 269 (applying cap to employment contract providing executive with severance upon termination at three times his annual base salary); *accord* CPT, 1991 WL 255679, at *5 (applying cap to executive's severance payment); *Dornier Aviation,* 305 B.R. at 656 (same); *In re Uly–Pak, Inc.,* 128 B.R. 763, 769 (Bankr.S.D.Ill.1991) (same).

[13] Even though the CIC Agreements contain nearly identical language to that before the court in *Protarga,* the Executives protest that *Protarga* "present[s] a completely different situation" than this case. (Exec. Resp. ¶ 17.) The § 502(b)(7) cap should not apply to their claims, they say, because the cap is meant to limit claims for future compensation, not "claims for which the employer has received all the consideration for which it bargained." (*Id.* ¶ 31) (quoting *In re Lavelle Aircraft Co.,* Bankr.No. 94–17496DWS, 1996 WL 226852, at *5 (Bankr.E.D.Pa. May 2, 1996).) The Executives assert that because they stayed at VeraSun, worked hard, and saw the merger through, they lived up to their end of the bargain. So they believe their claims are for "amounts already earned, ... services already performed, ... [and] consideration already provided." (*Id.* ¶ 23.) When they were terminated "all of the conditions for payment [had] occurred," making "100% of the compensation provided under the [Agreements] ... due, without acceleration...." (*Id.* ¶ 34.) The Executives liken their claims to those of former employees for previously vested retirement benefits or deferred compensation owed to retirees, both instances where courts have found the § 502(b)(7) cap not to apply. *See e.g. Folsom v. Prospect Hill Res., Inc. (In re Prospect Hill Res., Inc.),* 837 F.2d 453, 454–55 (11th Cir.1988) (vested retirement benefits); *Lavelle Aircraft,* 1996 WL 226852 at *3–6 (deferred compensation owed to retirees). But for two reasons this line of argument is a dead end.

First, the CIC Agreements explicitly define what the Executives are getting as "Severance Benefits." (CIC Agr. § 5(iii).) But even beyond that label, the agreements contain provisions that, in this Court's experience, commonly appear in contracts for severance benefits. For instance, the benefits trigger upon the Executives'*767 termination without cause or upon their leaving for good cause, the latter of which is not alleged here. And to get the benefits the Executives had to release all claims to any further salary or bonus from VeraSun.

Second, the CIC Agreements' key compensation provision states that the Executives receive this "severance pay ... *in lieu of any further salary for periods subsequent to the Date of Termination.*" (*Id.* § 5(iii)(B) (emphasis added).) Such "prospective compensation" paid on termination is not compensation for services already rendered. *Dornier Aviation,* 305 B.R. at 654–55.

For example, in *In re Netbank, Inc.,* No. 3:07–bk–04295, 2010 WL 5296952 (Bankr.M.D.Fla. March 11, 2010), a chief restructuring officer's employment contract with the debtor provided for a large "termination payment" if he was let go before his term of employment ended. When he was let go, he filed a claim for that payment. He argued that the cap should not apply because "the termination payment [was] not future compensation which would have been earned if he had not been terminated." *Id.* at *7. Rather, he claimed it was "simply unpaid compensation due under the Employment Agreement." *Id.* The court disagreed and applied the cap.

While this Court appreciates the economic impact today's ruling will have on the Executives, it cannot ignore the plain language of the CIC Agreements and pretend that the "Severance Benefits" are really something else. Nor does the Court find a good reason to depart from the long line of cases applying the § 502(b)(7) cap to such payments. Accordingly, the Court concludes that the cap applies to the Executives' claims.

IV. CONCLUSION

For all of these reasons, the Court concludes that the Executives' claims must be capped under § 502(b)(7) of the Bankruptcy Code. The Court cannot, and will not, allow those claims to exceed what the Code provides for in that section.

With today's ruling as the backdrop, the Court directs the parties to confer within the next 30 days and agree on the amount of each Executive's claim to be allowed. If the parties cannot agree, the Court will conduct such further proceedings as may be necessary to fix these allowed claims with precision.

Bkrtcy.D.Del.,2012.
In re VeraSun Energy Corp.
467 B.R. 757, 56 Bankr.Ct.Dec. 69

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Exhibit G

INSURERS REHABILITATION AND LIQUIDATION MODEL ACT

The date in parentheses is the effective date of the legislation or regulation, with latest amendments. Related legislation marked with a # is based on or contains provisions of the Uniform Insurers Liquidation Act (UILA) from the National Conference of Commissioners on Uniform State Laws. This uniform law is similar to Article III of the NAIC model. Also see KEY at end of list.

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
Alabama		ALA. CODE §§ 27-32-1 to 7-32-41 (1971/1975) #
Alaska	ALASKA STAT. §§ 21.78.010 to 1.78.330 (1966/1990).	
Arizona		ARIZ. REV. STAT. ANN. §§ 20-611 to 20-650 (1954/1997) #
Arkansas		ARK. CODE ANN. §§ 23-68-101 to 23-68-132 (1959/1997) #
California		CAL. INS. CODE §§ 1010 to 1043 (1935/2000); § 1063.6 (1999); §§ 1064.1 to 1064.12 (1988) #
Colorado	COLO. REV. STAT. §§ 10-3-501 to 10-3-559 (1992/2001).	COLO. REV. STAT. §§ 10-3-401 to 10-3-512 (1963) #
Connecticut	CONN. GEN. STAT. §§ 38a-903 to 38a-961 (1979/1998) [1]	
Delaware		DEL. CODE ANN. tit. 18 §§ 5901 to 5944 (1953/1995) #
District of Columbia	D.C. CODE ANN. §§ 35-2801 to 35-2857 (1993/2000) [2]	
Florida		FLA. STAT. §§ 631.001 to 631.399 (1982/1995) #
Georgia	GA. CODE §§ 33-37-1 to 33-37-50 (1991/1997) [1]	
Guam		GUAM GOV'T CODE §§ 43225 to 43238 (1981) #
Hawaii	HAWAII REV. STAT. §§ 431:15-101 to 431:15-411 (1988/1996).	
Idaho	IDAHO CODE §§ 41-3301 to 41-3360 (1981/1999).	
Illinois		215 ILL. COMP. STAT. 5/187 to 5/221.13 (1937/2001) #
Indiana	IND. CODE §§ 27-9-1-1 to 27-9-4-10 (1979/1996).	
Iowa	IOWA CODE §§ 507C.1 to 507C.59 (1984/1997).	
Kansas	*KAN. STAT. ANN. §§ 40-3605* to 40-3658 (1991).	
Kentucky	KY. REV. STAT. §§ 304.33-010 to 304.33-600 (1970/1996).	
Louisiana		LA. REV. STAT. ANN. §§ 22:731 to 22:764 (1958/2001) #

INSURERS REHABILITATION AND LIQUIDATION MODEL ACT

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
Maine	ME. REV. STAT. ANN. tit. 24-A § 4351 to 4407 (1970/1993) (Much of model).	
Maryland		MD. ANN. CODE Ins. §§ 9-201 to 9-232 (1933/2001) #
Massachusetts		MASS. GEN. LAWS. ANN. ch. 175 §§ 180A to 180L (1939/2000) #
Michigan	MICH. COMP. LAWS §§ 500.8101 to 500.8159 (1990/1996).	
Minnesota	MINN. STAT. §§ 60B.01 to 60B.61 (1969/1999).	
Mississippi	MISS. CODE ANN. §§ 83-24-1 to 83-24-117 (1991/2000).	MISS. CODE. ANN. §§ 83-23-1 to 83-23-9 (1942).
Missouri	MO. REV. STAT. §§ 375.1150 to 375.1246 (1991/2001).	MO. REV. STAT. §§ 375.535 to 375.780 (1939/1996); §§ 375.950 to 375.990 (1976/1986) #
Montana	MONT. CODE ANN. §§ 33-2-1301 to 33-2-1388 (1979/2001) [1]	
Nebraska	NEB. REV. STAT. §§ 44-4801 to 44-4861 (1989/1995).	NEB. REV. STAT. §§ 44-120 to 44-133 (1913/1989).
Nevada	NEV. REV. STAT. §§ 696B.010 to 696B.570 (1971/1979) #	
New Hampshire	N.H. REV. STAT. ANN. §§ 402-C:1 to 402-C:61 (1969/1998).	
New Jersey	N.J. STAT. ANN. §§ 17B:32-31 to 17B:32-91 (1992) (Life Insurers).	N.J. STAT. ANN. §§ 17:30C-1 to 17:30C-31 (1975) (P/C Insurers) #
New Mexico		N.M. STAT. ANN. §§ 59A-41-1 to 59A-41-57 (1985/1993) #
New York		N.Y. INS. LAW §§ 7401 to 7435 (1984/1999) #
North Carolina	N.C. GEN. STAT. §§ 58-30-1 to 58-30-305 (1989/2001) [1]	
North Dakota	N.D. CENT. CODE §§ 26.1-06.1-01 to 26.1-06.1-59 (1991/1997).	
Ohio	OHIO REV. CODE ANN. §§ 3903.01 to 3903.99 (1982/1995).	
Oklahoma		OKLA. STAT. tit. 36 §§ 1801 to 1812 (1975/2000)(Supervision and Conservatorship); §§ 1901 to 1937 (1957/2001) [1] (Rehabilitation and Liquidation) #
Oregon		OR. REV. STAT. §§ 734.010 to 734.440 (1967/1995) [1]
Pennsylvania	PA. UNCONS. STAT §§ 40-11-101 to 40-11-511 (1979/1996).	

INSURERS REHABILITATION AND LIQUIDATION MODEL ACT

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
Puerto Rico		P.R. LAWS ANN. tit. 26 §§ 4001 to 4024 (1978) #
Rhode Island	R.I. GEN. LAWS §§ 27-14.3-1 to 27-14.3-65 (1993/2001) [1]	R.I. GEN. LAWS §§ 27-14.4-1 to 27-14.4-23 (1994/1999) #
South Carolina	S.C. CODE ANN. §§ 38-27-10 to 38-27-1000 (1988/2000).	
South Dakota	S.D. CODIFIED LAWS §§ 58-29B-1 to 58-29B-161 (1989/2001).	
Tennessee	TENN. CODE ANN. §§ 56-9-101 to 56-9-510 (1991/1999).	
Texas		TEX. INS. CODE art. 21.28 (1951/1995); art. 21.28-A (1967/1993); art. 21.28-B (1967).
Utah	UTAH CODE ANN. §§ 31A-27-101 to 31A-27-411 (1986/1999) [1]	
Vermont	VT. STAT. ANN. tit. 8 §§ 7031 to 7100 (1991).	
Virgin Islands		V.I. CODE ANN. tit. 22 §§ 1253 to 1285 (1968/1985) #
Virginia		VA. CODE §§ 38.2-1500 to 38.2-1521 (1986).
Washington	WASH. REV. CODE ANN §§ 48.31.030 to 48.31.360 (1947/2001) (Parts of model) [1]	WASH. REV. CODE §§ 48.99.010 to 48.99.080 (1947) #
West Virginia		W. VA CODE §§ 33-10-1 to 33-10-39 (1957/1996) #
Wisconsin	WIS. STAT. §§ 645.01 to 645.90 *(1967/1989)*.	
Wyoming		WYO. STAT. §§ 26-28-101 to 26-28-131 (1967/1983) #

KEY:

[1] Contains Section 9 adopted in 1992 to indemnify receivers.

[2] Includes confidentiality provisions adopted by the NAIC in Jan. 2000.

Lower Court or Tribunal	STATE OF MICHIGAN IN THE COURT OF APPEALS	CASE NO.
INGHAM CIRCUIT COURT	**Proof of Service**	CIRCUIT: Year 10 Number 000397 Case Type CR COURT OF APPEALS: 312470

Case Name: OFFICE OF FINANCIAL & INS REGULATION V AMERICAN COMMUNITY MUTUAL

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