IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF:	)	
	)	C.A. No. 8601-VCZ
INDEMNITY INSURANCE CORPORATION, RRG, IN LIQUIDATION	)	

AMENDED OMNIBUS ORDER CONCERNING FOURTH REPORTED CLAIM RECOMMENDATIONS

WHEREAS:

A. On April 10, 2014, the Delaware Chancery Court placed Indemnity Insurance Corporation RRG ("IICRRG") into liquidation by a Liquidation and Injunction Order with Bar Date ("Liquidation Order"), pursuant to the Delaware Uniform Insurers Liquidation Act ("DUILA"), 18 *Del. C.* § 5901, *et seq*.

B. The Liquidation Order appointed the Delaware Insurance Commissioner as Receiver ("Receiver") and set a bar date of January 15, 2015, for the filing of proofs of claims against IICRRG and information for filing claims, including a Proof of Claim ("POC") form, was sent to potential claimants of IICRRG.

C. Pursuant to 18 *Del. C.* § 5902(a) and the Plan for the Receiver's Claim Recommendation Report and Final Determination of Claim By The Court (the "Claim Final Determination Plan"),[1] the Receiver has filed the Fourth Report of Claims Recommendations Pursuant to Paragraph (C) 8 and 9 of the Claim Final

[1] Docket Item ("D.I.") 899.

Determination Plan ("Fourth Report");[2] the Court has entered an Order to Show Cause fixing a time, date, and objection deadline to respond to the claim recommendations in the Fourth Report;[3] the Court and Receiver have given notice to claimants whose claims are in the Fourth Report;[4] and the September 15, 2023, Objection Deadline passed with the submission of ten objections via the Claimant Portal, POC #'s 0910, 2585, 2861, 2792, 2855, 2724, 1336, 1767, 1320, and 2762 (collectively, the "Objections").[5]

D. A telephonic hearing on the Objections was held on October 16, 2023, at 3:15 p.m. The Court considered the Receiver's Claim Recommendation in view of the Objections and supporting materials as submitted through the Claimant Portal under an abuse of discretion standard.[6]

E. The Objection in POC # 0910 was **WITHDRAWN** before the hearing. The Objection in POC # 1336 was **WITHDRAWN** by counsel for the claimant at the hearing.

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[2] D.I. 968.

[3] D.I. 983.

[4] D.I. 984, 989.

[5] Materials submitted by the claimant and Receiver via the Claimant Portal in connection with these objections are docketed under seal as exhibits to this Order. The largest documents were not electronically served to counsel of record.

[6] *Matter of Scottish Re (U.S.), Inc.*, 273 A.3d 277, 293 (Del. Ch. Mar. 31, 2022) ("Black letter authorities generally state that an abuse of discretion standard applies when a court reviews the decision of an insurance commissioner acting as a receiver for a delinquent insurer." (collecting authorities)).

F. The Objection in POC # 1320 is **MOOT**. Upon considering the objection, the Receiver agreed the claim should be valued at $1,000,000.00. POC # 1320 shall be valued at $1,000,000.00.

G. The Objection in POC # 2724 is **MOOT**. The Receiver has excused the claimant's late filing because the claimant was not timely notified.

H. The Objection in POC # 2762 is **MOOT**. Upon considering the objection, the Receiver excused the late filing and agreed to the claimant's proposed valuation of $41,222.70, and Class III priority class. POC # 2762 shall be so valued and classified.

I. The Receiver submitted to the Court for *in camera* review its notices of determination for the Fourth Report claims for which no objection was received (the "Unopposed Determinations"). The Court reviewed the Unopposed Determinations under an abuse of discretion standard.[7]

NOW, THEREFORE, IT IS HEREBY **ORDERED** as follows:

1. The Objection in POC # 1767 is **DENIED**. No party appeared at the hearing in support of this objection. I see no abuse of discretion in the Receiver's determination that the policy contains workers compensation and employer's liability exclusionary language that would preclude coverage.

[7] *See id.*

2. The Objection in POC # 2585 is **DENIED**. No party appeared at the hearing in support of this objection. The Receiver's original Notice of Determination explained that this claim is encompassed in POC # 1531. Counsel for the claimant stated in response, in a letter dated September 28, 2018, "We have no objection to this determination." The objection to the Receiver's $0 valuation seems to overlook that explanation and agreement. I see no abuse of discretion in the Receiver's valuation.

3. The Objection in POC # 2855 is **GRANTED IN PART**. Counsel for the claimant appeared at the hearing. This objection follows an extensive background. Citations are to the exhibits titled as they have been filed with this Order.

a. On January 29, 2006, Diana Tafur ("Claimant") was ejected from the back seat of a taxi cab struck by a driver that had allegedly consumed alcohol at the policyholder nightclub, called Home. Claimant was catastrophically injured and continues to suffer from a very serious traumatic brain injury. Claimant is represented by her father and guardian, Ivan Tafur.

b. Claimant filed suit in the fall of 2006 against the taxi driver, the driver of the other vehicle, and the nightclub as defendant A1 Entertainment, LLC d/b/a Home, on the grounds that Home continued to serve that driver alcohol while he was visibly intoxicated in violation of New York Alcoholic Beverage Control

Law § 65. A1 Entertainment held three IICRRG insurance policies numbered 3003266 (the "CGL Policy"), 3003267 (the "Liquor Liability Policy") and 3003268 (the "Excess Policy")

c. Claimant's suit proceeded through discovery, and after IICRRG offered and then withdrew a settlement offer, it was scheduled for trial on May 3, 2011. In the meantime, Home had closed in 2009.

d. On February 9, 2011, IICRRG instituted a declaratory judgment action against A1 Entertainment LLC to rescind and declare void from date of inception the Liquor Liability Policy (the "Rescission Action").[8] The Rescission Action also sought a declaration that neither the CGL Policy nor the Excess Policy provided coverage for Claimant's loss as per the terms of those policies. Claimant's suit was stayed pending resolution of the Rescission Action.[9]

e. In the Rescission Action, IICRRG represented to the Supreme Court of the State of New York that it was an actual insurance company, that it had issued actual insurance policies to A1 Entertainment, that it had relied on A1 Entertainment's answers to questions on the application in issuing the Liquor Liability Policy, and that it would not have issued that policy if it had known that

[8] POC 2855 Obj. Ex. 5.
[9] POC 2855 Obj. Ex. 11, at Decision After Trial at 4.

A1 Entertainment would be open to patrons after 4:00 a.m., contrary to the answer in the application.

f. Claimant moved to intervene in the Rescission Action, informing the Court that Home had closed and the property had been foreclosed on, and arguing that service at the address for Home would not reach A1 Entertainment because the property had been sold and rezoned for residential use.[10] IICRRG opposed the motion to intervene, submitting in support an unsigned application for insurance.[11] The Court denied Claimant's motion to intervene.[12]

g. IICRRG moved for judgment on default in the Rescission Action. On October 7, 2011, the Court granted judgment in IICRRG's favor, rescinding the Liquor Liability Policy and declaring it void from inception, and declared that no coverage was available under either the CGL Policy or the Excess Policy (the "Rescission Judgment").[13] The Court relied on filings including a purported "summons" and "proof of service," and an affidavit from counsel showing the "default" and that a copy of the summons had been mailed to A1 Entertainment "at its last known address."[14]

[10] POC 2855 Obj. Ex. 6, at Order to Show Cause; POC 2855 Obj. Ex. 14.
[11] POC 2855 Obj. Ex. 7.
[12] POC 2855 Obj. Ex. 8.
[13] POC 2855 Obj. Ex. 9.
[14] *Id.*

h. In Claimant's action, because "Home had closed [and] the continued existence of A-1 Entertainment LLC was not clear, . . . its counsel moved to be relieved," which the Supreme Court of the State of New York granted.[15] Claimant's suit against A 1 Entertainment and the driver proceeded to a nonjury trial on January 8, 2014, and the Court entered a verdict on February 13, 2015.[16] Home did not appear for the trial, and the plaintiff did not "establish the current status of defendant A-1 Entertainment, LLC."[17] The Court concluded Claimant had demonstrated Home's liability under New York's Dram Shop Act, General Obligations Law § 11-101 *et seq*. The driver admitted liability, having pled guilty to several related criminal offenses. The Court apportioned liability 60% to the driver and 40% to Home, and concluded damages totaled $20,403,540. On April 26, 2017, the Court entered a judgment against A1 Entertainment for nearly $12 million (the "Liability Judgment").[18]

i. In these proceedings, in 2017, Claimant filed a $4,000,000.00 claim against the CGL Policy, the Excess Policy, and the Liquor Liability Policy.[19]

[15] POC 2855 Obj. Ex. 11, at Decision After Trial at 4.
[16] *Id.*, at Decision After Trial.
[17] *Id.*, at Decision After Trial, at 3.
[18] POC 2855 Obj. Ex. 12.
[19] POC 2855 POC Form; POC 2855 POC Support Parts 1–6.

j. The Receiver issued its Notice of Determination on Claimant's Claims on October 3, 2018. The Receiver initially classified the claim as a Class VII claim because it was untimely, and then valued it as a Class VII claim as $0.00.[20]

k. On November 20, 2018, Claimant objected, insisting she had a viable claim against the CGL Policy and Liquor Liability under New York Insurance Law § 3420 based on IICRRG's wrongful and untimely disclaimer and voiding of A1 Entertainment's policies.[21] Claimant also objected to the Class VII classification because she was not timely served with the Liquidation and Injunction Order with Bar Date.[22]

l. On August 16, 2019, the Receiver indicated it would not oppose excusing the late filing, and stated that "the classification of that portion of the POC seeking an amount within the coverage of the IICRRG policy would be considered a Class III claim and the classification of that portion of the POC seeking an amount being extra-contractual to the coverage of the IICRRG policy would be considered a Class VI claim."[23] The Receiver did not revise its $0 valuation.[24]

[20] POC 2855 NOD Letter.
[21] POC 2855 NOD Responses.
[22] *Id.*
[23] POC 2855 Affirmed NOD Letter.
[24] *Id.*

m. Claimant moved this Court for allowance of her late claim, and the Court granted that motion.[25] On February 10, 2022, the Receiver reclassified Claimant's claim as follows:

> (a) the portions of the claim in the POC under the CGL Policy and under the Excess Policy (policies # 3003266 and # 3003268 respectively) be assigned and qualify as Priority Class "III" claims in the IICRRG estate, (b) the portion of the claim in the POC under the Liquor Policy #3003267 be assigned and qualify as a Priority Class VI and (c) that the portion of this claim that asserts an Extra-contractual Claim also be assigned and qualifies as a Priority Class VI.[26]

The Receiver valued the Class III claim as zero because of the Rescission Judgment.[27] The Receiver did not value the Class VI claims because it is not anticipated there will be funds in the estate to satisfy that class.[28]

n. Claimant objected to the Class VI classification. Claimant asserts IICRRG's attempt to disclaim A1 Entertainment's policies in the Rescission Action were untimely and therefore prohibited under New York law.[29] Claimant also asserts IICRRG is estopped from attempting to void or disclaim coverage under the Liquor Liability Policy because they failed to investigate Home's operations while it was still in business, and sought to void coverage only after Home had

[25] D.I. 782–787, 795.
[26] POC 2855 Revised NOD Letter.
[27] *Id.*
[28] *Id.*
[29] POC 2855 Obj. Response at pdf 5–7 (citing cases).

ceased operations.[30] Claimant further asserts IIC could not seek to void or disclaim coverage because it undertook A1 Entertainment's defense without reserving its rights to disclaim under the policy.[31]

o. Claimant concludes, "As such, the entire basis of the declaratory judgment action seeking to void these policies ab initio was based on fraud."[32] Claimant asserts IICRRG made several false statements in the Rescission Action: (i) bringing an action against Home as if it existed when it did not, and with the knowledge that A 1 Entertainment would default; (ii) that IICRRG would tender back A1 Entertainment's payments under the policy while knowing A1 Entertainment was no longer operational; (iii) representing it had served Home when it could not have; (iv) that IICRRG would not have insured Home if it had known it stayed open after 4:00 a.m., and (v) that Tafur's injuries were caused by service of alcohol after 4:00 a.m. as surveillance video showed the driver was last served between 3:40 and 3:43 a.m.

p. Claimant has offered no basis to conclude the Receiver abused its discretion in categorizing Claimant's claim against IICRRG for its conduct in the Rescission Action as a Class VI claim. Indeed, Class VI, dedicated to "[c]laims of general creditors," appears appropriate for a claim for damages against IICRRG

[30] *Id*. at pdf 9–11.
[31] *Id*. at pdf 12.
[32] *Id*. at pdf 13.

rather than a claim under a policy.[33] The Receiver pointed out Section 5918's mandate: "No claim by a shareholder, policyholder or other creditor shall be permitted to circumvent the priority classes through the use of equitable remedies."[34] Here, that means that the equities underpinning Claimant's Class VI claim cannot be leveraged to reclassify that claim. As to value, Claimant has offered no basis to conclude the Receiver abused its discretion in declining to assign any value to the Class VI claim, given the size of the estate.

q. As for the value of Claimant's Class III claim, Claimant's submission is ambiguous. In the Claimant Portal's landing page for her submission, the response to "Objection to Value" is "yes." In the Objection Form generated by the Claimant Portal, the response is "no." Based on the rest of Claimant's submissions and oral argument, I conclude Claimant intended to object to the value of the Class III claim. I take Claimant's argument to be that the claim should be valued as if the policies were still in effect because she would have prevailed in establishing they were fraudulently voided. Claimant has set forth detailed allegations of IICRRG's fraudulent conduct leading to the default judgment in the Rescission Action.

[33] 18 *Del. C.* § 5918(e)(6).
[34] 18 *Del. C.* § 5918(e).

r. At oral argument, the Receiver explained, "[T]he receiver's position is that the receiver cannot be a party to a fraud and therefore if the court finds that there was in fact a fraud here, then the receiver believes that the court should relieve the claims."[35] Indeed, the Receiver has assigned value to other claims against policies that were ostensibly cancelled under fraudulent circumstances to avoid liability.[36] The Receiver's notices of determination do not address the fraud Claimant alleges.

s. I must conclude that silence was an abuse of the Receiver's discretion. The Receiver shall assess and value Claimant's Class III claim as if the policies were still in effect. The Receiver shall do so and issue a new Notice of Determination within thirty days, which shall specifically describe the contours of Claimant's Class III claim, the policies against which it is made, and the valuation as if those policies were still in place. The Receiver shall file that Notice of Determination on File&Serve and serve it on Claimant's counsel via the Claimant Portal.

4. The Objection in POC # 2861 is **DENIED**. No party appeared at the hearing in support of this objection. As the Receiver explained in its October 16, 2020, Notice of No Revision of Notice of Determination, the objector settled and

[35] D.I. 991 at 20.
[36] D.I. 969 ¶ 19.

released all claims for $4,500 in October 31, 2013. I see no abuse of discretion in the Receiver's valuation of the claim for that amount.

5. The Objection in POC #2792 is **DENIED**. Counsel for the claimant appeared at the hearing. The Receiver valued the claim at $150,000, noting the manager on duty confirmed the claimant had been refused bar service due to possibly being intoxicated; that "wet floor" caution signs had been posed on the patio and noted on surveillance video; and that no loss of income was indicated and no medical or hospital records had been provided. The Receiver concluded, "Questionable liability on the insured establishment factored into discounted value." The claimant relies on to an August 31, 2018, trial verdict and final judgment, obtained after IICRRG entered liquidation in April 2014, in the amount of $1,387,283.82. By statute, no judgment against an insured "taken after the date of entry of the liquidation order shall be considered in the liquidation proceedings as evidence of liability or of the amount of damages."[37] That language is clear and mandatory: neither the Receiver nor the Court can consider the 2018 judgment as evidence of the amount of damages. With the judgment set to the side, I see no abuse of discretion in the Receiver's determination.

6. The Unopposed Determinations are confirmed. The Court saw no basis to conclude the Receiver abused its discretion in making those Determinations.

[37] 18 Del. C. § 5928(c).

7. This Order shall be sent to the Objectors through the Claimant Portal, and served on counsel for the Receiver. This Order will be publicly available to claimants in the Unopposed Determinations. The Order dated November 9, 2023 is hereby **VACATED.**

IT SO ORDERED this 20th day of November, 2023.

/s/ Morgan T. Zurn
Vice Chancellor Morgan T. Zurn