Presented:
25th Annual Bankruptcy Conference

November 16 – 17, 2006
Austin, Texas

ALTERNATIVE INSOLVENCY REGIMES

The State Insurance Receivership and the Interaction Between the State Receiver and the Foreign Liquidator in Federal Bankruptcy Courts.

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1 Introduction

The frequency of insurance company failures tends to evade public notice which helps maintain consumers' faith in the insurance system;[1] however, the rehabilitation or dissolution of an insurance company is an all too common occurrence and a substantial body of law has developed to deal with the consequences.[2] The insurance insolvency system is in many respects what bankruptcy might have looked like had it not been provided for in the U.S. Constitution. Indeed, the state insurance regulation system is based on mandated federalism as a consequence of the passage of the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.,* which "reverse pre-empts" federal law in favor of regulation of insurance by the states.[3] For better or worse, however, federalism in this context has been eroded over time by the relentless march of bankruptcy jurisdiction.[4]

Unlike a traditional bankruptcy, a driving force in the insurance company rehabilitation or dissolution process is the fact that states themselves are often left funding a substantial portion of the costs of such failures. This impact of an insurance insolvency on state coffers motivates the state insurance receiver to make a substantial and significant effort to recover as many assets as possible and to pursue all legitimate claims of the insolvent to offset the cost of the policyholders' claims for which the public is ultimately responsible.[5] In addition to the types of tools available to a bankruptcy trustee, most states have established administrative processes to ostensibly deal with the insolvency in a quicker and more cost-effective manner.[6] It is during the insolvency process when the receiver is actively accumulating assets to cover the claims against the estate that the receiver is most likely to come into conflict with, or is at least forced to work within, the larger federal bankruptcy system.[7] In a complex insolvency when multiple parties fail simultaneously, it is also the case that the receivers, trustees, and/or liquidators of related entities attempt to move the proceedings into the bankruptcy court to relieve the estate of assets and hope to avoid any perceived advantage to the insurance receiver of the state administrative process.

After providing a brief overview of the underpinnings of the state insolvency system, this paper describes the benefits of the state insolvency process and explores the interaction and jurisdictional conflicts between the state and federal systems. Finally, this paper looks at how the new Chapter 15 of the Bankruptcy Code changes the dynamics of the relationship between the state insurance receiver and the foreign liquidator, and proposes a robust effort to define the "main" insolvency proceeding to redress the disparate treatment of the state receivership as compared to the federal bankruptcy estate or the foreign liquidator.

2 The State Insurance Insolvency System

2.1 The McCarran-Ferguson Act - Federalism Applied to Insurance

An insurance company is a state-regulated entity that has been barred by statute from taking advantage of the protections afforded by the Federal Bankruptcy System for at least a century.[8] Until 1944, the states were the primary regulators of most aspects of the insurance industry including rates, coverage, and financial condition, and federal law was not generally applied to such companies.[9] In 1944, however, an anti-trust claim was decided against South Eastern Underwriters Association which was alleged to have engaged in price fixing.[10] This decision applying federal anti-trust law to state regulated insurance entities raised concern that the tradition of state regulation was at risk and Congress was asked to correct this through legislation.[11] In 1945, the McCarran-Ferguson Act[12] was passed to prohibit generally the courts from construing any federal legislation as invalidating, impairing or superseding a state law regulating insurance unless the federal law was intended specifically to regulate or otherwise concern insurance and to, thereby, "restore the state regulatory prerogative."[13]

The intent of Congress, as expressed in McCarran-Ferguson, is to consign to the states broad primary responsibility for regulating the insurance industry.[14] McCarran-Ferguson provides, *inter alia*, that:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided [that the Antitrust Laws] shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.[15]

By its terms, McCarran-Ferguson provides three requirements for a state insurance law to "reverse preempt" the operation of a federal statute: "(1) the federal statute does not specifically relate to the 'business of insurance,' (2) the state law was enacted for the purpose of 'regulating the business of insurance,' and (3) the federal statute operates to 'invalidate, impair, or supersede' the state law."[16]

Over time, the Federal Courts latched onto the determination of whether something is the "business of insurance" to narrow the scope of McCarran-Ferguson's limitation on the application of federal law to the insurance industry. Specifically, the Supreme Court in *Royal Drug* and *Pireno* set out a multi-prong test to determine if the regulated activity was related to the business of insurance.[17] *Royal Drug* found agreements between an insurer and a pharmacy regarding the mark-up that could be charged were not the business of insurance and that federal anti-trust laws were applicable.[18] Similarly in *Pireno*, the Supreme Court found that a chiropractic association's use of peer review committees to assess the necessity and reasonableness of treatment was not a risk-spreading activity and therefore was not the business of insurance that preempted application of federal anti-trust laws.[19] Following the trail blazed by the Supreme Court, the circuits soon waded into the question of whether or not the rehabilitation and dissolution of an insurance company was related to the business of insurance.

Predictably, the Federal Circuits applied the *Pireno* test and concluded that since the insolvent company was no longer in business it was no longer in the process of spreading risk. If no risk was spread, it was reasoned, then the activity was not the business of insurance. As a result, state priority and dissolution schemes for an insolvent insurance company were determined not to preempt application of federal statutes granting the United States superior creditor status under the Federal Insolvency Act.[20]

> Once rendered insolvent and placed in the hands of a liquidator, an insurance company no longer is involved in risk protection, nor is there anything that a liquidator could do to make the defunct entity a reliable insurer. In such a situation, the state is no longer regulating the traditional business of insurance, and, thus, has exceeded the boundaries within which the McCarran-Ferguson Act frees it from preemption by general federal statutes.[21]

In 1988, the Fourth Circuit concluded that Maryland's insolvency regime, and its priority statute in particular, did not meet the standards established in *Royal Drug* and *Pireno* and was, therefore, not enacted for the purpose of regulating the business of insurance.[22] Likewise, that same year the Ninth Circuit determined that Idaho's insurance insolvency regime and priority statute were not excluded from federal preemption under McCarran-Ferguson, and as such, the United States' claim was granted priority over those of the insolvent's policyholders despite the fact that Congress has for at least the last century excluded insolvent insurance companies from access to the federal bankruptcy system.[23] Idaho's regulations governing the dissolution of an insolvent insurance company were simply not the business of insurance and, therefore, McCarran-Ferguson did not preempt application of federal priority statutes.[24]

To redress the circuits' zealous application of the *Pireno* test to remove state insurance insolvencies from the scope of McCarran-Ferguson, the Supreme Court in *U.S. Dep't of Treasury v. Fabe* considered whether Ohio's insurance insolvency laws reverse-preempted the United States from claiming a priority for its claims higher than that granted to policyholder claims under the state insolvency regime.[25] Certiorari was granted in the case ostensibly to reconcile a conflict among the circuits as to whether the dissolution of an insurance company and the relevant state priority statutes were laws enacted specifically for the purpose of regulating the business of insurance.[26] In its decision, the Supreme Court latched onto the term "purpose" and found that this language indicated intent by Congress to encompass more than the regulation of the "business of insurance."[27] If the law was enacted as part of a scheme to regulate an insurance company's dealings with "policyholders" generally, then the specific regulation was covered by McCarran-Ferguson.[28] Ohio's priority statute with regard to policyholders in particular was in conflict with the United States' claim of a superior priority. To the extent the insolvency statute was enacted to regulate priority among other creditors, however, it was not enacted for the proper purpose, and must yield to the federal law.[29]

Although *Fabe* seemed to have fairly clearly reaffirmed the McCarran-Ferguson federalism carve out with respect to the state insurance insolvency regime—at least to the extent of its primary goal of protecting policyholders—this has not proved to be the end of the inquiry. As discussed in greater detail below, the plum of the offshore reinsurance system, the state mandated domestic trusts established to insure sufficient reserves to cover domestic policyholder claims, has proven too tempting a target to avoid further incursion by federal courts into the state systems. Under the cover of the ancillary proceedings available to a foreign representative of an alien insolvent under 11 U.S.C. § 304, *repealed*, Federal Bankruptcy Courts have been tempted into asserting jurisdiction over claims against those trusts.[30] Hopefully, this temptation has now been quelled by the adoption of the new Chapter 15 that exempts those domestic reinsurance trusts from the jurisdiction of the Bankruptcy Court.[31]

2.2 The NAIC and the Model Acts

In most areas, the general system of laws in the United States is a patchwork of state regulations and common law that govern everything from contract rights to torts and property transactions. To impose some semblance of consistency and predictability on the system, various uniform laws are created and adopted with varying degrees of consistency among the states. For example, the Uniform Commercial Code has been adopted with minor modifications by most states and serves to provide a degree of consistency across state lines. Indeed, "uniformity throughout jurisdictions is one of the main objectives of [the] Code."[32] In this respect, the states have similarly recognized that insurance companies operate across jurisdictions, and that a degree of uniformity in insurance regulation is likewise beneficial to the efficient operation of the insurance industry. To achieve such consistency and cooperation, the National Association of Insurance Commissioners ("NAIC") was formed with a goal of organizing and drafting such uniform regulations. According to its website, "State insurance regulators created the NAIC in 1871 to address the need to coordinate regulation of multistate insurers."[33] Over time, the draft laws promulgated by the association have been adopted and implemented by most states, although usually with some degree of modification.

In the insolvency area, the NAIC has promulgated the Insurers Rehabilitation and Liquidation Model Act, which as of 2003, had been adopted in its basic or similar form by 34 states.[34] Subsequent to that count, Texas adopted a highly modified version of the Model Act under the provisions of the Texas Insurance Receivership Act.[35] The NAIC has now created some confusion by promulgating the Insurance Receivership Model Act, IRMA, that supersedes the prior model law. As of this date, IRMA has only been adopted in a few jurisdictions. Overall, the system enacted by the NAIC has much in common with other receivership schemes and the bankruptcy system. The receiver steps into the shoes of existing management, obtains an injunction to stop actions against the company unless presented first to the receiver, collects assets, and pursues the claims due the estate. There are two significant powers granted the state insurance receiver not generally seen in other insolvency systems that are worth mentioning in brief. First, the priority scheme of the insurance receivership statutes favors or prioritizes claims of policyholders over those of other unsecured creditors.[36] This distinction is, in fact, the basis relied on in *Fabe* to justify the application of McCarran-Ferguson's reverse preemption to the insurance insolvency process.[37]

The second distinction is the fact that the insurance receiver, when acting to liquidate the company, is, in fact, granted more rights than are generally available in other contexts to pursue claims against the company. He does not merely step into the shoes of the existing management, but rather is granted the authority to pursue the claims of "creditors, members, policyholders or shareholders of the insurer against any officer of the insurer or [sic], or any other person."[38] Under the Bankruptcy Code, the trustee or creditors committee does not represent the individual creditors' claims or interests due to the specific terms of 11 U.S.C. § 541.[39] Section 541 has a specific limitation on the trustee's ability to bring a claim based on how this section "directs courts to evaluate defenses as they existed at commencement of the bankruptcy."[40] In this respect, the insurance receivership statutes arguably divest the policyholders, creditors, and owners of standing to pursue such claims on their own and give such standing to the receiver.

2.3 Some Benefits of the State Insurance Insolvency System

2.3.1 Priority - Why choose one system over the other?

Significantly, when the Supreme Court in *Fabe* considered whether Ohio insurance insolvency law reverse-preempted the claim of the United States for first priority, the decision against the United States rested on the fact that the state system preferred claims of "policyholders." The Supreme Court determined that Ohio's insurance insolvency laws were enacted generally for the purpose of regulating insurance in large part because the priority statute gave a preference to policyholders.[41] It is, in fact, this preference for the claims of policyholders that is a defining characteristic of the insurance insolvency regime. The priority provisions of the Texas Insurance Receivership Act, § 21A.301, and the NAIC Model Act Section 47, are very similar in their basic structure and typical of most state priority provisions that apply to the distribution of assets from the estate of an insolvent insurance company. As with virtually all receivership, bankruptcy, and liquidation laws, the first or highest priority for unsecured claimants goes to the administrative expenses of the estate. In the insurance receivership context, however, this preference for administrative claims extends to the similar costs and expenses incurred by the state guaranty associations or funds which are granted the second priority class for the costs and expenses incurred in administering the policyholder claims they are obligated to cover.[42] The third statutory priority class includes the claims of the insolvent's policyholders.[43] Indeed, the high priority given to policyholders can to some extent explain the unique treatment of state guaranty associations. It should be noted that Texas' priority provision, TEX. INS. CODE § 21A.301(b), grants policyholder claims, whether covered by the estate directly or paid by a guaranty association, second rather than third priority status since it confers equal first priority status to the estate's and the guaranty association's administrative expenses under § 21A.301(a)(1) & (2).

Under the state insurance insolvency system, most states have guaranty association acts that establish a state fund intended to cover the claims of policyholders if sufficient assets are not available to the estate.[44] Not all policyholders are covered by such funds. For example, the policyholders of companies organized pursuant to the federal Risk Retention Group Act—a law enacted specifically to regulate insurance and therefore not reverse-preempted by McCarran-Ferguson—do not generally participate in the state guaranty association systems.[45] Nevertheless, because the state is itself obligated to distribute funds it collects and maintains to cover some or all of the policyholder claims from participating insurance companies, and because such policyholder claims would otherwise be covered by the insolvent entity as part of the highest non-administrative claim category, the state grants the expenses that the guaranty association ostensibly relieves the receiver from expending equal, or close to equal, footing with the claims of the estate itself.[46]

Clearly the state insurance insolvency preference system is beneficial to policyholders, but this comes at the expense of the un-secured or "other" creditors. Not until all policyholder claims and administrative costs are paid in full will such other creditors begin to be paid. Moreover, the administrative claims of the insurance receivership system are usually extensive since the administration of policyholder claims effectively requires the continuation of most aspects of the insurance company to review, adjust, defend and otherwise administer the claims as they play out.

2.3.2 Power to Pursue Claims in Name of Creditors, Policyholders, Members and Shareholders

A significant advantage of the insurance insolvency system from the receiver's perspective is the ability to assert the claims of creditors, policyholders, members, and shareholders as his own. This is particularly significant in the context of bringing claims against management, as well as the accounting and actuarial service companies that worked with, or facilitated the continuation of, the insurance company beyond the point at which regulatory intervention would have been triggered. In the bankruptcy context such claims are often thwarted by the *in pari delicto* defense which is variously discussed or described in conjunction with the unclean hands and/or imputation concepts.

In the Federal Circuits, the *in pari delicto* defense has been defined in two distinct and consequentially different ways.[47] The first formulation, as stated by the Third Circuit, provides that "a plaintiff may not assert a claim against a defendant if the plaintiff bears fault for the claim."[48] Similarly, the Sixth Circuit determined that a Chapter 7 trustee could not pursue malpractice claims against a debtor's advisors based on the *in pari delicto* defense, which it described as meaning that "no court will lend its aid to a man who founds his cause upon an immoral or illegal act."[49] An alternative formulation that is more beneficial to a receiver looks at the defense based on the effect of the remedy as opposed to the prior act. Specifically, the Seventh Circuit defines the defense as providing that "the wrongdoer must not be allowed to profit from his wrong by recovering property that is parted with in order to thwart his creditors…. Put differently, the defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated."[50] The Third and Sixth Circuit definitions create a fault-oriented test that is akin to contributory negligence.[51] The Seventh Circuit's formulation, however, holds that *in pari delicto* should not be applied when no wrongdoer would profit from the recovery, as would be the case in most receivership situations.[52]

In a Maryland bankruptcy court, the defense of *in pari delicto* was explained as follows:

> The trustee also lacks standing under the doctrine of *in pari delicto*, according to which a debtor who was complicit in wrongdoing with third parties is precluded from pursuing a claim against a nondebtor third party. "[W]hen a [debtor] has

> joined with a third party in defrauding creditors, the trustee cannot recover against the third party for the damage to the creditors."[53]

This formulation is obviously more consistent with the Third and Sixth Circuits' statement of the defense and appears to limit the trustee's ability to collect on behalf of the bankrupt's creditors.

Fortunately for the insurance receiver, the application of this defense generally is based on a peculiarity of bankruptcy law that arguably is not present in the insurance receivership context. This peculiarity limits not only the Maryland Court's holding, but also the Third and Sixth Circuits' approach in a fraudulent transfer situation. Under the Bankruptcy Code, the trustee or creditors committee does not represent the individual creditor's claims or interests due to the specific terms of 11 U.S.C. § 541.[54] Section 541 has a specific limitation on the trustee's ability to bring a claim based on how this section "directs courts to evaluate defenses as they existed at commencement of the bankruptcy."[55] Where, however, the action concerns the trustee's voiding powers, the limitations of Section 541 are not implicated.[56] For example, under Section 548 of the Code, post-petition events such as the appointment of a receiver or trustee can be considered in evaluating the claim or remedy available to the trustee. Once the receiver is appointed, the person who is *in pari delicto* is eliminated and the defense loses its sting.[57] Similarly, under Section 544 of the Bankruptcy Code the parties' status is not fixed as of the date the petition is filed and post-petition events may also be considered in evaluating the applicability of equitable defenses.

Claims against management and related entities that have worked or colluded with them avoid liability by imputing the conduct of management to the trustee who—except in the context of the trustee's voiding powers—steps into the shoes of the company as of the creation of the insolvent's estate. *In pari delicto* has been applied to claims brought under 11 U.S.C. § 541 by bankruptcy trustees based on the theory that this section—unlike the insurance receivership acts—specifically grants to the trustee only the power to bring claims and defenses as they exist as of the commencement of the proceeding. An insurance receiver, in contrast, is granted specifically the right to bring claims on behalf of creditors and others.[58] According to the Insurers Rehabilitation and Liquidation Model Act, and Texas Insurance Code § 21A.124, the receiver may pursue the claims of "creditors, members, policyholders or shareholders of the insurer against any officer of the insurer or [sic], or any other person." Therefore, a receiver in this role is acting for the creditors and/or policyholders of the insolvent insurance company, and is not *in pari delicto* with the defendant and is not barred from recovering on this ground.

3 The Complex Multi-Party Insolvency - Who gets to decide the case?

3.1 The International Insolvency

A significant drawback to the state receivership process is that it inhabits a no man's land of overlapping jurisdictions and is systematically denied a status equal to that of other receiverships. In the case of the collapse of a large insurer, it is typical that a number of related entities operating in other states and foreign jurisdictions will also become insolvent once the main company is placed into receivership. Some of these entities are similar subsidiary or related insurance entities put in receivership in other states. Others are non-insurance entities which enter the bankruptcy process directly. Finally, and often the most troubling in my estimation, there are the liquidations of the insolvent's foreign reinsurers whose representatives take advantage of the U.S. Bankruptcy Code's provision for ancillary proceedings under former 11 U.S.C. § 304, and now under the new Chapter 15 of the Bankruptcy Code.[59] It is through the ancillary proceeding that Bankruptcy Courts have encroached on the state insurance insolvency process in the face of the limitations of McCarran-Ferguson.

McCarran-Ferguson, as interpreted by *Fabe*, assigned to the states jurisdiction over the insurance insolvency process. Unfortunately, the Bankruptcy Courts have not recognized this decision as a barrier to the exercise of jurisdiction over the core debtor/creditor relationship by the federal courts in all instances. Specifically, the Bankruptcy Courts have felt free to intervene and accept jurisdiction over claims made by foreign liquidators and have effectively relegated the insurance receiver to second class status in dealing with their foreign counterparts.

3.2 Structure of the Domestic Insurance Company Leads to Conflict with the Foreign Liquidator

As a factual predicate, the state regulations dealing with domestic insurance companies focus in large part on the maintenance by the company of assets equal to some multiple of the funds necessary to cover the projected losses on the policies it has written. The first step for the company is to conduct actuarial analyses of the risks it holds, and to continually update such analyses based on new information and the actual development of losses experienced over time. Such information is a prediction of future losses so that that an amount can be established which would cover the obligations on the policies as they develop. Projections are then used to determine the value of the assets ("reserves") that the insurance company is required to maintain—usually some multiple of these predicted obligations. Alternatively, an insurer can obtain reinsurance to cover some portion of its reserve requirements and thereby transfer the obligation to maintain such assets to the reinsurer. These relationships are employed for various reasons not the least of which is to allow the state insurer to reduce its reserve obligation and to provide headroom for the company to increase the number of policies written.

To ensure that the reinsurance company also has the same obligation to maintain assets as does the primary insurer, it will be required either to submit itself to the state oversight and regulatory regime, or establish a trust, or other secure account in the United States, that will satisfy the predicted obligations. Failing to agree to these conditions will prevent the primary insurer from reducing its own reserve obligations.

As often happens, when the domestic insurance company goes under, the foreign reinsurer is obligated on its reinsurance treaties and no longer has premiums or other income being paid by the domestic company. As such, the company is not solvent and petitions the courts in its jurisdiction to be dissolved. Once the liquidator is appointed, his first task, like that of any such trustee, receiver, or liquidator, is to secure as many assets as possible to pay creditors and shareholders. Very often there are few assets outside of the state reinsurance trusts, making these the first target of the foreign liquidator. The key to gaining access to the state trust is the Bankruptcy Code provisions granting rights to the foreign liquidator under 11 U.S.C. § 304, now repealed in favor of 11 U.S.C. § 1501 *et seq*. These domestic reinsurance trusts established by the foreign reinsurer are the primary target, or the plum, sought by the foreign liquidator and have been the basis for the Bankruptcy Courts' incursion into the state insolvency process.

3.3 The Domestic Reinsurance Trust

The essence of a trust is the transfer of legal title to the trustee and equitable title to the beneficiary. "When an escrow or trust is created, the only interest of the party contributing the funds left in the escrowed funds is a contingent right to any surplus after payment of the claims against the fund."[60] When courts first addressed situations where a trust was established pursuant to a statutory requirement to obtain credit for reinsurance they recognized the lack of a present interest by the foreign grantor.

In *In re Ocana*, Hannover, the reinsured party, sued the foreign reinsurer, Latino Americano de Reseguros, S.A. ("LARSA"), and the trustee, Citibank, N.A., seeking to attach the assets of a New York trust established by LARSA for the protection of the rights of its policyholders and beneficiaries pursuant to New York insurance regulations.[61] In response, LARSA filed an ancillary proceeding in bankruptcy court in New York that resulted in the stay of Hannover's suits pursuant to § 304(b)(1) of the Bankruptcy Code.[62] On appeal to the district court, LARSA argued that the trust was property of the foreign bankruptcy estate because the reinsurer had "a reversionary interest in the trust after any distribution to its policyholders, for whose benefit the trust was established."[63] In response, Hannover argued that the part of the trust "held for the benefit of beneficiaries is not property of the debtor's estate, and therefore that it's suit against Citibank for recovery from those funds may not be enjoined by the bankruptcy court."[64] Balancing these arguments, the district court partially lifted the stay of the bankruptcy court and allowed the domestic proceedings addressing the claims against the trust to continue. With respect to the sole issue of ownership of any reversionary interest to the trust, the stay remained in place. The court further determined that the funds held for the benefit of the policyholders were not property of LARSA's estate. Reasoning that the purpose of creating a reinsurance trust is to place the property beyond the settlor's control, the court stated, "[u]pon the establishment of the trust, the property ceased to belong to the debtor."[65]

Shortly after *Ocana*, the Bankruptcy Court for the Southern District of New York was again faced with a similar question in *In re Rubin*, and reached a different result.[66] Israel Re had petitioned the bankruptcy court to stay the actions of an aggressive receiver for an insolvent domestic ceding insurer and beneficiary to obtain the proceeds of a reinsurance trust, and to then order turnover of the corpus of that trust to Israel Re's foreign estate.[67] The domestic receiver argued that the trust was not property of the Israel Re estate and was therefore not subject to the ancillary proceeding.[68] The Court agreed that the trust was not property of the estate and therefore not subject to turnover under 11 U.S.C. § 304(b)(2); however, it refused to lift the stay because it believed that the particular trust at issue, while not property of the estate, was sufficiently "involved" in the foreign proceeding to warrant injunctive relief under 11 U.S.C. § 304(b)(1).[69] The court distinguished the reasoning in *Ocana* on a number of grounds. Primarily, however, the court noted that the trust in *Ocana* was created pursuant to a New York insurance regulation requiring the trust benefit the reinsurer's policyholders and beneficiaries.[70] In truth, this distinction is somewhat illusory since the trust in *Rubin* was also statutorily required, and any assets obtained by the state receiver would be distributed according to a state priority scheme which paid policyholder claims first.

In the *In re Butterfield* case, the trust—like the one in *Ocana*—was established pursuant to a statute. VA. CODE ANN. § 38.2-1316.4.[71] This statute, together with the relevant administrative code provisions, requires the creation of a trust for the sole benefit of the ceding insurer.[72] It does not, however, specifically require that the trust be established for the benefit of "policyholders" as the *Rubin* court claimed was a significant ground for distinguishing *Ocana*. The Court never addressed this distinction, and in any event it is likely a distinction without a difference in the insolvency context since the policyholders are provided priority access to the trust's assets through the state mandated distribution scheme.[73] Moreover, First Virginia Reinsurance, Ltd., the Bermuda-based reinsurer, retained no beneficial interest in the trust account once the funds were settled other than a mere defeasible reversionary interest. In short, the Bermuda reinsurer retained at most a claim, contingency or chose in action to the residual, if any, and had no claim to the fund itself. Nevertheless, the court believed that it could exercise jurisdiction in the face of McCarran-Ferguson based on the allegations of the Bermuda Liquidators that they were merely seeking turnover under 11 U.S.C. § 304(b)(2).[74] The novel approach taken by the Liquidators was to claim a present property interest in a portion of the trust based on their assertion that the terms of the trust agreement required an immediate distribution of some undetermined portion of the trust. Effectively, the court accepted the characterization of the claim as a determination of the property interest rather than a breach of contract action for damages without questioning the contrived nature of the allegation.[75] The court concluded that the construction and determination of compliance with the trust agreement was merely a matter of simple contract construction that did not implicate state insurance law.[76]

This case has been settled and the appeal of this decision abandoned. Nevertheless, the author believes the court's analysis was wrong on numerous grounds, not the least of which was the fact that the basic premise for the exercise of jurisdiction was the conception of the claim for trust assets as turnover. As described above, title in the grantor was a mere defeasible reversionary interest. When a debtor such as the Bermuda Reinsurer creates a trust to secure its obligations on an agreement, the funds transferred into the trust cease to belong to the debtor; and because those funds are not property of the debtor's estate, they are not subject to a turnover action.[77] The opinion in *In re Rubin*, was a situation where the New Jersey liquidator had already made numerous claims in the Israeli insolvency proceeding—the primary insolvency proceeding where a number of other insurers had also made claims.[78] Concerned over a potential race to the courthouse by creditors asserting claims against the company's domestic assets, the court determined that the proceedings in Israel would best ensure the equitable distribution of the assets.[79] Even then, however, the court refused to grant the foreign representative's request for turnover, because its interest was limited to a claim of reversion, and the value was not presently quantifiable.[80]

3.4 Second Class Citizen

In *In re Butterfield*, the foreign liquidators argued that McCarran-Ferguson was inapplicable in a section 304 proceeding because the concerns of international comity outweighed the considerations of comity that the federal courts owe the states.[81] Taking this argument to its logical conclusion would put the creditors of a domestic insurer at a structural disadvantage to the creditors of a foreign reinsurer in all insolvencies involving a domestic insurer with a foreign reinsurer. The foreign entity could simply come in and enjoin further actions and force the state receiver into the bankruptcy system. The state receiver has no similar ability to enjoin actions by the foreign entity whether in the bankruptcy system or on the home turf of the foreign company. Although the Virginia state court issued an injunction in *In re Butterfield*, the bankruptcy court virtually ignored its existence, and Bermuda has no provision similar to section 304 that the insurance receiver could have invoked in the foreign forum.

Despite Congress' recognition when it passed McCarran-Ferguson, that the regulation of the business of insurance was handled predominantly by the individual states, and the fact that 11 U.S.C. § 109 expressly exempts insurance companies from the purview of the Bankruptcy Code, the Virginia bankruptcy court ignored the policy of state primacy in insurance regulation and determined section 304 to be broadly applicable. Without any consideration for the primacy of one insolvency over another, the foreign debtor, no matter how small or insignificant, can halt an ongoing insurance receivership in the United States, and force the domestic receiver to pursue claims against the foreign reinsurer overseas.[82] No such reciprocal protection is afforded the domestic insurer in a foreign insolvency proceeding, nor can the state receiver ask the bankruptcy court for a section 304-type injunction. In effect, such a view of the jurisdiction of the bankruptcy court relegates domestic insurers to second class status. While the new Chapter 15 remedies this treatment to some degree by excluding from the court's jurisdiction a state insurance trust, it does not put the state receiver on equal footing with the foreign liquidator. However, if the courts look more closely at the determination of the "main" proceeding, the problem may be remedied.

4 The New Chapter 15

4.1 Leveling the Playing Field

The recent amendments to the Bankruptcy Code in the Bankruptcy Abuse and Consumer Protection Act of 2005 not only confirm that turnover relief is not available with respect to domestic reinsurance trusts, but also provide independent and equally compelling support for why it is appropriate for the bankruptcy courts to reject a foreign liquidator's request for other relief from a state insurance receiver.[83] This Act clarifies and embodies Congress' beliefs as to how a foreign insolvency should be treated vis-à-vis a domestic proceeding. In this regard, Congress statutorily embodied existing case authority interpreting the prior code's treatment of domestic, state based, insolvency proceedings. This was accomplished through two basic features of the new code that would summarily cut off attempts by a foreign liquidator to use the bankruptcy system to claim a superior position over a state receiver of the often earlier and larger domestic insurance insolvency.

Section 1501(d) of the new Chapter 15 is quoted below in its entirety because it directly addresses a Liquidator's claims to a domestic reinsurance trust. Specifically, it states that:

> (d) **The court may not grant relief under this chapter with respect to any deposit, escrow, trust fund, or other security required or permitted under any applicable State insurance law** or regulation for the benefit of claim holders in the United States. (emphasis added) [84]

According to the House Report that accompanied S.256, "section 1501(d) has the effect of leaving to State regulation any deposit, escrow, trust fund or the like posted by a foreign insurer under State law." As such, the new Chapter 15 specifically prevents a bankruptcy judge from granting relief that touches a domestic reinsurance trust. Current authority provides that:

> the lawfulness of the stay under § 304(b)(1)(A) is whether [the enjoined] suit is "with respect to" or "against" property of the debtor . . . . The very purpose of establishing such a trust is to take the property outside the settlor's control . . . . [S]uch an action is not "with respect to property involved in [the] foreign [bankruptcy] proceeding"; nor is it "against . . . such property." Upon the establishment of the trust, the property ceased to belong to the debtor; the establishment of the trust put the property beyond the reach of the settlor-debtor's bankruptcy court.[85]

While a foreign debtor's reversionary interest might be property of its estate and the question of the ownership of that right subject to injunctive relief solely as to any question regarding such ownership, it goes beyond section 304 jurisdiction to liquidate ancillary claims based on such a non-possessory future interest. The conflict between the *Butterfield* Court's willingness to entertain claims against the trust, and the *Ocana* Court's refusal has now been resolved in favor of restraint on such exercises of jurisdiction.[86]

A second feature of the new Chapter 15 that benefits domestic insurance receivers is contained in section 1521(d). Once a foreign proceeding is "recognized," the court then has discretion to grant the relief, including injunctive relief, described in section 1521, with certain exceptions. Specifically, part (d) states that "[t]he court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section."[87] Since state receivership proceedings are normally conducted in the context of a state administrative process before a state agency, they are regulatory acts of a governmental unit—albeit adjudicative acts. Clearly the above-noted House Report language which refers to "regulation" of the account, suggests that state action is regulatory and therefore excluded from the injunctive relief of this chapter even for matters outside of actions aimed at reinsurance trusts.

Interestingly, section 1521(d) is only intended to enunciate existing law on the issue. According to the relevant House Report "**[t]his section does not expand or reduce the scope of relief currently available in ancillary cases under sections 105 and 304** nor does it modify the sweep of sections 555 through 560" (emphasis added).[88] If you consider this statement in conjunction with the legislative history noted above that section 1501(d) "has the effect of leaving to **State regulation** any deposit, escrow, trust fund or the like posted by a foreign insurer under State law," then the conclusion must be reached that Congress considers proceedings such as those enjoined in *Butterfield* state "regulation" and not subject to injunctive relief under either the current section 304 or the new Chapter 15.

4.2 Primary Insolvency and Economical Centralization of Multiple Insolvencies

It is without a doubt more economical and expeditious to centralize claims so that discovery and other pre-trial matters can be centrally resolved where there are overlapping factual issues. While this same argument is made to justify centralizing claims against an insolvent in the domestic or foreign insolvency court, that normally presupposes a single or limited number of debtors. Where, as in the case of the insolvency of a large regional or national insurer, there are a large number of dependant parties that become insolvent with each claiming a similar right to centralize claims in its own forum, then policy considerations should favor the forum in which the primary or most significant activities occurred over some post-office box operation in Bermuda or the Caymans with no assets. In the insolvency of the company that was the subject of the *Butterfield* opinion, a number of asset recovery matters were filed by the receivers for the various insolvent companies as well as by some of the larger policyholders. These cases were ultimately consolidated in Tennessee under the Federal Multidistrict Litigation Rules ("MDL").[89] By filing a section 304 action, the foreign liquidator managed to stay claims against the alien insolvent, and thereby put on hold the claims of four domestic insolvency estates—each with many thousands of domestic policyholders complaining of the same conduct—unless they filed a claim in Bermuda. The company maintained no significant assets in Bermuda and none of the policyholders had operations there. In fact, most of the management of the Bermuda company was comprised of the same individuals as that of the various state insurance entities. No reasonable policy argument could be advanced in favor of sending everyone to Bermuda in order to file their claims.

With the new Chapter 15 the distinction between a foreign main and nonmain proceeding presents a potential means to establish a coherent basis to look at the problem of overlapping multi-jurisdictional insolvencies.[90] A foreign proceeding shall be recognized as a "foreign main proceeding" if the country where it is pending is the "center of its main interests," otherwise it will be recognized only as a foreign nonmain proceeding.[91] There is a presumption that the registered office is the main location, but it can be challenged with evidence to the contrary pursuant to section 1516(c). The consequences of the classification are dramatic. If it is not a main proceeding then it is not subject to the new automatic stay provision and the foreign representative is not granted avoidance powers under section 1520(a). An injunction can be issued by the court, but not if it interferes with a foreign main proceeding or if it limits the state regulatory acts. 11 U.S.C. § 1519(c) and (d). In addition, the court can not grant discretionary relief under section 1521 unless it determines that the property should be administered in that nonmain proceeding. Effectively, this allows the state insurance receiver to argue that the state proceeding is the main proceeding and is the appropriate place to administer and coordinate the distribution of the insolvent's property.

In the *Rubin* case discussed above, the reinsurer, Israel Re, was more than a mere captive operation, and was the subject of claims by multiple insurers seeking its assets. As such, the center of the liquidation activity was outside the United States and the domestic companies were appropriately required to bring their claims in the foreign proceeding. The main proceeding in *Rubin* was centered offshore. In contrast, the reinsurer in *Butterfield* was a captive of the domestic insurance company which was, in fact, the main proceeding. Applying Chapter 15 to such a situation would have allowed a challenge to determination of the center of the Bermuda company's interests, and recognition that the Bermuda proceeding was not a main proceeding and not due injunctive relief. Moreover, since the domestic reinsurance trust was the only justification for the action and the expenditure of scarce resources, § 1501(d)'s exclusion of the trust would have avoided that litigation. Simply put, a robust application of the provisions defining the location of the main proceeding should lead to a better relationship between the state insurance receiver and the bankruptcy court.

Endnotes:

[1] Confidence in insurance is also justified by state guaranty funds that protect many, but not all, policyholders.

[2] Davis J. Howard, *Standing to Sue a Carrier's Killers*, 17 Pepp. L. Rev. 311, 311 (1990) (noting that while insiders may have known for some time that "insurance companies are dropping like files," it was not generally common knowledge until a high profile case was on the front page of the New York Times).

[3] *See, e.g., Genord v. Blue Cross & Blue Shield of Michigan*, 440 F.3d 802, 805 (6th Cir. 2006) ("Federal law thus provides for 'reverse preemption' in the realm of regulating the insurance business. *AmSouth Bank v. Dale*, 386 F.3d 763, 780-83 (6th Cir.2004) (discussing the concept of reverse preemption under the McCarran-Ferguson Act). A general federal law that does not specifically relate to the business of insurance, therefore, cannot be construed to 'invalidate, impair, or supersede' a state law enacted to regulate the insurance business. **Error! Main Document Only.**15 U.S.C. § 1012(b).").

[4] *See, e.g.*, *In re Butterfield*, 339 B.R. 366 (Bankr. E.D. Va. 2004) (court construes contest over state mandated insurance trust as a mere contract action and not subject to reverse pre-emption under the McCarran-Ferguson Act).

[5] Not all policyholder claims are paid and those that are paid are not always paid in full. The risk retention group is a specific form of insurance company that was created pursuant to the Federal Risk Retention Act and is often exempt from the requirements of the state guaranty association

acts. 15 U.S.C. §§ 3901-06 (West 1982 & Supp.1990). *See also* Andrew S. Hanen and Jett Hanna, *Legal Malpractice Insurance: Exclusions, Selected Cove Rage and Consumer Issues*, 33 S. TEX. L. REV. 75, 125 (1992) ("Risk retention groups and purchasing groups do not have the protection provided by state guaranty funds."). Because such entities do not participate in the state funds designed to protect state policyholders in the event of insolvency, the state does not generally pick up the tab for policyholder claims that are not covered by assets recovered by the receiver.

[6] *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 494 (1993) (Ohio priority statute held to be "part of a complex and specialized administrative structure for the regulation of insurance companies from inception to dissolution.").

[7] Because of a claim priority scheme which prefers policyholder claims over those of general creditors, attempts have been made to force some insurance type entities into involuntary bankruptcy by narrowing the definition of an insurance company under 11 U.S.C. 109(b). See for example the debate over the nature of an HMO and the entitlement such entities to bankruptcy relief. *See generally* Patrick H. Cantilo, *Health, HMO and Related Entity Insolvencies, in, Law and Practice of Insurance Regulation of Health Care Arrangements* 13-1 - 13-42 (Dennis G. LaGory, Ed., A.B.A. 1996) (*discussing Delcke v. MedCare HMO*, 147 B.R. 895 (N.D. Ill. 1992), *aff'd*, 998 F.2d 436 (7th Cir. 1993); *In re Family Health Servs., Inc.*, 143 B.R. 232 (C.D. Cal. 1992); *In re Grouphealth P'ship, Inc.*, 137 B.R. 593 (Bankr. E.D. Pa. 1992); *In re Beacon Health, Inc.*, 105 B.R. 178 (Bankr. D. N.H. 1989); *In re Family Health Servs., Inc.*, 104 B.R. 298 (Bankr. C.D. Cal. 1989); *In re Family Health Servs., Inc.*, 101 B.R. 636 (Bankr. C.D. Cal. 1989); *In re Family Health Servs., Inc.*, 101 B.R. 628 (Bankr. C.D. Cal. 1989); *In re Family Health Servs., Inc.*, 101 B.R. 618 (Bankr. C.D. Cal. 1989); *In re Michigan Master Health Plan, Inc.*, 90 B.R. 274 (E.D. Mich. 1985); and *In re Portland Metro Health, Inc.*, 15 B.R. 102 (Bankr. D. Or. 1981)).

[8] 11 U.S.C. 109(b) "A person may be a debtor under chapter 7 of this title only if such person is not . . . (2) a domestic insurance company." *See also State of Idaho ex rel. Soward v. U.S.*, 858 F.2d 445, 452 (9th Cir. 1988) (noting that insurance companies have been excluded from the bankruptcy system for most of the last century).

[9] Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 U.S.F. L. REV. 627, 638 (2006); *see also Sec. and Exchange Comm'n v. Nat'l Sec., Inc.,* 393 U.S. 453, 458-59 (1969)(discussing the legislative history of McCarran-Ferguson).

[10] *United States v. S.E. Underwriters Ass'n*, 322 U.S. 533 (1944).

[11] *Id*. at 635-636; *See also Fabe*, 508 U.S. at 499-500.

[12] The McCarran-Ferguson Act, 15 U.S.C. §1011, *et seq* (1945).

[13] *Id*.

[14] *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998).

[15] 15 U.S.C. § 1012(b).

[16] *Munich Am. Reinsurance*, 141 F.3d at 590; *Fabe*, 508 U.S. at 507 (1993).

[17] *Group Life & Health Ins. Co. v. Royal Drug Co., Inc.*, 440 U.S. 205 (1979), *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

[18] *Royal Drug*, 440 U.S. at 232-33.

[19] *Pireno*, 458 U.S. at 134.

[20] The Federal Insolvency Statute, 31 U.S.C. § 3713 (1982).

[21] *State of Idaho ex rel. Soward v. U.S.*, 858 F.2d 445, 452 (9th Cir. 1988).

[22] *Gordon v. U.S. Dept. of Treasury*, 846 F.2d 272, 274 (4th Cir. 1988).

[23] *Soward*, 858 F.2d at 450, 452.

[24] *Id*. at 454.

[25] *Fabe*, 508 U.S. at 493; 31 U.S.C. § 3713(a)(1)(A)(iii).

[26] *Fabe*, 508 U.S. at 498-99.

[27] *Id*. at 505.

[28] *Id*. at 508.

[29] *Id*.

[30] *See, e.g.*, *In re Rubin*, 160 B.R. 269 (Bankr. S.D.N.Y. 1993); *In re Laitasolo*, 193 B.R. 187 (Bankr. S.D.N.Y. 1996); *In re Butterfield*, 339 B.R. 366 (Bankr. E.D. Va. 2004).

[31] 11 U.S.C. § 1501(d):

> The court may not grant relief under this chapter with respect to any deposit, escrow, trust fund, or other security required or permitted under any applicable State insurance law for the benefit of claim holders in the United States.

[32] GENERAL COMMENT OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW AND THE AMERICAN LAW INSTITUTE, U.C.C. (1990).

[33] http://www.naic.org/index_about.htm

[34] NAIC Model Laws Regulations and Guidelines, Volume III, p. 555-63 - 67 (2003).

[35] TEX. INS. CODE § 21A.001 *et seq*. (2005).

[36] TEX. INS. CODE § 21A.301 (2005); INSURERS REHABILITATION AND LIQUIDATION MODEL ACT § 47 (1998).

[37] *Fabe*, 508 U.S. at 508.

[38] INSURERS REHABILITATION AND LIQUIDATION MODEL ACT, § 24(A)(15) (1998); *See also* TEX. INS. CODE § 21A.154(m) ("The liquidator may prosecute any action that may exist on behalf of

the creditors, members, policyholders, shareholders of the insurer, or the public against any person, except to the extent that a claim is personal to a specific creditor, member, policyholder, or shareholder and recovery on such claim would not inure to the benefit of the estate. This subsection does not infringe or impair any of the rights provided to a guaranty association pursuant to its enabling statute or otherwise.”).

[39] *See In re Educators Group Health Trust*, 25 F.3d 1281, 1283-84 (5th Cir. 1994) (Property of the debtor includes causes of action belonging to the debtor at the time the case is commenced. If the claim belongs to the estate’s creditors, the trustee has no standing to bring the cause of action.).

[40] *In re Personal Bus. Ins. Agency*, 333 F.3d 239, 245 (3d Cir. 2003).

[41] *Fabe*, 508 U.S. at 493.

[42] INSURERS REHABILITATION AND LIQUIDATION MODEL ACT, § 47 (1998). Note that the similar Texas priority provision, TEX. INS. CODE § 21A.301(a)(2), grants the guaranty association’s administrative expenses the same first priority it grants the estate’s administrative expenses under § 21A.301(a)(1).

[43] INSURERS REHABILITATION AND LIQUIDATION MODEL ACT, § 47 (1998); *Cf.* TEX. INS. CODE § 21A.301(a)(1), (a)(2), & (b).

[44] POST-ASSESSMENT PROPERTY AND LIABILITY INSURANCE GUARANTY ASSOCIATION MODEL ACT, (2004).

[45] Hanen, *supra* note 5.

[46] *Supra* text accompanying note 42 (identifying the distinction between the Model Act and the Texas priority statute in their respective treatments of guaranty association administrative expense claims).

[47] Tanvir Alam, *Fraudulent Advisors Exploit Confusion in the Bankruptcy Code: How in Pari Delicto Has Been Perverted to Prevent Recovery for Innocent Creditors*, 77 AM. BANKR. L.J. 305, 313 (2003).

[48] *Official Comm’n of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 354 (3d Cir. 2001) (holding creditors' committee was *in pari delicto* with shareholders).

[49] *Terlecky v. Hurd* (*In re Dublin Sec. Inc.*), 133 F.3d 377 (6th Cir. 1998).

[50] *Scholes v. Lehmann*, 56 F.3d 750, 755 (7th Cir. 1995).

[51] 77 AM. BANKR. L.J. at 314.

[52] *Id*. at 314, 316.

[53] *In re Inner City Mgmt., Inc.*, 304 B.R. 250, 254 (Bankr. D. Md. 2003) (citing *In re A.R. Baron & Co., Inc.*, 280 B.R. 794, 800 (Bankr. S.D.N.Y. 2002), and *Shearson Lehman Hutton, Inc. v.Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991)).

[54] *See In re Educators Group Health Trust*, 25 F.3d 1281, 1283-84 (5th Cir. 1994) (property of

the debtor includes causes of action belonging to the debtor at the time the case is commenced. If the claim belongs to the estate's creditors, the trustee has no standing to bring the cause of action.).

[55] *Personal Bus. Ins. Agency*, 333 F.3d 239, 245 (3d Cir. 2003).

[56] *Id*.

[57] *Id*. at 246.

[58] See n. 38 supra.; *see also* VA. CODE ANN. § 38.2-1513(C) ("A receiver in any proceeding under this chapter may avoid any transfer or lien upon the property of the insurer that any creditor, stockholder, subscriber or member of the insurer might have avoided").

[59] 11 U.S.C. § 1501 *et seq*. (2005).

[60] *In Re Holmes Envtl., Inc.*, 287 B.R. 363, 382 (Bankr. E.D. Va. 2002) (citing *Musso v. N.Y. State Higher Education Services Corp.*, 157 B.R. 932, 940 (Bankr. E.D.N.Y. 1993); *In re Coco*, 67 B.R. 365, 369 (Bankr. S.D.N.Y. 1986)); *In re O.P.M. Leasing Servs., Inc.*, 46 B.R. 661 (Bankr. S.D.N.Y. 1985).

[61] *In re Ocana*, 151 B.R. 670, 671 (S.D.N.Y. 1993).

[62] *Id*.

[63] *Id*. at 673.

[64] *Id*.

[65] *Id*.

[66] *In re Rubin*, 160 B.R. 269 (Bankr. S.D.N.Y. 1993).

[67] *Id*. at 272.

[68] *Id*. at 274.

[69] *Id*. at 277.

[70] *Id*. at 275 n.7.

[71] *Butterfield*, 339 B.R. 366.

[72] This trust was also compliant with the corresponding Virginia Administrative Code provisions of 14 VAC 5-300-120.

[73] VA. CODE ANN. § 38.2-1509 (1996).

[74] *Butterfield*, 339 B.R. at 371.

[75] It should be noted the arguments were based on the pleadings and allegations of the petitioner and not on any other evidence. This posture of the motion to dismiss may explain the court's failure to look at the true nature of the claims.

[76] *Butterfield*, 339 B.R. at 374.

[77] *In re Palm Beach Heights Dev. & Sales Corp.*, 52 B.R. 181, 183 (Bankr. S.D. Fla. 1985).

[78] 160 B.R. at 282.

[79] *Id*.

[80] *Id*. at 277.

[81] *In re Butterfield*, 339 B.R. 366 (Bankr. E.D. Va. 2004), Petitioners Brief in Opposition to Motion to Dismiss at Page 11.

[82] *See, e.g., In re Butterfield*, 339 B.R. 366 (Bankr. E.D. Va. 2004).

[83] 11 U.S.C. § 1501 *et seq.* (2005).

[84] 11 U.S.C. § 1501(d).

[85] *In re Ocana*, 151 B.R. 670, 673-74 (S.D.N.Y. 1993).

[86] One relatively weak argument to the contrary is that although the court may not "grant" relief per section 1501(d), it does not necessarily prevent the automatic relief that is now available to a "foreign main proceeding" in section 1520(a)(1). The automatic relief arguably limits the State's ability to administer the account since the Court itself does not technically grant such an "automatic" stay. Such an argument, however, ignores the fact that the automatic stay is triggered by the Court's act of recognizing the foreign main proceeding and, moreover, the House Report suggests that Congress' intention was to allow continued state regulation of the account.

[87] 11 U.S.C. § 1521(d).

[88] H.R. REP. NO. 109-31(I) at 116 (2005).

[89] 28 U.S.C. §§ 1407, 2112(a)(3) (2006).

[90] *See, e.g.*, 11 U.S.C. §§ 1502(4) and (5), 1517(a)(1) and (b)(1)-(2), 1520.

[91] 11 U.S.C. § 1517(b).