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Meet the new boss — same as the old boss

By Karl S. Myers

Commonwealth Court reaffirms the Insurance Department's singular role in the approval of insurance company acquisitions.

When the prospective buyer and seller of an insurance company seek the government's approval for the company to change hands, it is not uncommon for policyholders to try to interject themselves into the process. The question becomes what role, if any, these kinds of parties should be allowed to play. In a decision that helps answer that question, the Pennsylvania Commonwealth Court recently held that policyholders do not have a right to intervene in the regulatory approval process for the change in control of an insurance company. Instead, it is up to the Pennsylvania Insurance Department — the regulatory body empowered by the Insurance Holding Company Act to approve or reject the transaction — to look out for the interests of the policyholders, other interested parties and the public.

The Challenge to the OneBeacon Sale

In *Crosby Valve v. Department of Insurance,*[1] the court was faced with a challenge to the proposed sale of several OneBeacon Insurance companies to the Armour Group.[2] Armour had asked the Department for its permission to acquire the OneBeacon companies by submitting a "Form A" application, as required by the Holding Company Act. The Department then published notice of this proposed acquisition in the *Pennsylvania Bulletin.*

The Department's notice prompted several companies insured by the OneBeacon entities to apply to the Department for permission to intervene in the transaction so they could oppose it. These objecting policyholders believed the sale of the OneBeacon companies would cause insufficient funds to be available to pay environmental, asbestos and other third-party liability claims that had been asserted against the objectors.

While the objectors' intervention request was pending, the Department went forward with its consideration of the transaction. The Department's review process included holding a public informational hearing. There, the objectors appeared, made comments and presented their experts' opinions. The objectors also were permitted to make written submissions and submit their experts' written reports during the course of the Department's review.

The Department ultimately denied the objectors' request to intervene. The same day, it approved of Armour's acquisition of the OneBeacon entities.

The Court Agrees with the Department

The objectors appealed to the Commonwealth Court, arguing that they were owed a more meaningful opportunity to participate. The court, however, sustained the Department's order denying the objectors' application for intervention. The court explained that the

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regulatory process specified in the Insurance Holding Company Act controls the Department's consideration of a "Form A" change-in-control application — not the adversarial proceeding requirements of other administrative laws and regulations, as urged by the objectors.[3]

The court's examination of the Holding Company Act demonstrated that the law does not allow for intervention by non-parties to the transaction. Only the parties to the transaction — in this case, the buyer and seller of the insurance company – are permitted hearing rights. While either of those parties can ask for a hearing, it is up to the Department to decide if a hearing is warranted. The Act similarly gives the Department wide discretion over other matters relating to the proposed acquisition, including the option for it to hire attorneys and experts to assist with its review. The court concluded, therefore, that the aim of the Holding Company Act is for the process to be a regulatory one conducted by the Department, rather than an adjudicatory one centered on adversaries with conflicting interests. In that regulatory context, it is up to the Department — and only the Department — to consider all interests when making its decision.

The court also looked favorably on the Department's process as it was deployed for the proposed OneBeacon-Armour transaction. The court pointed out that the Department had provided a hearing, even though one was not required, and that the Department had gone out of its way to allow the objectors to appear at the hearing, present oral comments and present their expert's oral comments, as well as in allowing them to provide written comments and arguments and written expert reports. The court also noted that the Department had provided summary versions of confidential materials the objectors had demanded. This process, the court observed, mirrored the Department's review of the insurance transaction in *LaFarge Corporation v. Pennsylvania Insurance Department,*[4] where the Pennsylvania Supreme Court found the Department's process satisfied due process requirements.

Given that the court affirmed the Department's denial of intervention, it affirmed the Department as to the objectors' related and contingent challenges. This included their appeal of the Department's refusal to allow access to confidential documents submitted by OneBeacon and Armour. The court reasoned that the objectors' lack of a right to intervene meant they had no right to access those documents. The court also noted that provisions of the Holding Company Act required the Department to retain certain documents in confidence. Similarly, because the Department correctly denied intervention, the court dismissed the objectors' challenge to the Department's approval of the transaction on mootness grounds.

Author

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What *Crosby Valve* Means

The court's decision in Crosby Valve represents an important milestone in Pennsylvania jurisprudence with respect to the Insurance Department's regulatory powers in the transactional setting. The decision validates the process the Insurance Department has developed and utilized in "Form A" proceedings. That process allows nonparties to be heard and to make substantive submissions. At the same time, however, the Department has clearly delineated the roles of the participants before it. These clear lines and limited roles of nonparties to the transaction help eliminate troublesome and unnecessary delays and litigation threats concerning the Department's review.

Nonparties to transactions often seek to delay, challenge or duplicate the Department's own efforts in "Form A" proceedings. By limiting the scope of nonparty participation, the Department is able to consider the concerns of these nonparties, while remaining focused on the proposed transaction and the parties to it. The parties, for their part, are similarly able to focus their attention on satisfying the Department's requests and inquiries, rather than consuming bandwidth fending off collateral attacks. This transactional review process, which the Commonwealth Court has now validated, is keeping with the letter and spirit of the Insurance Holding Company Act. ■

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1 No. 78 C.D. 2015, ___ A.3d ___, 2016 WL 164094 (Pa. Commw. Jan. 14, 2016).

2 Stradley Ronon is representing the Armour Group in this matter.

3 Later in its opinion, the court noted that those other laws would not have given the objectors a right to participate anyway, as they could not establish their right to intervene due to the speculative nature of their fears of insufficient funds to pay claims and delayed payment of claims.

4 735 A.2d 74 (Pa. 1999).

People News

Sam Arena participated in three panel discussions during the Fidelity Program of the American Bar Association Fidelity and Surety Law Committee's 2016 MidWinter Meeting in New York. The panel discussions, "The Ethics of Mediation," "Staying in Bounds at Mediation" and "What Have We Learned" addressed mediation strategies and ethical issues that may arise in the course of fidelity bond claim and crime policy claim-related mediations.

Sam Arena and **Nicole Stover** co-authored a chapter in the Third Edition of *Annotated Commercial Crime Insurance Policy*, published by the American Bar Association. The chapter, titled "Exclusions Other Than Inventory Loss," provides commentary and annotations with regard to exclusions found in the Insurance Services Office's Commercial Crime Policy and the Surety & Fidelity Association of America's Crime Protection Policy.

Joan Boros served as co-chair for the Practicing Law Institute's Securities Products of Insurance Companies conference on Jan. 20 in New York. The program provides critical content on the prevailing and emerging legal issues practitioners must understand, and will discuss product development and asset management services offered by insurance company complexes. Joan co-founded the Securities Products of Insurance Companies conference and this year marks her 20th as co-chair.

Jana Landon served as a panelist during Bryn Mawr Trust's breakfast seminar, "Cybersecurity: Protecting Against Data Breaches." Jana spoke on the prevalence of data breaches, cyberinsurance coverage available for closely held business, and the state of the cyberinsurance marketplace.

Steve Davis and **Jana Landon** will serve as panelists at the Pennsylvania Bar Institute's upcoming conference, Insurance Law for Insurance Lawyers, in Mechanicsburg, PA on March 31. The program provides in-depth presentations in emerging insurance issues. Steve will be speaking on corporate governance issues and Jana will be speaking on cybersecurity and cyberinsurance coverage.