IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 29663

LARRY DEITER, DIRECTOR OF INSURANCE
OF THE STATE OF SOUTH DAKOTA, AS LIQUIDATOR
OF RELIAMAX SURETY COMPANY, IN LIQUIDATION,

Plaintiff,

vs.

XL SPECIALTY INSURANCE CO.,

Defendant.

CERTIFICATION OF QUESTION FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF SOUTH DAKOTA, CENTRAL DIVISION
THE HONORABLE ROBERTO A. LANGE,
UNITED STATES DISTRICT JUDGE

BRIEF OF PLAINTIFF LARRY DEITER, DIRECTOR OF INSURANCE OF THE STATE OF SOUTH DAKOTA, AS LIQUIDATOR OF RELIAMAX SURETY COMPANY, IN LIQUIDATION

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Introductory Statement

Plaintiff is referred to herein as the "Liquidator." Defendant is referred to sometimes as "XL." The following legal proceedings will be referred to in this brief:[1]

- *Larry Deiter, Director of Insurance of the State of South Dakota, as Liquidator of ReliaMax Surety Company in Liquidation v. XL Specialty Insurance Co.*, in Circuit Court for the Sixth Judicial Circuit, Hughes County, South Dakota, 32CIV20-000026, removed to United States District Court for the District of South Dakota, Central Division, Case No. 3:20-CV-03009-RAL (the "XL Federal Action")
  Docket # Citation: Fed #___

- *State of South Dakota, ex rel. Larry Deiter, Director of Insurance of the State of South Dakota v. ReliaMax Surety Company*, in Circuit Court for the Sixth Judicial Circuit, Hughes County, South Dakota, 32CIV18-125 (the "Liquidation Action")
  Docket # Citation: LIQ #___.

- *Massachusetts Institute of Technology Federal Credit Union v. ReliaMax Surety Company; ReliaMax Holding Company; Michael Van Erdewyk; John Van Erdewyk; Bradley Messerli; Mark Payne; Randy Schaefer; Jim Rickards; and Miles Beacom, individually and as the Directors of ReliaMax Surety Company and ReliaMax Holding Company*, in Circuit Court for the Second Judicial Circuit, Minnehaha County, South Dakota, 49CIV18-3330 removed to Circuit Court for the Sixth Judicial Circuit, Hughes County, South Dakota, 32CIV19-22 (the "MIT Action")
  Docket # Citation: MIT #___.

- *Larry Deiter, Director of Insurance of the State of South Dakota, as Liquidator of ReliaMax Surety Company in Liquidation v. Michael Van Erdewyk, John Van Erdewyk, Bradley Messerli, Mark Payne, Randy Schaefer, and Jim Rickards, individually and as the Directors and Officers of ReliaMax Surety Company and ReliaMax Holding Company; and RSM US LLP*, in Circuit Court for the Sixth Judicial Circuit, Hughes County, South Dakota, 32CIV20-000207 (the "DO Action")
  Docket # Citation: DO #___.

[1] The Odyssey/eCourts system for state court proceedings does not assign numbers to docket entries. For ease of reference, the Liquidator submits an Appendix of the docket sheets for each state court action with numbers inserted for each docket entry. See Appendix A, B and C.

Of course, the records of those proceedings are proper subjects of judicial notice. *Jenner v. Dooley,* 590 N.W.2d 463, 1999 SD 20.

Jurisdictional Statement

This matter comes before this Court as a certified question from the United States District Court, District of South Dakota, Central Division, and arises out of the XL Federal Action before Judge Roberto A. Lange. Judge Lange *sua sponte* sought certification to this Court under SDCL 15-24A-1, as part of an Opinion and Order Certifying Question to Supreme Court of South Dakota issued on June 1, 2021. Fed #49. This Court accepted the Certified Question by Order dated June 28, 2021. Such Order directed the parties to respond in accordance with SDCL 15-24A-7 and designated the Liquidator as the party to file the first brief. Fed #52.

Statement of Issue Presented

The Court has agreed to determine the following question (the "Certified Question"):

> Does SDCL § 58-29B-56, in giving the Liquidator 180 additional days from the order of liquidation to give notice of a potential claim, thereby enlarge the coverage period under a claims-made insurance policy past the end of the policy period? That is, was the Liquidator's notice of claim given on November 1, 2018, within 180 days of the order of liquidation but four months after the end of the XL Specialty claims-made policy coverage period both timely and triggering of coverage under the policy?

The Liquidator respectfully requests that the Court answer the Certified Question in the affirmative. To clarify, however, the Liquidator does not contend that the period of XL Policy coverage is extended under SDCL 58-29B-56 so that claims based on post-July 1,

2018 events or losses would be covered. Instead, it is the period for asserting and noticing claims arising before July 2, 2018 that is extended for the statutory period.

The Certified Question is actually in two parts. The first sentence poses the question in the abstract. The second sentence places the abstract question within the specific context of the Liquidator's claim on the XL Policy. Because South Dakota settled law established by this Court places SDCL 58-29B-56 within and as part of a claims-made policy, the abstract question is resolvable in the affirmative by just a few sentences. *See infra* at 12. Since, however, the second sentence focuses specifically on the XL Policy, the Liquidator adds discussion about the particular context of the Liquidation Action and the XL Policy.

Statement of the Case

The Liquidator filed a Complaint for Declaratory Judgment and Other Relief against XL dated February 11, 2020 in Circuit Court for the Sixth Judicial Circuit, Hughes County, South Dakota. On or about March 13, 2020, XL removed the action to Federal Court. Fed #1. By the Complaint, the Liquidator sought (i) a declaration of coverage by an XL liability insurance policy for various claims described in notices given to XL, (ii) a declaration that the Liquidator is the sole proper claimant regarding such coverage and (iii) compensatory and punitive damages and (iv) attorney's fees.

The removed case was assigned to Judge Lange. In response to Judge Lange's ruling on initial motions filed by both parties, the Liquidator was permitted to file and did file an Amended Complaint on September 28, 2020. Fed #22. The parties filed competing Motions for Summary Judgment. Fed #25, 31, 41. Based on further developments outside the District Court action, the Liquidator filed a Second Amended

Complaint as permitted by Judge Lange's March 23, 2021 Order. Fed #44, 47. That Order deferred XL's obligation to answer the Second Amended Complaint until the Court ruled on the competing Motions for Summary Judgment. Thereafter, the Court issued the Decision and Order that included the request for certification. Fed #49.

Statement of Facts

The Liquidation Action

ReliaMax Surety Company ("RSC") is one of numerous subsidiaries of ReliaMax Holding Company ("RHC") and was formerly in the business of issuing surety bonds in connection with student loans made by other lenders. RSC became insolvent and on June 27, 2018 the Circuit Court for the Sixth Judicial Circuit, Hughes County, South Dakota (in this reference the "Liquidation Court") entered its Order in the Liquidation Action that RSC be placed in liquidation under SDCL Chapter 58-29B (the "Liquidation Order"). LIQ #4. The Liquidator is the statutorily designated and court-appointed liquidator of RSC pursuant to the Liquidation Order. Michael FitzGibbons was appointed Special Deputy Liquidator by separate Order of the Liquidation Court dated June 27, 2018 to conduct the day-to-day liquidation administration. LIQ #6. The Liquidator's purpose is to conduct the orderly wind-down of the business and ultimately distribute assets and recoveries to the insolvent insurer's policyholders and creditors, pursuant to SDCL 58-29B-124. Successful actions brought by the Liquidator obviously benefit those policyholders and creditors.

The Policies

As of the date of the Liquidation Order, RSC was an insured under two Directors and Officers Liability Policies procured by RHC: a primary policy with $3 million limits issued by Pioneer Specialty Risk Insurance Services, Inc. (the "Pioneer Policy"); and a $2 million excess policy issued by XL (the "XL Policy"). The two policies and their endorsements are attached to the Amended Complaint in the XL Federal Action as Exhibits B and C, respectively (Fed #23). The policy periods for both expired on July 1, 2018, but prior to the Liquidation Order, RHC had apparently purchased a reporting endorsement extending the reporting period following July 1, 2018.[2] The premium was supposedly paid to Pioneer in the amount required by the Pioneer Policy Declarations.

The MIT Action

In late October 2018, a creditor of the RSC Liquidation Estate, Massachusetts Institute of Technology Federal Credit Union ("MIT"), commenced the MIT Action in Minnehaha County against certain officers and directors of RSC and RHC and also against RSC and RHC, asserting claims related to the insolvency of RSC and RHC, particularly the alleged depletion of RSC assets by loans to RHC that RHC had no ability to repay, amounting to some $20 million. MIT #1-4. Because the MIT claims belonged to the Liquidator exclusively pursuant to SDCL 58-29B-42 and -49, venue of the action was transferred to the Liquidation Court and later dismissed on January 22, 2020, but

[2] A November 20, 2018 letter from counsel for Lloyds of London (Pioneer) in an unrelated matter mentions that RHC purchased an "Optional Reporting Period" that extends the Policy Period through July 1, 2021. *See* Exh 5 to Affidavit of Mark W. Haigh (Fed #34-5). That assertion seems contrary to Item G of the Declarations for the Pioneer Policy (Fed #23-2), but that potential conflict need not be resolved to answer the Certified Question.

without prejudice to the Liquidator's rights under statute and the Liquidation Order to pursue those D&O claims. MIT #62, 63, 64.

The Liquidator's Claims and Notices

Coincident with filing of the MIT Action, the Liquidator provided written notice of the Liquidator's D&O claims and ongoing investigation to Pioneer and XL on November 1, 2018. Fed #23, Ex 5. Consistent with that investigation notice, the Liquidator provided additional notices and claims descriptions on April 4, 2019 and October 21, 2019. Fed #23, Ex 6. The categories and descriptions of the claims against the directors and officers are spelled out in those exhibits.

On February 14, 2020, the Liquidator, via counsel, emailed to both Pioneer and XL a Summons and Complaint of the Liquidator against officers and directors of RSC and RHC and also the accounting firm that had prepared and provided audits and audit reports for RSC to the South Dakota Division of Insurance. All defendants admitted service and an agreement was reached staying the filing or obligation to answer pending settlement negotiations. DO #1-3. The suit was eventually settled with all defendants on terms approved by the Liquidation Court. DO #4, 5; LIQ #76, 77, 80. As a part of the settlement, Pioneer paid its policy limits, but XL refused. LIQ #77. There are more details regarding the DO Action and the settlement terms, but they are not directly relevant to the Certified Question.

Key Policy Provisions

The XL Policy provides that "Coverage hereunder will apply in conformance with the terms, conditions, endorsements and warranties of the Primary Policy (the Pioneer

Policy) . . . ." Fed 23, Ex C, p. 1 of 3. So, all the following in the Pioneer Policy applies with full force and effect to the XL Policy:

- Under definition EE of the Pioneer Policy "Wrongful Act" is defined in part as follows:

  EE. "**Wrongful Act**" means any actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty:

  1. by any of the **Insured Persons**, while acting in their capacity as such, or any matter claimed against any of the **Insured Persons** solely by reason of their serving in such capacity;

  2. by any of the **Insured Persons**, while acting in their capacity as, or any matter claimed against any of the **Insured Persons** solely by reason of their serving as:

     . . . .

     (b) a director, officer, manager, trustee, governor or executive director or in a functionally equivalent position of any **Outside Entity**; and

     . . . .

  By definition, all wrongful acts occurred before the expiration of XL's policy period on July 1, 2018. In other words, the Liquidator does not assert any claims against the directors and officers for wrongful acts first occurring <u>after</u> the date of the Liquidation Order. *See* Fed 23, Ex B, p. 10 of 22.

- The definition of "Claim" includes "any civil, criminal, administrative, *regulatory*, arbitration or mediation proceeding . . . " (emphasis supplied) and thus the Liquidation Proceeding itself, which obviously was commenced before expiration of the XL policy period. *See* Fed 23, Ex B, §II B 1, p. 2 of 22.

- Under the Pioneer Policy an "Insured Person" includes all directors, officers and risk managers of the Company (which includes all Subsidiaries) and all persons

who were, now are or shall be members of the board of directors of the Company (parents and subsidiaries). See Fed #23, Ex B, Section II C and K, pp. 2 and 4.

- While the Pioneer Policy excludes "any claim by, on behalf of, or at the direction of the Company,[3] any Insured Person in any capacity or by past, present or future security holder, partner or member of the Company," an exception to the exclusion applies where "such claim is brought in the event of the appointment of a trustee, examiner, receiver, *liquidator*, conservator, rehabilitator or similar official." *See* Fed #23, Ex B, p. 10 of 22 (emphasis supplied). Of course, that is precisely the circumstance we have now.
- Importantly, the Pioneer Policy does not require a Wrongful Act be joined in by all officers, directors and other Insured Persons. It is sufficient that the Wrongful Act be committed by a single individual. Fed #23, Ex B, p 10 of 22.

Standard of Review

This Court has the power to answer certified questions that "may be determinative of the cause pending in the certifying court and it appears to the certifying court and to the Supreme Court that there is no controlling precedent in the decisions of the Supreme Court of this state." SDCL 15-24A-1.

[3] The Pioneer Policy defines "Company" to include any subsidiary – RSC, in other words. *See* Fed #23, Ex B, p. 2 of 22.

Arguments and Authorities

1. Applicable Statutes in the Liquidation.[4]

In the liquidation of insolvent insurers, claims against officers and directors are not at all uncommon. *Stewart v. Wilmington Trust SP Services, Inc.*, 112 A.3d 271 (Del. Ch. 2015); *Koken v. Steinberg*, 825 A.2d 723 (Pa. Commw. Ct. 2015); *State ex rel. McReynolds v. Weed*, 1993 WL 133237 (Tenn. Ct. App. 1993); *State ex rel. Long v. ILA Corp.*, 513 S.E.2d 812 (N.C. Ct. App. 1999); *In re Integrity Insurance Co.*, 573 A.2d 928 (N.J. Super. Ct. App. Div. 1990); *In re Ideal Mut. Ins. Co.*, 140 A.D.2d 62 (N.Y. App. Div. 1988); and *Lexington Insurance Co. v. American Healthcare Providers*, 621 N.E.2d 332 (Ind. Ct. App.1993). SDCL Chapter 58-29B contains numerous provisions bearing upon such claims.

SDCL 58-29B-34 provides:

> 58-29B-34. *Authority to pursue legal remedies on insurer's behalf.* If it appears to the rehabilitator that there has been criminal or tortious conduct, or breach of any contractual or fiduciary obligation detrimental to the insurer by any officer, manager, representative, insurance producer, employee, or other person, the rehabilitator may pursue all appropriate legal remedies on behalf of the insurer.

This authority is continued in Liquidation. SDCL 58-29B-49(12).

Under SDCL 58-29B-42, the Liquidator is vested by operation of law "with the title to all property, contracts, and rights of action and all of the books and records of the

[4] Rules of construction and interpretation of statutes and insurance contracts are settled and well-known. *See In re Wintersteen Revocable Trust Agreement*, 907 N.W.2d 785, 2018 SD 12 (statutes); and *Sapienza v. Liberty Mutual Ins. Co.*, 2021 WL 2231422, 2021 SD 35 (insurance contracts). The Liquidator does not, however, anticipate that the decision in this case will turn on a difficult or disputed application of those rules.

insurer ordered liquidated, wherever located, as of the entry of the final order of liquidation."

Under SDCL 58-29B-43, upon entry of the Liquidation Order, all rights and liabilities of the insolvent insurer and "of its creditors, policyholders, shareholders, members *and all other persons interested in its estate* shall become fixed as of the date of the entry of the order of liquidation . . . ." (with exceptions that are inapplicable here). (emphasis supplied.) Those other persons include XL and Pioneer as insurers.

SDCL 58-29B-49 vests the Liquidator with numerous powers broad in scope, in addition to pursuit of the insurer's claims under SDCL 58-29B-49(12). They include the right to prosecute any action which may exist on behalf of the creditors, members, policyholders, or shareholders of the insurer against any officer of the insurer, or any other person. SDCL 58-29B-49(13). Further, the Liquidator may exercise or enforce all the rights, remedies, and powers of any creditor, shareholder, policyholder, or member. SDCL 58-29B-49(19). In other words, the Liquidator has statutory power to assert claims on the Pioneer and XL Policies for both RSC as Insured and also for all who could be legitimate claimants.[5]

SDCL 58-29B-56 provides as follows:

> The liquidator may, upon or after an order for liquidation, within two years or such time in addition to two years as applicable law may permit, institute an action or proceeding on behalf of the estate of the insurer upon any cause of action against which the statute of limitations has not expired at the time of the filing of the petition upon which such order is entered. <u>If, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for filing any claim, proof of claim, proof of loss, demand, notice, or the like</u>, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in the proceeding or by

[5] This statutory "two hats" is a unique feature of insurer insolvency proceedings under SDCL Chapter 58-29B.

> applicable law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case the period had not expired at the date of the filing of the petition, the liquidator may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the insurer, within a period of one hundred eighty days subsequent to the entry of an order for liquidation, or within such further period as is shown to the satisfaction of the court not to be unfairly prejudicial to the other party.

(emphasis supplied). Clearly, the statute deals with three different subjects:

- The time after entry of the Liquidation Order within which the Liquidator may commence any action or proceeding on behalf of the estate of the insurer.
- Any agreement by which "a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for filing any claim, proof of claim, proof of loss, demand, notice, or the like . . . ."
- A period of limitation fixed in any proceeding, judicial or otherwise, "either in the proceeding or by applicable law, for taking any action, filing any claim or pleading, or doing any act" that had not already expired.

For the first circumstance - commencement of suit - the statute extends the limitation period to two years from the Liquidation Order. For the second and third situations, the limited period is extended to "one hundred eighty days subsequent to the entry of an order for liquidation, or within such further period as is shown to the satisfaction of the court not to be unfairly prejudicial to the other party." Under the statute, the Liquidator has at a minimum 180 days after June 27, 2018 to make a claim and/or give notice under the policies. Such claim was made and notice of claim was given to both Pioneer and XL by letters dated November 1, 2018, via Federal Express overnight delivery, well within the 6-month period after June 27, 2018. Fed #23, Ex D.

2. Application to XL Policy.

Obviously the XL Policy is an agreement, as contemplated by Section 56. The first page of the XL Excess Policy Coverage Form expressly says so. Fed #23, Ex C, Excess Policy Coverage Form, p 1 of 3. As an agreement, it fixes a period of limitation for claims, notices of claims and other notices such as notice of investigation. While the Liquidator agrees that the XL Policy Period expired four days after the date of the Liquidation Order, the plain language of SDCL 58-29B-56 gives the Liquidator a minimum of 180 days after the Liquidation Order date to file such claims and notices. XL would have to concede that if the statute applies, the claims and notices were timely filed with XL.

It is elemental that all insurance policies are subject to state insurance laws. When necessary to review an insurance policy in light of such a statute, that statute is treated as if it were actually written into the policy. *Dusseldorp v. Continental Casualty Co.*, 951 F.3d 981, 984 (8th Cir. 2020); *Cornelius v. National Casualty Co.*, 813 N.W.2d 167, 2012 SD 167; *Farm & City Ins. v. Estate of Davis*, 629 N.W.2d 586, 2001 SD 71; *State Farm Mut. Auto. Ins. Co. v. Vostad*, 520 N.W.2d 273, 275-76 (S.D. 1994); and *Kremer v. American Family Mut. Ins. Co.*, 501 N.W.2d 765, 768-9 (S.D. 1993). Under the settled case law, then, Section 56 is to be read as though it were part of the XL Policy. Thus, the Pioneer and XL Policy claims and notice provisions and timing defenses are not enforceable against the Liquidator, because South Dakota statute expressly grants the Liquidator an extension of time with which he has undisputedly complied. SDCL 58-29B-56.

Just as the XL Policy (via Section III E2 of the Pioneer Policy) makes an express exception in the context of a liquidation proceeding, so must Section 56, as part of the XL Policy, be deemed to provide for an exception on claims and notices timing in the context of the Liquidation. It could not be reasonably argued that Section 56 is inapplicable to claims-made policies. Since occurrence-based liability policies do permit claims and notices after policy period expiration, there would be no need for Section 56 in that context. *Hortica-Florists' Mut. Ins. Co. v. Pittman Nursery Corp.*, 729 F.3d 846, 851 n.3 (8th Cir. 2013). So, the claims-made policy is precisely what Section 56, as part of the XL Policy, is designed for. It would be absurd to argue that Section 56 is unavailable in the only situation where it is needed.

RSC's D&O coverage is fixed upon the issuance of the Liquidation Order by SDCL 58-29B-43. As of the date of the Liquidation Order for RSC, June 27, 2018, the Pioneer and XL Policies were still in effect and did not lapse for another 4 days after the Liquidation Order. Therefore, the D&O coverage was fixed as of the Liquidation Order, and the Liquidator had 180 days to make a claim and to give notice of a claim under the two Policies.

3. Section 56 Origin and Relationships.

If the plain language of Section 56 were not enough, understanding of its origin slams the door on any argument to the contrary. Under 11 U.S.C. §109(b)(2), a domestic insurance company is not eligible to be a debtor in a federal bankruptcy proceeding. Accordingly, states have adopted insurance conservatorship, receivership and liquidation statutes to implement and accomplish what the Federal Bankruptcy Code provides for eligible debtors not excluded by §109. *In Matter of Liquidation of Freestone Insurance*

Company, 143 A.3d 1234, 1242 (Del.Ch. 2016); *Capstone Building Corp. v. American Motorists Ins. Co.*, 2013 WL 12250149 *2 (N.D.Ala. 2013) and *In re Amwest Sur. Ins. Co.*, 245 F.Supp.2d 1038 (D.Neb. 2002). All this is consistent with the McCarran-Ferguson Act, 15 USC §1012, which assigns the subject of insurance to state law.

South Dakota's statutory scheme has borrowed from the Federal Bankruptcy Code concepts and provisions for preferences, fraudulent transfers, claim filing procedures and priorities of types of claims. *See* SDCL 58-29B-61, -67, -107, -124. Thus, state courts before whom insurance liquidations are brought often cite the Federal Bankruptcy Code and cases interpreting it. *State ex rel. Wagner v. Gilbane Bldg. Co.*, 757 N.W.2d 194 (Neb. 2008); *In re Liquidation of Integrity Ins. Co.*, 935 A.2d 1184, 1193 (N.J. 2007); *Wilcox v. CSX Corp.*, 70 P.3d 85, 88 (Utah 2003); and *Koken v. Fidelity Mut. Life Ins. Co.*, 803 A.2d 807, 815-16 (CC.Pa. 2002).

Most pertinent to this case is 11 U.S.C. §108(b) (Extension of Time), which provides in relevant part as follows:

> [I]f . . . an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 60 days after the order for relief.

Thus SDCL 58-29B-56 and 11 U.S.C. §108(b) are substantially similar and function in the same manner, except that under South Dakota law the 60-day period under the Bankruptcy Code is expanded to a minimum of 180 days.[6]

While there are no South Dakota reported cases on Section 56, 11 U.S.C. §108(b) has been applied specifically in the claims-made insurance context. *See Federal Ins. Co. v. Sheldon,* 150 B.R. 314 (S.D.N.Y. 1993). The case was a declaratory action brought by Federal as issuer of a claims-made D&O policy. At issue was whether 11 U.S.C. §108(b) gave the trustee an extension of time within which to provide Federal with notice of a D&O claim. The Court held that §108(b) did grant the extension right. It is most useful to quote extensively from the decision:

> [5] Federal contends that section 108(b) does not act to extend the time to report potential claims under the D & O policy because the notice of termination was "unequivocal" and was to become effective "regardless of any actions taken by DSCO." Memorandum of Law in Opposition to the Trustee's Motion for Summary Judgment Dismissing Sheldon's Third-Party Complaint ("Federal Response") at 21. Cases interpreting section 108, however, demonstrate that Federal's argument is inapposite. For example, it has been held that a debtor who filed a petition for relief thirty-two minutes prior to the expiration of an option contract was entitled to the sixty-day extension provided by section 108 despite the fact that the failure to exercises the option could not be considered a "default." *In re G-N Partners,* 48 B.R. 462, 467 (Bankr.D.Minn.1985). The court noted that section 108 "is broader than curing defaults as is obvious from its reading; Congress included the language 'perform any other similar act.'" *Id.* 48 B.R. at 467. Similarly, the Eighth Circuit has held that section 108 extends the time in which a debtor may redeem a property from a mortgage foreclosure. *See Johnson v. First Nat'l Bank of Montevideo,* 719 F.2d 270, 278 (8th Cir. 1983), *cert. denied.* 465 U.S. 1012, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984).
>
> . . . .

[6] As it happens, at the time SDCL Chapter 58-29B was originally enacted in 1989, the then version of Insurers Rehabilitation and Liquidation Model Act, promulgated by the National Association of Insurance Commissioners, also used 180 days. See NAIC Model Act Publication 555, §24B, p. 22 (January 1987) (See Appendix D).

> Moreover, the language of section 108 explicitly states that the debtor is entitled to an extension of time in which to provide "notice." 11 U.S.C. §108(b). The Bankruptcy Act has been designed to provide the Trustee a limited time period in which to doing certain acts, which the debtor has failed to do, in order to preserve the debtor's rights. This is exactly the situation presented in the case at bar. *Id.* at 321.

As Judge Lange observed in his Opinion and Order (Fed #49), the current National Association of Insurance Commissioners ("NAIC") Receiver's Handbook for Insurance Company Insolvencies is of negligible relevance. The 2007 Insurer Receivership Model Act ("IRMA") contains a provision substantially the same as 11 U.S.C. §108 reducing the previous 180-day extension period to 60 days. (IRMA §109--see attached Appendix E)

Thus, under both 11 U.S.C. §108 and current IRMA §109, the extension period for a trustee or liquidator is only 60 days. So, small wonder that the NAIC Handbook would counsel prompt investigation of claims-made policies and possible purchase of tail coverage. Our South Dakota Legislature has eliminated the need for this rush and added premium expense by retaining the originally-enacted 180-day minimum (for free). Most significantly, however, the "Forward" (sp)[7] page to the NAIC Handbook disclaims any intent to be definitive about interpretation or application of state insurance insolvency laws or procedures. See Appendix F. That further underscores Judge Lange's expressed view.

[7] Likely intended to mean "Foreword."

4. Effect of RHC Extension Purchase.

ReliaMax Holding Company, the parent of RSC reputedly purchased an Optional Extension Period which extends the Policy Period through July 1, 2021. That is perfectly understandable and does nothing for XL in its attempts to avoid Section 56. Neither RHC nor its officers and directors are given the statutory extension benefit of Section 56. Unlike RHC and the directors and officers, only the Liquidator has the benefit of the statutory extension of time. So, the purchase by those not benefitting by SDCL 58-29B-56 cannot be used to suggest that Section 56 is useless to the Liquidator.

5. Timeliness and Relation Back of Later Notices.

The issue of timeliness of the later additional claims and notices by the Liquidator is beyond the scope of the Certified Question. Suffice it to say, however, that in the words of Section 56, those claims and notices were "within such further period . . . not . . . unfairly prejudicial to" XL. Also, under the Pioneer Policy (hence, the XL Policy also), any "Interrelated Wrongful Acts" relate back to the original Wrongful Act and Claim described in the first notice (November 1, 2018). Courts have held that such provision makes later notices of claims against the same Insureds relate back to the original notice date. *Burks v. XL Specialty Insurance Company*, 534 S.W.3d 458 (Texas 2015).

Conclusion

For all the reasons above-stated, the Liquidator respectfully requests that both parts of the Certified Question be answered in the affirmative.

Dated: July 14, 2021

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Certificate of Compliance

Under SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements of the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 4,227 words from the Statement of the Case through the Conclusion. I have relied on the word count feature of Microsoft Word to prepare this Certificate.

Dated: July 14, 2021

_/s/ SW Sanford_____

Certificate of Service

The undersigned attorney hereby certifies that, pursuant to SDCL 15-26C-4, a true and correct copy of the foregoing was served via email on those listed below:

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Dykema Gossett PLLC
1301 K Street NW, Suite 1100W
Washington, DC 20005
Email: *tjudge@dykema.com; jreichlyn@dykema.com*

on July 14, 2021.

_/s/ SW Sanford_____

Steven W. Sanford

APPENDIX TO

BRIEF OF PLAINTIFF LARRY DEITER,

DIRECTOR OF INSURANCE OF THE STATE OF SOUTH DAKOTA,

AS LIQUIDATOR OF RELIAMAX SURETY COMPANY, IN LIQUIDATION

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South Dakota Unified Judicial System eCourts

Dockets are continuously updated during normal business hours, but cannot make assurances that the latest information on orders or filings available at the Clerk's Office have been recorded on the dockets.

CASE LEGEND

STATE OF SOUTH DAKOTA, EX REL. LARRY DEITER, DIRECTOR OF INSURANCE OF THE STATE OF SOUTH DAKOTA vs. RELIAMAX SURETY COMPANY

32CIV18-000125
Judicial Officer: Rank, Bobbi
Type: Other
County: Hughes
Date Filed: 6/12/2018
Status: Reopened

PARTY INFORMATION

Claimant	Attorney(s)
KEY CORP TRUST Address: 127 PUBLIC SQUARE 2ND FLOOR CLEVELAND OH 44114-1306	OUT OF STATE ATTORNEY GOOSMANN, JEANA L
WRIGHT-PATT CREDIT UNION INC Address: 3560 PENTAGON BOULEVARD BEAVERCREEK OH 45431-1706	SUTTON, JASON ROBERT-FEIL WELK, THOMAS J

Petitioner	Attorney(s)
STATE OF SOUTH DAKOTA EX REL LARRY DEITER, DIRECTOR OF INSURANCE OF THE STATE OF SOUTH DAKOTA Address: 124 S EUCLID AVE 2ND FLOOR PIERRE SD 57501	HARMON, LISA SANFORD, STEVEN W MARNELL, FRANK

Respondent	Attorney(s)
RELIAMAX SURETY COMPANY Address: 5400 E 54TH ST SIOUX FALLS SD 57104	ANDERSEN, JOSHUA

JUDGMENT INFORMATION

06/27/2018 - Granted

0

EVENT INFORMATION

Date	Type	Comment
06/12/2018	#1 PETITION	FOR ORDER OF LIQUIDATION, JUDICIAL DECLARATION OF INSOLVENCY, AND REQUEST FOR INJUNCTIVE RELIEF AND CERTIFICATE OF SERVICE WITH ATTACHED EXHIBITS
06/18/2018	#2 ADMISSION OF SERVICE	
06/27/2018	#3 FINDINGS OF FACT AND CONCLUSIONS OF LAW	FOR ORDER OF LIQUIDATION, JUDICIAL DECLARATION OF INSOLVENCY, AND INJUNCTIVE RELIEF
06/27/2018	#4 ORDER	OF LIQUIDATION JUDICIAL DECLARATION OF INSOLVENCY, AND INJUNCTIVE RELIEF
06/27/2018	#5 NOTICE OF ENTRY	OF ORDER OF LIQUIDATION, JUDICIAL DECLARATION OF INSOLVENCY, AND INJUNCTIVE RELIEF AND CERTIFICATE OF SERVE WITH ATTACHMENTS

EVENT INFORMATION		
Date	**Type**	**Comment**
06/27/2018	#6 NOTICE	OF APPOINTMENT OF SPECIAL DEPUTY LIQUIDATOR AND CERTIFICATE OF SERVICE
07/30/2018	#7 APPLICATION	NO. 1 FOR ORDER APPROVING COMPENSATION OF EMPLOYEES AND OTHER PERSONS EMPLOYED BY THE LIQUIDATOR AND CERTIFICATE OF SERVICE WITH ATTACHED EXHIBITS
08/02/2018	#8 ORDER	APPROVING COMPENSATION PURSUANT TO LIQUIDATION APPLICATION NO.1
08/03/2018	#9 NOTICE OF ENTRY	OF ORDER APPROVING COMPENSATION PURSUANT TO LIQUIDATOR'S APPLICATION NO.1
09/18/2018	#10 NOTICE OF APPEARANCE AND OF SERVICE	
10/01/2018	#11 MOTION	FOR ADMISSION PRO HAC VICE FOR ELIZABETH M. LALLY AND CERTIFICATE OF SERVICE
10/01/2018	#12 AFFIDAVIT	OF ELIZABETH M. LALLY
10/03/2018	#13 ORDER	FOR ADMISSION PRO HAC VICE FOR ELIZABETH M. LALLY
10/15/2018	#14 APPLICATION	NO. 2 FOR ORDER APPROVING COMPENSATION OF CONTRACTORS TO BE EMPLOYED BY THE LIQUIDATOR AND CERTIFICATE OF SERVICE WITH ATTACHED EXHIBITS
10/18/2018	#15 REPORT	LIST OF RELIAMAX SURETY ASSETS AND CERTIFICATE OF SERVICE WITH ATTACHMENT
10/24/2018	#16 ORDER	APPROVING COMPENSATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 2
10/25/2018	#17 APPLICATION	NO. 3 FOR ORDER APPROVING LIQUIDATOR'S PROPOSAL REGARDING DISBURSEMENT TO GUARANTY ASSOCIATIONS AND CERTIFICATE OF SERVICE WITH ATTACHMENT
10/26/2018	#18 ORDER	APPROVING LIQUIDATOR'S PROPOSAL REGARDING DISBURSEMENT TO GUARANTY ASSOCIATIONS WIN LIQUIDATOR'S APPLICATION NO. 3
10/29/2018	#19 COPY OF EMAIL(S)	FROM ATTORNEY MARNELL TO JUDGE DEVANEY
10/29/2018	#20 NOTICE OF ENTRY OF ORDER	APPROVING COMPENSATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 2 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
10/29/2018	#21 NOTICE OF ENTRY OF ORDER	APPROVING LIQUIDATOR'S PROPOSAL REGARDING DISBURSEMENT TO GUARANTY ASSOCIATIONS IN LIQUIDATOR'S APPLICATION NO. 3 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
10/30/2018	#22 NOTICE OF APPEARANCE AND OF SERVICE	
10/31/2018	#23 APPLICATION	NO. 4 FOR ORDER CONFIRMING TITLE TO SLRS LOAN PORTFOLIO AND CERTIFICATE OF SERVICE WITH ATTACHED EXHIBITS
11/02/2018	#24 ORDER	APPROVING LIQUIDATOR'S APPLICATION NO. 4 FOR ORDER CONFIRMING TITLE TO SLRS LOAN PORTFOLIO

EVENT INFORMATION		
Date	**Type**	**Comment**
11/07/2018	#25 NOTICE OF ENTRY OF ORDER	APPROVING LIQUIDATOR'S APPLICATION NO. 4 FOR ORDER CONFIRMING TITLE TO SLRS PORTFOLIO AND CERTIFICATE OF SERVICE WITH ATTACHMENT
11/27/2018	#26 APPLICATION	NO. 5 FOR ORDER APPROVING COMPENSATION OF CONTRACTOR TO BE EMPLOYED BY THE LIQUIDATOR AND CERTIFICATE OF SERVICE WITH ATTACHED EXHIBITS
12/03/2018	#27 ORDER	APPROVING COMPENSATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 5
12/04/2018	#28 NOTICE OF ENTRY OF ORDER	APPROVING COMPENSATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 5 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
12/10/2018	#29 APPLICATION	NO. 6 FOR ORDER APPROVING FINANCIAL STATEMENTS AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
12/14/2018	#30 ORDER	APPROVING FINANCIAL STATEMENTS PURSUANT TO LIQUIDATOR'S APPLICATIONS NO. 6
12/17/2018	#31 NOTICE OF ENTRY OF ORDER	APPROVING FINANCIAL STATEMENTS PURSUANT TO LIQUIDATOR'S APPLICATION NO. 6 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
02/07/2019	#32 APPLICATION	NO. 7 FOR ORDER APPROVING COMPENSATION OF CONTRACTOR TO BE EMPLOYED BY THE LIQUIDATOR AND CERTIFICATE OF SERVICE WITH ATTACHED EXHIBITS
02/11/2019	#33 ORDER	APPROVING COMPENSATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 7
02/13/2019	#34 NOTICE OF ENTRY OF ORDER	APPROVING COMPENSATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 7 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
02/21/2019	#35 APPLICATION	NO. 8 FOR APPOINTMENT OF SPECIAL REFEREE FOR CLAIMS AND APPROVAL OF PROCEDURES GOVERNING REFEREE'S PROOF OF CLAIM ADJUDICATION AND CERTIFICATE OF SERVICE WITH ATTACHED EXHIBITS
02/25/2019	#36 ORDER	APPOINTING SPECIAL REFEREE FOR CLAIMS AND APPROVAL OF PROCEDURES GOVERNING SPECIAL REFEREE'S PROOF OF CLAIM ADJUDICATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 8
02/26/2019	#37 NOTICE OF ENTRY OF ORDER	APPOINTING SPECIAL APPROVAL OF PROCEDURES GOVERNING SPECIAL REFEREE'S PROOF OF CLAIM ADJUDICATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 8 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
05/28/2019	#38 APPLICATION	NO. 9 FOR ORDER APPROVING COMPENSATION OF CONTRACTOR TO BE EMPLOYED BY THE LIQUIDATOR AND CERTIFICATE OF SERVICE WITH ATTACHMENT
05/31/2019	#39 ORDER	APPROVING COMPENSATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 9
06/04/2019	#40 NOTICE OF ENTRY OF ORDER	APPROVING COMPENSATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 9 AND CERTIFICATE OF SERVICE WITH ATTACHMENT

EVENT INFORMATION		
Date	**Type**	**Comment**
07/09/2019	#41 NOTICE OF APPEARANCE AND OF SERVICE	
07/12/2019	#42 APPLICATION	NO. 10 FOR ORDER APPROVING FINANCIAL STATEMENTS AND CERTIFICATE OF SERVICE WITH ATTACHED EXHIBITS
07/12/2019	#43 REPORT	REGARDING UNEARNED PREMIUM FOR USE IN CALCULATION OF CLASS 4 UNEARNED PREMIUM CLAIMS AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
07/18/2019	#44 ORDER	APPROVING FINANCIAL STATEMENTS PURSUANT TO LIQUIDATOR'S APPLICATION NO. 10
07/23/2019	#45 NOTICE	FOR CHANGE OF ADDRESS FOR ATTORNEY FIRM AND CERTIFICATE OF SERVICE
07/24/2019	#46 NOTICE OF ENTRY OF ORDER	APPROVING COMPENSATION PURSUANT TO LIQUIDATOR'S APPLICAITON NO. 10 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
08/09/2019	#47 MOTION	OF LIQUIDATOR FOR ENTRY OF A PROTECTIVE ORDER FOR CONFIDENTIALITY AND CERTIFICATE OF SERVICE
08/16/2019	#48 ORDER	FOR CONFIDENTIALITY
08/20/2019	#49 NOTICE OF ENTRY	OF PROTECTIVE ORDER FOR CONFIDENTIALITY AND CERTIFICATE OF SERVICE WITH ATTACHMENT
09/03/2019	#50 APPLICATION	NO. 11 FOR APPROVAL OF FINANCIAL STATEMENTS AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
09/03/2019	#51 ORDER	APPROVING FINANCIAL STATEMENTS PURSUANT TO LIQUIDATOR'S APPLICATION NO. 11
09/09/2019	#52 NOTICE OF ENTRY	OF ORDER APPROVING FINANCIAL STATEMETNS PURSUANT TO LIQUIDATOR'S APPLICATION NO. 11 AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
09/23/2019	#53 APPLICATION	NO. 12 FOR ORDER APPROVING COMPENSATION OF CONTRACTOR TO BE EMPLOYED BY LIQUIDATOR AND CERTIFICATE OF SERVICE WITH ATTACHMENT
09/30/2019	#54 ORDER	APPROVING COMPENSATION PURUANT TO LIQUIDATOR'S APPLICATION NO. 12
10/08/2019	#55 NOTICE OF ENTRY OF ORDER	APPROVING COMPENSATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 12 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
10/09/2019	#56 SUBSTITUTION OF COUNSEL	AND CERTIFICATE OF SERVICE
11/18/2019	#57 APPLICATION	NO. 13 FOR ORDER APPROVING LIQUIDATOR'S FIRST CLAIMS REPORT & RECOMMENDATION AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
11/22/2019	#58 ORDER	APPROVING LIQUIDATOR'S FIRST CLAIMS REPORT & RECOMMENDATION PURSUANT TO LIQUIDATOR'S APPLICAITON NO. 13
11/26/2019	#59 NOTICE OF ENTRY OF ORDER	APPROVING LIQUIDATOR'S FIRST CLAIMS REPORT & RECOMMENDATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 13 AND CERTIFICATE OF SERVICE WITH ATTACHMENT

EVENT INFORMATION		
Date	**Type**	**Comment**
04/06/2020	#60 APPLICATION	NO. 14 FOR ORDER APPROVING FINANCIAL STATEMENTS AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
04/10/2020	#61 ORDER	APPROVING FINANCIAL STATEMENTS PURSUANT TO LIQUIDATOR'S APPLICATION NO. 14
04/24/2020	#62 NOTICE OF ENTRY OF ORDER	APPROVING FINANCIAL STATEMENTS PURSUANT TO LIQUIDATOR'S APPLICATION NO. 14 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
05/01/2020	#63 APPLICATION	NO. 15 FOR ORDER APPROVING LIQUIDATOR'S SECOND CLAIMS REPORT & RECOMMENDATION AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
05/05/2020	#64 ORDER	APPROVING LIQUIDATOR'S SECOND CLAIMS REPORT & RECOMMENDATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 15
05/07/2020	#65 NOTICE OF ENTRY OF ORDER	APPROVING LIQUIDATOR'S SECOND CLAIMS REPORT & RECOMMENDATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 15 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
07/15/2020	#66 APPLICATION	NO. 16 FOR ORDER APPROVING LIQUIDATOR'S THIRD CLAIMS REPORT & RECOMMENDATION AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
07/22/2020	#67 ORDER	APPROVING LIQUIDATOR'S THIRD CLAIMS REPORT & RECOMMENDATION PURSUANT TO APPLICATION NO. 16
07/23/2020	#68 NOTICE OF ENTRY OF ORDER	APPROVING LIQUIDATOR'S THIRD CLAIMS REPORT & RECOMMENDATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 16 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
09/16/2020	#69 APPLICATION	NO. 17 FOR ORDER APROVING FINANCIAL STATEMENTS AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
09/29/2020	#70 ORDER	APPROVING FINANCIAL STATEMENTS PURSUANT TO LIQUIDATOR'S APPLICATION NO. 17
09/30/2020	#71 NOTICE OF ENTRY OF ORDER	APPROVING FINANCIAL STATEMENTS PURSUANT TO LIQUIDATOR'S APPLICATION NO 17 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
11/23/2020	#72 APPLICATION	NO. 18 FOR ORDER APPROVING LIQUIDATOR'S FOURTH CLAIMS REPORT & RECOMMENDATION AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
11/30/2020	#73 ORDER	APPROVING LIQUIDATOR'S FOURTH CLAIMS REPORT & RECOMMENDATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 18
12/01/2020	#74 NOTICE OF ENTRY OF ORDER	APPROVING LIQUIDATOR'S FOURTH CLAIMS REPORT & RECOMMENDATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 18 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
12/22/2020	#75 APPLICATION	OF LIQUIDATOR FOR APPROVAL OF SETTLEMENT WITH RSM US, LLP IN 32CIV20-000207 AND CERTIFICATE OF SERVICE WITH ATTACHED EXHIBITS

EVENT INFORMATION		
Date	**Type**	**Comment**
12/28/2020	#76 ORDER	APPROVING SETTLEMENT WITH RSM US, LLP IN 32CIV20-000207
01/05/2021	#77 MOTION	OF LIQUIDATOR TO APPROVE SETTLEMENT WITH MICHAEL VAN ERDEWYK, JOHN VAN ERDEWYK, BRADLEY MESSERLI, MARK PAYNE, RANDY SCHAEFER AND JIM RICKARDS IN 32CIV20-000207 AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
01/13/2021	#78 REPORT	SPECIAL REFEREE'S RECOMMENDATION
01/15/2021	#79 NOTICE OF ENTRY OF ORDER	APPROVING SETTLEMENT WITH RSM US, LLP IN 32CIV20-000207 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
01/26/2021	#80 ORDER	APPROVING SETTLEMENT WITH DIRECTORS AND OFFICERS OF RELIAMAX SURETY COMPANY AND RELIAMAX HOLDING COMPANY IN 32CIV20-000207
01/27/2021	#81 NOTICE OF ENTRY OF ORDER	APPROVING SETTLEMENT WITH DIRECTORS AND OFFICERS OF RELIAMAX SURETY COMPANY AND RELIAMAX HOLDING COMPANY IN 32CIV20-000207 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
02/12/2021	#82 APPLICATION	NO. 19 FOR ORDER APPROVING COMPENSATION OF EMPLOYEES AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
02/23/2021	#83 ORDER	APPROVING COMPENSATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 19
03/15/2021	#84 ORDER	AFFIRMING SPECIAL REFEREE'S RECOMMENDATION
03/16/2021	#85 NOTICE OF ENTRY OF ORDER	AFFIRMING SPECIAL REFEREE'S RECOMMENDATION AND CERTIFICATE OF SERVICE WITH ATTACHMENT
03/23/2021	#86 NOTICE OF ENTRY OF ORDER	APPROVING COMPENSATION PURSUANT TO LIQUIDATOR'S APPLICATION NO. 19 AND CERTIFICATE OF SERVICE WITH ATTACHMENT
03/25/2021	#87 STIPULATION	FOR DIVISION OF FEDERAL TAX REFUND AND APPLICATION FOR COURT APPROVAL AND CERTIFICATE OF SERVICE
03/29/2021	#88 ORDER	APPROVING DIVISION OF FEDERAL TAX REFUND
03/30/2021	#89 NOTICE OF ENTRY OF ORDER	APPROVING DIVISION OF FEDERAL TAX REFUND AND CERTIFICATE OF SERVICE WITH ATTACHMENT
04/29/2021	#90 APPLICATION	NO. 20 FOR ORDER APPROVING FINANCIAL STATEMENTS AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
05/03/2021	#91 ORDER	APPROVING FINANCIAL STATEMENTS PURSUANT TO APPLICATION NO. 20
05/04/2021	#92 NOTICE OF ENTRY OF ORDER	APPROVING FINANCIAL STATEMENTS PURSUANT TO LIQUIDATOR'S APPLICATION NO 20 AND CERTIFICATE OF SERVICE WITH ATTACHMENT

HEARING INFORMATION

Hearing Type	*Hearing Date/Time*	*Judge*	*Result*	*Cancel Reason*
Other Hearing	06/27/2018 10:00 AM	DeVaney, Patricia	Held	

FINANCIAL INFORMATION

KEY CORP TRUST

Total Financial Assessment	$200.00
Total Payments and Credits	$200.00
Balance Due as of 7/7/2021	$0.00

Fee Categories

Civil Filing Fees and Fees	$200.00

Transactions

10/09/2018	Transaction Assessment			$200.00
10/09/2018	Payment	Receipt # 32-33494	GOOSMANN LAW FIRM	($200.00)

LARRY DEITER, DIRECTOR OF THE DIVISION OF INSURANCE

Total Financial Assessment	$70.00
Total Payments and Credits	$70.00
Balance Due as of 7/7/2021	$0.00

Fee Categories

Civil Filing Fees and Fees	$30.00
Court Automation Surcharge	$40.00

Transactions

06/13/2018	Transaction Assessment	$70.00
06/13/2018	Waived for Hardship (EFile)	($70.00)

South Dakota Unified Judicial System eCourts

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CASE LEGEND

MASSACHUSETTS INSTITUTE OF TECHNOLOGY FEDERAL CREDIT UNION vs. RELIAMAX SURETY COMPANY, RELIAMAX HOLDING COMPANY, MICHAEL VAN ERDEWYK, BRADLEY MESSERLI, MARK PAYNE, RANDY SCHAEFER, JOHN VAN ERDEWYK, JIM RICKARDS, MILES BEACOM

32CIV19-000022
Judicial Officer: Klinger, Christina
Type: Litigation
County: Hughes
Date Filed: 10/23/2018
Status: Terminated

PARTY INFORMATION

Plaintiff	Attorney(s)
MASSACHUSETTS INSTITUTE OF TECHNOLOGY FEDERAL CREDIT UNION Address: 700 TECHNOLOGY SQUARE CAMBRIDGE MA 02139-3586	SARGENT, CLINT L DUNCAN, DENNIS LEE

Defendant	Attorney(s)
RELIAMAX SURETY COMPANY Address: 3801 W TECHNOLOGY CIRCLE SIOUX FALLS SD 57106	BARNETT, MALLORI M. MARNELL, FRANK SANFORD, STEVEN W
RELIAMAX HOLDING COMPANY Address: 2300 E 54TH ST NORTH STE 1 SIOUX FALLS SD 57104	Pro Se
VAN ERDEWYK, MICHAEL Address: 6745 BROADWAY DR PRIOR LAKE MN 55372	TULLY, EDWARD H.
MESSERLI, BRADLEY Address: 612 HICKORY LN HARRISBURG SD 57032	TULLY, EDWARD H.
PAYNE, MARK Address: 1800 S NORTON AVE SIOUX FALLS SD 57106	TULLY, EDWARD H.
SCHAEFER, RANDY Address: 23613 SD HWY 19 MADISON SD 57042	TULLY, EDWARD H.
VAN ERDEWYK, JOHN Address: 525 FOSTER ST MITCHELL SD 57301	TULLY, EDWARD H.
RICKARDS, JIM Address:	TULLY, EDWARD H.
BEACOM, MILES Address: 48027 E RIVERSIDE PLACE SIOUX FALLS SD 57105	TULLY, EDWARD H.

JUDGMENT INFORMATION

02/11/2019 - Change of Venue

01/23/2020 - Dismissed

JUDGMENT INFORMATION

EVENT INFORMATION

Date	Type	Comment
10/23/2018	#1 SUMMONS	
10/23/2018	#2 COMPLAINT	
10/26/2018	#3 AMENDED SUMMONS	
10/26/2018	#4 AMENDED COMPLAINT	
10/26/2018	#5 AFFIDAVIT OF SERVICE	
10/29/2018	#6 AFFIDAVIT OF SERVICE	
10/29/2018	#7 SHERIFF'S RETURN OF SUBSTITUTE PERSONAL SERVICE	
10/31/2018	#8 AFFIDAVIT	OF ATTEMPTED SERVICE ON MARK PAYNE
10/31/2018	#9 AFFIDAVIT	OF ATTEMPTED SERVICE ON BRAD MESSERLI
10/31/2018	#10 AFFIDAVIT	OF ATTEMPTED SERVICE ON JIM RICKARDS
10/31/2018	#11 AFFIDAVIT OF SERVICE	
10/31/2018	#12 AFFIDAVIT OF SERVICE	
10/31/2018	#13 AFFIDAVIT OF SERVICE	OF SUBSTITUTED SERVICE - AMENDED SUMMONS AND COMPLAINT - MICHAEL VAN ERDEWYK
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11/20/2018	#16 NOTICE OF APPEARANCE AND OF SERVICE	
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11/27/2018	#18 NOTICE OF APPEARANCE	
11/27/2018	#19 MOTION	BY LIQUIDATOR FOR IMMEDIATE AND TEMPORARY STAY AND EXTENSION OF TIME FOR RELIAMAX HOLDING COMPANY TO ANSWER OR RESPOND TO PLAINTIFF'S COMPLAINT AND CERTIFICATE OF SERVICE
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11/28/2018	#21 ADMISSION OF SERVICE	
11/28/2018	#22 ADMISSION OF SERVICE	
11/29/2018	#23 NOTICE OF HEARING AND CERTIFICATE SERVICE	
12/03/2018	#24 ADMISSION OF SERVICE	
12/04/2018	#25 DEFENDANT'S	MOTION TO ADMIT RICHARD C. LANDON PRO HAC VICE
12/04/2018	#26 DEFENDANT'S	MOTION TO ADMIT OLIVIA GARBER PRO HAC VICE
12/04/2018	#27 DEFENDANT'S	MOTION TO ADMIT BRIAN A. DILLON PRO HAC VICE
12/04/2018	#28 AFFIDAVIT	OF RICHARD C. LANDON IN SUPPORT OF MOTION FOR ADMISSION PRO HAC VICE
12/04/2018	#29 AFFIDAVIT	OF OLIVIA GARBER IN SUPPORT OF MOTION FOR ADMISSION PRO HAC VICE

EVENT INFORMATION		
Date	**Type**	**Comment**
12/04/2018	#30 AFFIDAVIT	OF BRIAN A. DILLON IN SUPPORT OF MOTION FOR ADMISSION PRO HAC VICE
12/04/2018	#31 ORDER	TO ADMIT RICHARD C. LANDON PRO HAC VICE
12/04/2018	#32 ORDER	TO ADMIT OLIVIA GARBER PRO HAC VICE
12/04/2018	#33 ORDER	TO ADMIT BRIAN A. DILLON PRO HAC VICE
12/05/2018	#34 NOTICE	OF MOTION AND MOTION TO DISMISS
12/05/2018	#35 MEMORANDUM	OF LAW IN SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION TO DISMISS
12/06/2018	#36 AFFIDAVIT	OF BRIAN A. DILLON IN SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION TO DISMISS WITH ATTACHED EXHIBITS
12/06/2018	#37 RECEIPT	
12/17/2018	#38 ORDER	FOR BRIEFING SCHEDULE ON MOTIONS
12/17/2018	#39 NOTICE OF ENTRY	OF ORDER FOR BRIEFING SCHEDULE ON MOTIONS AND CERTIFICATE OF SERVICE WITH ATTACHMENT
12/19/2018	#40 ORDER	
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01/07/2019	#42 PLAINTIFF'S	BRIEF IN RESPONSE TO LIQUIDATOR'S MOTION TO STAY AND CHANGE OF VENUE TO LIQUIDATION COURT, OR ALTERNATIVELY MOTION TO DISMISS; LIQUIDATOR'S MOTION FOR IMMEDIATE AND TEMPORARY STAY AND EXTENSION OF TIME FOR RELIAMAX HOLDING COMPANY TO ANSWER OR RESPOND TO PLAINTIFF'S COMPLAINT; AND INDIVIDUAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION TO DISMISS AND CERTIFICATE OF SERVICE
01/07/2019	#43 RESPONSE	OF LARRY DEITER, AS COURT APPOINTED LIQUIDATOR OF RELIAMAX SURETY COMPANY TO THE INDIVIDUAL DEFENDANTS' MOTION TO DISMISS AND CERTIFICATE OF SERVICE
01/16/2019	#44 DEFENDANT'S	INDIVIDUAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS
01/16/2019	#45 REPLY	BRIEF OF LIQUIDATOR IN SUPPORT OF ITS (1) MOTION FOR STAY AND CHANGE OF VENUE TO THE LIQUIDATION COURT, OR ALTERNATIVELY, TO DISMISS AND (2) MOTION FOR IMMEDIATE AND TEMPORARY STAY AND EXTENSION OF TIME FOR RELIAMAX HOLDING COMPANY TO ANSWER OR RESPOND TO PLAINTIFF'S COMPLAINT AND CERTIFICATE OF SERVICE WITH ATTACHMENT
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01/24/2019	#47 MOTION	LIQUIDATOR'S CONDITIONAL MOTION TO INTERVENE AND CERTIFICATE OF SERVICE

EVENT INFORMATION		
Date	**Type**	**Comment**
02/06/2019	#48 MEMORANDUM	OPINION REGARDING LIQUIDATOR'S CONDITIONAL MOTION TO INTERVENE, LIQUIDATOR'S MOTION FOR STAY AND CHANGE OF VENUE TO THE LIQUIDATION COURT, OR ALTERNATIVELY, TO DISMISS, LIQUIDATOR'S MOTION FOR IMMEDIATE AND TEMPORARY STAY AND EXTENSION OF TIME FOR RELIAMAX HOLDING COMPANY TO ANSWER OR RESPOND TO PLAINTIFF'S COMPLAINT, AND MOTION TO DISMISS INDIVIDUAL DEFENDANTS
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02/11/2019	#50 NOTICE OF ENTRY	OF ORDER GRANTING LIQUIDATOR'S CONDITIONAL MOTION TO INTERVENE, GRANTING LIQUIDATOR'S MOTION FOR CHANGE OF VENUE AND ABSTAINING FROM RULING ON ADDITIONAL MOTIONS AND CERTIFICATE OF SERVICE WITH ATTACHMENT
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12/26/2019	#56 ORDER	GRANTING LIQUIDATOR'S MOTION TO DISMISS, GRANTING DEFENDANTS' MOTION TO DISMISS IN PART, DENYING DEFENDANTS' MOTION TO DISMISS IN PART AND DISMISSING CLAIMS
12/31/2019	#57 MOTION	LIQUIDATOR'S RENEWED OR AMENDED MOTION TO STAY OR DISMISS AND CERTIFICATE OF SERVICE
01/02/2020	#58 PLAINTIFF'S	RESPONSE TO LIQUIDATOR'S RENEWED OR AMENDED MOTION TO STAY OR DISMISS AND CERTIFICATE OF SERVICE
01/03/2020	#59 REPLY	OF LIQUIDATOR IN SUPPORT OF HIS RENEWED OR AMENDED MOTION TO STAY OR DISMISS AND CERTIFICATE OF SERVICE WITH ATTACHMENT
01/06/2020	#60 DEFENDANT'S	RESPONSE TO LIQUIDATOR'S RENEWED OR AMENDED MOTION TO STAY OR DISMISS
01/08/2020	#61 NOTICE	OF FIRM NAME CHANGE
01/22/2020	#62 AMENDED	MEMORANDUM OPINION
01/22/2020	#63 AMENDED ORDER	GRANTING LIQUIDATOR'S MOTION TO DISMISS AND STAY - DENIED
01/23/2020	#64 AMENDED ORDER	GRANTING LIQUIDATOR'S MOTION TO DISMISS, GRANTING DEFENDANTS' MOTION TO DISMISS AND DISMISSING
02/06/2020	#65 NOTICE OF ENTRY	OF AMENDED ORDER GRANTING LIQUIDATOR'S MOTION TO DISMISS, GRANTING DEFENDANT'S MOTION TO DISMISS AND DISMISSING AND CERTIFICATE OF SERVICE WITH ATTACHMENT

HEARING INFORMATION

Hearing Type	*Hearing Date/Time*	*Judge*	*Result*	*Cancel Reason*
Motions Hearing	10/16/2019 1:30 PM	Klinger, Christina	Held	
Motions Hearing	01/28/2019 1:30 PM	Houwman, Robin J	Held	

FINANCIAL INFORMATION

BEACOM, MILES

Total Financial Assessment	$200.00
Total Payments and Credits	$200.00
Balance Due as of 7/7/2021	$0.00

Fee Categories

Civil Filing Fees and Fees	$200.00

Transactions

10/25/2019	Transaction Assessment			$200.00
10/25/2019	Payment	Receipt # 32-38665	GRAY, PLANT, MOOTY, MOOTY & BENNETT, P.A.	($200.00)

MASSACHUSETTS INSTITUTE OF TECHNOLOGY FEDERAL CREDIT UNION

Total Financial Assessment	$70.00
Total Payments and Credits	$70.00
Balance Due as of 7/7/2021	$0.00

Fee Categories

Civil Filing Fees and Fees	$30.00
Court Automation Surcharge	$40.00

Transactions

10/23/2018	Transaction Assessment			$70.00
10/23/2018	E-File Payment	Receipt # 49-346722	MASSACHUSETTS INSTITUTE OF TECHNOLOGY FEDERAL CREDIT UNION	($70.00)

South Dakota Unified Judicial System eCourts

Dockets are continuously updated during normal business hours, but cannot make assurances that the latest information on orders or filings available at the Clerk's Office have been recorded on the dockets.

CASE LEGEND

LARRY DEITER, DIRECTOR OF THE DIVISION OF INSURANCE vs. MICHAEL VAN ERDEWYK, JOHN VAN ERDEWYK, BRADLEY MESSERLI, MARK PAYNE, RANDY SCHAEFER, JIM RICKARDS, RSM US LLP

32CIV20-000207
Judicial Officer: Klinger, Christina
Type: Litigation
County: Hughes
Date Filed: 12/17/2020
Status: Pending

PARTY INFORMATION

Plaintiff	Attorney(s)
LARRY DEITER, DIRECTOR OF THE DIVISION OF INSURANCE Address: 124 S EUCLID AVE 2ND FLOOR PIERRE SD 57501	SANFORD, STEVEN W

Defendant	Attorney(s)
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JOHN VAN ERDEWYK Address:	Pro Se
BRADLEY MESSERLI Address:	Pro Se
MARK PAYNE Address:	Pro Se
RANDY SCHAEFER Address:	Pro Se
JIM RICKARDS Address:	Pro Se
RSM US LLP Address:	Pro Se

EVENT INFORMATION

Date	Type	Comment
12/17/2020	#1 SUMMONS	
12/17/2020	#2 COMPLAINT	
12/17/2020	#3 STIPULATION	FOR ADMISSION OF SERVICE, EXTENSION OF TIME TO ANSWER OR RESPOND AND STAY
01/25/2021	#4 NOTICE OF DISMISSAL	OF RSM USA, LLP AND CERTIFICATE OF SERVICE
01/29/2021	#5 JUDGMENT	FINAL JUDGMENT
02/02/2021	#6 NOTICE OF ENTRY	OF FINAL JUDGMENT AND CERTIFICATE OF SERVICE WITH ATTACHMENT

FINANCIAL INFORMATION

LARRY DEITER, DIRECTOR OF THE DIVISION OF INSURANCE

Total Financial Assessment	$70.00
Total Payments and Credits	$70.00
Balance Due as of 7/7/2021	$0.00

Fee Categories

Civil Filing Fees and Fees	$30.00
Court Automation Surcharge	$40.00

Transactions

12/21/2020	Transaction Assessment			$70.00
12/21/2020	E-File Payment	Receipt # 32-43679	LARRY DEITER, DIRECTOR OF THE DIVISION OF INSURANCE	($70.00)

agent satisfies the notice requirement for any agents under contract to him. Each agent obligated to give notice under this section shall file a report of compliance with the liquidator.

B. Any agent failing to give notice or file a report of compliance as required in Subsection A may be subject to payment of a penalty of not more than $1,000 and may have his license suspended, said penalty to be imposed after a hearing held by the Commissioner.

C. The liquidator may waive the duties imposed by this section if he determines that other notice to the policyholders of the insurer under liquidation is adequate.

Section 24. Actions By and Against Liquidator

A. Upon issuance of an order appointing a liquidator of a domestic insurer or of an alien insurer domiciled in this state, no action at law or equity shall be brought against the insurer or liquidator, whether in this state or elsewhere, nor shall any such existing actions be maintained or further presented after issuance of such order. The courts of this state shall give full faith and credit to injunctions against the liquidator or the company or the continuation of existing actions against the liquidator or the company, when such injunctions are included in an order to liquidate an insurer issued pursuant to corresponding provisions in other states. Whenever, in the liquidator's judgment, protection of the estate of the insurer necessitates intervention in an action against the insurer that is pending outside this state, he may intervene in the action. The liquidator may defend any action in which he intervenes under this section at the expense of the estate of the insurer.

B. The liquidator may, upon or after an order for liquidation, within two years or such time in addition to two years as applicable law may permit, institute an action or proceeding on behalf of the estate of the insurer upon any cause of action against which the period of limitation fixed by applicable law has not expired at the time of the filing of the petition upon which such order is entered. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in the proceeding or by applicable law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case the period had not expired at the date of the filing of the petition; the liquidator may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the insurer, within a period of 180 days subsequent to the entry of an order for liquidation, or within such further period as is shown to the satisfaction of the court not to be unfairly prejudicial to the other party.

C. No statute of limitation or defense of laches shall run with respect to any action against an insurer between the filing of a petition for liquidation against an insurer and the denial of the petition. Any action against the insurer that might have been commenced when the petition was filed may be commenced for at least sixty days after the petition is denied.

D. Any guaranty association or foreign guaranty association shall have standing to appear in any court proceeding concerning the liquidation of an insurer if such association is or may become liable to act as a result of the liquidation.

Section 25. Collection and List of Assets

A. As soon as practicable after the liquidation order but not later than 120 days thereafter, the liquidator shall prepare in duplicate a list of the insurer's assets. The list shall be amended or supplemented from time to time as the liquidator may determine. One copy shall be filed in the office of the clerk of the [insert proper court] Court and one copy shall be retained for the liquidator's files. All amendments and supplements shall be similarly filed.

B. The liquidator shall reduce the assets to a degree of liquidity that is consistent with the effective execution of the liquidation.

C. A submission to the court for disbursement of assets in accordance with Section 34 fulfills the requirements of Subsection A of this section.

Section 26. Fraudulent Transfers Prior to Petition

A. Every transfer made or suffered and every obligation incurred by an insurer within one year prior to the filing of a successful petition for rehabilitation or liquidation under this Act is fraudulent as to then existing and future creditors if made or incurred without fair consideration, or with actual intent to hinder, delay or defraud either existing or future creditors. A transfer made or an obligation incurred by an insurer ordered to be rehabilitated or liquidated under this Act, which is fraudulent under this section, may be avoided by the receiver, except as to a person who in good faith is a purchaser, lienor, or obligee, for a present fair equivalant value, and except that any purchaser, leinor, or obligee, who in good faith has given a consideration less than fair for such transfer, lien, or obligation, may retain the property, lien or obligation as security for repayment. The court may, on due notice, order any such transfer or obligation to be preserved for the benefit of the estate, and in that event, the receiver shall succeed to and may enforce the rights of the purchaser, leinor, or obligee.

B. (1) A transfer of property other than real property shall be deemed to be made or suffered when it becomes so far perfected that no subsequent lien obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee under Section 28C.

(2) A transfer of real property shall be deemed to be made or suffered when it becomes so far perfected that no subsequent bona fide purchaser from the insurer could obtain rights superior to the rights of the transferee.

(3) A transfer which creates an equitable lien shall not be deemed to be perfected if there are available means by which a legal lien could be created.

(4) Any transfer not perfected prior to the filing of a petition for liquidation shall be deemed to be made immediately before the filing of the successful petition.

(5) The provisions of this subsection apply whether or not there are or were creditors who might have obtained any liens or persons who might have become bona fide purchasers.

(1) For cause; or

(2) With respect to a stay of an act against property under Subsection C if:

(a) The insurer does not have any equity in the property; and

(b) The property is not necessary to an effective plan.

(3) For the purposes of this section, "cause" includes, but is not limited to, if (a) the receiver cancels a policy, a surety bond, or a surety undertaking, and (b) the creditor is entitled, by contract or law, to require the insured or the principal to have a policy, a surety bond, or a surety undertaking, and (c) the insured or the principal fails to obtain a replacement policy, surety bond, or surety undertaking within the later of thirty (30) days from the date of cancellation or the time permitted by contract or law.

I. In any hearing under Subsection H, the party seeking relief from the stay shall have the burden of proof on each issue, which shall be established by clear and convincing evidence.

J. The estate of an insurer that is injured by any willful violation of a stay provided by this section shall be entitled to actual damages, including costs and attorneys' fees, and, in appropriate circumstances, the receivership court may impose additional sanctions.

K. Notwithstanding any other provision of law, no bond shall be required of the commissioner or receiver in relation to any stay or injunction under this section.

Section 109. Statutes of Limitation

A. If applicable law, an order, or an agreement fixes a period within which the insurer may commence an action, and this period has not expired before the date of the filing of the initial petition in a delinquency proceeding, the receiver shall not by reason thereof be barred from commencing such an action if the receiver does so on or before the later of:

(1) The end of the period, including any suspension of the period occurring on or after the filing of the initial petition in a delinquency proceeding; or

(2) Four (4) years after the entry of the most recent receivership order.

B. Except as provided in Subsection A, if applicable law, an order or an agreement fixes a period within which the insurer may file any pleading, demand, notice, or proof of claim or loss, or cure a default in a case or proceeding, or perform any other similar act, and the period has not expired before the date of the filing of the petition initiating formal delinquency proceedings, the receiver shall not by reason thereof be barred from filing, curing or performing, as the case may be, if the receiver does so on or before the later of:

(1) The end of the period, including any suspension of the period occurring on or after the filing of the initial petition in a delinquency proceeding; or

(2) Sixty (60) days after the entry of the most recent receivership order.

C. If applicable law, an order or an agreement fixes a period for commencing or continuing a civil action in a court other than the receivership court on a claim against the insurer, and the period has not expired before the date of the filing of the initial petition in a delinquency proceeding, then the period does not expire until the later of:

(1) The end of the period, including any suspension of the period occurring on or after the filing of the initial petition in a delinquency proceeding; or

(2) Thirty (30) days after termination or expiration of the stay pursuant to this section with respect to the claim.

Forward

The 2018 edition of the *Receiver's Handbook for Insurance Company Insolvencies* has been updated as follows.

Chapter 5.II.E.–Proof of Claim Forms has been updated and 5.II.F–Coordination and Communication with Reinsurers has been added to address coordination and communication with reinsurers regarding reinsurance claims.

Disclaimer

These materials are designed and intended to provide a general overview of concepts, principles and procedures that the authors and editors believe may be of assistance to a receiver. This is not an instructional manual. These materials are not intended to serve as a definitive statement of the law or procedural requirements of any particular jurisdiction or to establish a standard of conduct or performance. They are not intended and should not be construed as being binding upon a receiver in any jurisdiction, nor should a receiver act solely in reliance on the contents of this Handbook. Materials in this Handbook relate to individual experiences and receiverships and are not necessarily suitable or applicable for use in all situations.

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Every reasonable effort is made to ensure that the materials in this Handbook are current. However, because of the committee structure and operational procedures of the National Association of Insurance Commissioners, there may be a lag between the drafting, exposure, adoption and publication of these materials.

The NAIC welcomes the comments and suggestions of the readers of this Handbook. Comments or suggestions should be directed to Financial Regulatory Services, National Association of Insurance Commissioners, 1100 Walnut Street, Suite 1500, Kansas City, MO, 64106-2197.

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 29663

LARRY DEITER, DIRECTOR OF INSURANCE
OF THE STATE OF SOUTH DAKOTA, AS LIQUIDATOR
OF RELIAMAX SURETY COMPANY, IN LIQUIDATION

Plaintiff,

v.

XL SPECIALTY INSURANCE COMPANY,

Defendant.

CERTIFICATION OF QUESTION FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF SOUTH DAKOTA, CENTRAL DIVISION
THE HONORABLE ROBERTO A. LANGE, UNITED STATES DISTRICT JUDGE

BRIEF OF DEFENDANT XL SPECIALTY INSURANCE COMPANY

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BRIEF OF DEFENDANT XL SPECIALTY INSURANCE COMPANY

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PRELIMINARY STATEMENT

The Court is presented with a certified question from the federal district court that effectively asks whether the South Dakota insurance company liquidation statute extends the coverage period under a claims-made liability policy. A determination requires application of the time-extension provision in SDCL 58-29B-56 to the insuring agreement of the claims-made policy at issue here. As shown below, the time-extension provision, which applies to "agreements" that fix the time for an insurer in liquidation to have done something, does not apply to the insuring agreement in the claims-made liability policy that was issued to the corporate parent of the surety company in liquidation here. This is so because the claims-made insuring agreement does not fix the time period for the insureds under the policy to do anything. Rather, the insuring agreement imposes an obligation only on the insurer, Defendant XL Specialty Insurance Company ("XL Specialty"), to provide defense and indemnity liability coverage for a claim *made against insureds* during the policy period. Accordingly, the insured directors and officers, who had the claim made against them by the Plaintiff (the "Liquidator") four months after the claims-made policy expired, are not entitled to any defense or indemnity coverage under the policy. The Liquidator, having taken an assignment from the directors and officers, likewise is not entitled to coverage.

JURISDICTIONAL STATEMENT

On June 28, 2021, this Court entered its order accepting a question of South Dakota law certified *sua sponte* pursuant to SDCL Ch. 15-24A from the United States District Court for the District of South Dakota, Central Division (the "Federal Court") in the action between the parties captioned *Larry Dieter, Director of Insurance State of South Dakota, as Liquidator of ReliaMax Surety Co. in Liquidation v. XL Specialty Insurance Co.*, No. 3:20-cv-3009 RAL (D.S.D.) (the "Coverage Action").

REQUEST FOR ORAL ARGUMENT

XL Specialty respectfully requests oral argument on the certified question. XL Specialty believes that oral argument may help ensure that the facts of the case and the parties' respective arguments are fully presented. XL Specialty believes oral argument is particularly warranted here because it was a dispositive movant below and will not have an opportunity to file a reply brief on the certified question to this Court.

STATEMENT OF THE ISSUES

The certified question, as framed by the Federal Court, is:

> Does SDCL § 58-29B-56, in giving the Liquidator 180 additional days from the order of Liquidation to give notice of a potential claim, thereby enlarge the coverage period under a claims-made insurance policy past the end of the policy period? That is, was the Liquidator's notice of claim given on November 1, 2018, within 180 days of the order of liquidation but four months after the end of the XL Specialty claims-made policy coverage period both timely and triggering of coverage under the policy?

For the reasons discussed below, XL Specialty respectfully asks the Court to answer the certified question in the negative. Specifically, the Court should hold that SDCL §58-29B-56 (the "Liquidation Statute") does not enlarge the claims-made coverage period and provide insureds under such a liability policy, such as the ReliaMax Holdings Company ("RHC") and ReliaMax Surety Company ("RSC") (collectively,

"ReliaMax") directors and officers against whom the Liquidator's claim was made, with six months of defense and indemnity claims-made coverage for free.

STATEMENT OF THE CASE

On February 11, 2020, the Liquidator filed the Coverage Action in the Circuit Court for the Sixth Judicial Circuit, Hughes County, South Dakota. *See* Compl. for Declaratory J. and Other Relief (Fed # 1-1).[1] On March 13, 2020, XL Specialty removed the Coverage Action to the Federal Court. *See* Def. XL Specialty Insurance Co.'s Notice of Removal (Fed # 1). On September 21, 2020, the Federal Court granted in part and denied in part XL Specialty's motion to dismiss the Coverage Action on ripeness grounds. *See* Op. and Order Den. Abstention and Granting in Part Dismissal (Fed # 20). The Federal Court granted the Liquidator leave to amend to state a plausibly ripe claim for a declaratory judgment that, under the Liquidation Statute, the Liquidator's claim against the ReliaMax directors and officers (the "D&Os") falls within the XL Specialty excess policy's claims-made coverage, even though the claim undeniably was first made four months after the XL Specialty excess policy expired. *See id.* at 17.

The Liquidator thereafter filed a first amended complaint, and XL Specialty filed its answer and affirmative defenses. *See* Am. Compl. for Declaratory J. and Other Relief (Fed # 23). Two days later, the Liquidator filed a motion for judgment on the pleadings. *See* Mot. for J. on the Pleadings and Req. for Judicial Notice (Fed # 25). XL Specialty filed its opposition to the Liquidator's motion for judgment on the pleadings and simultaneously moved for summary judgment in XL Specialty's favor. *See* Def.'s Mot.

[1] For ease of reference, XL Specialty adopts the citation formats used in the Liquidator's Brief and identifies the Federal Court's docket entries as "(Fed # __)" and documents in XL Specialty's Appendix, which supplements the Liquidator's Appendix, as "(App-__)."

for Summ. J. (Fed # 31); Def.'s Mem. in Opp'n to Pl.'s Mot. for J. on the Pleadings and in Supp. of Def.'s Mot. for Summ. J. (Fed # 32). The Liquidator and XL Specialty completed supplemental briefing by the end of December 2020. *See generally* Fed #s 35-40.

On February 2, 2021, with the parties' dispositive motions pending, the Liquidator, filed a motion with the Federal Court seeking leave to file a second amended complaint in the Coverage Action. *See* Pl.'s Mot. to Amend Am. Compl (Fed # 44). The Liquidator's proposed second amended complaint specifically seeks to impose liability on XL Specialty for a $10 million consent judgment against the D&Os that is subject to a comprehensive covenant not to execute against the D&Os and the D&Os' assignment of any rights they may have under the XL Specialty excess policy or against XL Specialty. *See* Second. Am. Compl. at 8-9 (Fed # 44-1). On March 23, 2021, the Federal Court granted the Liquidator leave to filed the proposed amended complaint. *See* Order (Fed # 47).

On June 1, 2021, the Federal Court *sua sponte* certified a question of South Dakota law to this Court. *See* Op. and Order (Fed # 49). The Court accepted the Federal Court's certified question on June 28, 2021. *See* Order Accepting Certification (Fed # 52).

STATEMENT OF FACTS

The Claims-Made Liability Policies

For a premium of $60,000, XL Specialty issued excess policy no. ELU150747-17 (the "Excess Policy") to RHC with a Limit of Liability of $2 million excess of an underlying limit of liability of $3 million in a followed primary policy issued by certain Underwriters at Lloyd's, London (the "Primary Policy").[2] *See* Excess Policy, Declarations (Fed # 34-1).[3]

> The Excess Policy's Insuring Agreement states in relevant part:
>
> The Insurer [i.e., XL Specialty] will provide the **Insured** with insurance coverage for claims first made against the **Insured** during the **Policy Period** excess of the **Underlying Insurance** stated in ITEM 4 of the Declarations. Coverage hereunder will apply in conformance with the terms, conditions, endorsements and warranties of the **Primary Policy** . . . .

Id., § I. An Insured under the Excess Policy includes "those persons or organizations designated as insureds in the **Underlying Insurance**." *Id*., § II.(A). The Excess Policy's claims-made Policy Period commenced on July 1, 2017, and ended at 12:01 a.m. Standard Time in South Dakota on July 1, 2018. *Id*., Declarations Item 2 & § II.(B).

The Primary Policy is policy no. IFP-0000069-02 issued by Lloyd's with a $3 million Limit of Liability for Directors and Officers Coverage. *See* Primary Policy, Declarations Item C., as amended by Endorsement No. 11 (Fed # 34-2). The Primary Policy has Insuring Clauses for Insured Persons (defined to include ReliaMax's directors

---

[2] The Liquidator's brief refers to Pioneer Specialty Risk Insurance Services, Inc. ("Pioneer") as the insurer of the Primary Policy. The Primary Policy states by endorsement, however, that the insurer is Lloyd's. It appears that Pioneer was Lloyd's underwriting agent for the Primary Policy.

[3] Capitalized and/or bold terms are defined in the Excess Policy or the Primary Policy.

and officers)[4] and the Company (defined to include RHC and RSC).[5] *See id.*, §§ I.A. & C. For Insured Persons, the relevant Insuring Clause, section A.1., affords coverage only for:

> **Loss** resulting from any **Claim** first made against the **Insured Persons** during the **Policy Period** . . . for a **Wrongful Act** . . . .

Id., § I.A.1.

The Primary Policy's definition of a Claim includes "[a]ny written demand for monetary damages . . . or any civil . . . proceeding . . . against any Insureds." *Id.*, § II.B.1. The Primary Policy's definition of covered Loss includes "damages, judgments . . . , and settlements" as well as "**Costs, Charges and Expenses**." *Id.*, § II.P. Costs, Charges and Expenses are "reasonable and necessary legal fees and expenses . . . incurred by the **Insured Persons** in defense and appeal of any **Claim** . . . ." *Id.*, § II.E., as amended by Endorsement No. 9.

The Policy Period for the Primary Policy is July 1, 2017 to July 1, 2018. *See id.*, § II.V. & Declarations Item B. The Primary Policy, however, permits, up to sixty (60) days after the expiration of the Primary Policy on July 1, 2018, the purchase of an Optional Extension Period of twelve months (i.e., July 1, 2018 to July 1, 2019) if the Primary Policy is not renewed, provided an additional premium, twice the amount (200%) of the original premium for the Primary Policy, is paid. *See id.*, § IX.A. & D.1., as amended by Endorsement No. 10, Declarations Item G.1. The Optional Extension Period, if purchased, extends coverage under the Primary Policy to Claims first made against Insureds during the Optional Extension Period from July 1, 2018 to July 1, 2019,

[4] *See id.*, § II.K.
[5] *See id.*, § II.C.

provided the Claims are for Wrongful Acts that occurred prior to July 1, 2018. *See id.*, § IX.A.1. & Declarations Item G.2.

The Primary Policy's Notification provisions state, in relevant part, that the "**Insureds** shall give to Underwriters notice in writing of any **Claim** . . . as soon as practicable . . . , but in no event later than sixty (60) days after the end of the **Policy Period** . . . ." *Id.*, § VI.A., as amended by Endorsement Nos. 9 & 10. The Primary Policy also permits the reporting of facts or circumstances that can give rise to a Claim. Specifically, the Primary Policy provides, in relevant part, that if the Insureds:

> become aware of a specific fact, circumstance, or situation which could reasonably give rise to a **Claim** . . .
>
> * * *
>
> and if the **Insureds** during the **Policy Period** give written notice to Underwriters of:
>
> (a) the specific fact, circumstance, [or] situation . . . ;
> (b) the consequences which have resulted or may result therefrom; and
> (c) the circumstance which the **Insureds** first became aware thereof,
>
> then any Claim made . . . subsequently arising out of such fact, circumstance, [or] situation . . . shall be deemed for the purposes of this Policy to have been made . . . at the time such notice was first given.

Id., § VI.C., as amended by Endorsement No. 9, § VI.D.

RSC's Liquidation

On June 12, 2018, the Director of Insurance of the State of South Dakota filed a petition for an order of liquidation of RSC in the Sixth Judicial Circuit in Hughes County, South Dakota. *See* Pet. (Fed # 34-3). On June 27, 2018, the Sixth Judicial Circuit declared RSC insolvent under South Dakota's Insurers Supervision, Rehabilitation and Liquidation Act, SDCL § 58-29B-1, *et seq.*, and appointed Larry Dieter as Liquidator of RSC under SDCL § 58-29B-42. *See* Order of Liquidation (Fed # 34-4).

Optional Extension Period Purchased for the Primary Policy, but not for the Excess Policy

RHC purchased an Optional Extension Period for the Primary Policy, extending the claims-made coverage beyond July 1, 2018. *See* Ltr. from P. Curley (Nov. 20, 2018) (Fed # 34-5). Neither RHC, the Liquidator, nor anyone else ever sought, purchased, or obtained an Optional Extension Period for the Excess Policy.

The MITFCU Claim

On October 23, 2018, the Massachusetts Institute of Technology Federal Credit Union (MITFCU) filed a complaint against RSC, RHC, and their D&Os in the Circuit Court for Minnehaha County, South Dakota, with the case captioned *Massachusetts Institute of Technology Federal Credit Union v. ReliaMax Surety Co., et al.*, No. 49CIV18-003330. Liquidator's Br. at 5; *see generally* Docket (Fed # 35-1). MITFCU alleged that, at the time it was paying premium to RSC to insure the risk of student loan defaults, RSC was, unknown to MITFCU, insolvent because RSC had issued $20 million in loans to RHC when RHC was unable to repay such loans. *See* Compl. ¶¶ 5-20 (App-20-22). With the Primary Policy's Optional Extension Period having been purchased from Lloyd's, it defended the MITFCU Claim and, with the Liquidator, successfully moved to dismiss the Claim on the basis that the Claim belonged to the Liquidator. Br. at 5-6 (citing MIT # 62-64).

The Liquidator's Claim Against the D&Os

After MITFCU's complaint was filed and during the Primary Policy's Optional Extension Period (but four months after the expiration of the Excess Policy's claims-made Policy Period on July 1, 2018), the RSC Special Deputy Liquidator, on November 1, 2018, sent letters to Lloyd's and XL Specialty asserting a claim against the

ReliaMax D&Os. *See* Ltrs. from M. FitzGibbons (Nov. 1, 2018) (Fed # 34-6). The letters, addressed only to entities affiliated with insurance companies, advised that "[n]umerous Wrongful Acts by the Officers and Directors of [RHC] are being investigated." *Id*. The letters contended that the "most significant Wrongful Act of the Directors and Officers . . . was their continuous advances from [RSC] of more than $21 million dollars, without means for repayment." *Id*. The letters stated that "[t]his immediate claim is to recover these advances paid in an amount in excess of $21 million." *Id*.

The Liquidator filed a complaint against the D&Os on December 17, 2020. *See* Compl. (Fed # 48-1). A few days later, without the D&Os having filed an answer, the Liquidator and the D&Os executed a settlement agreement permitting the entry of a $10 million consent judgment against the D&Os subject to a complete covenant not to execute against them and an assignment of their rights against XL Specialty. *See* Final J. (Fed # 48-2). The Liquidator, *standing in the D&Os' shoes*, now seeks indemnity liability coverage under the Excess Policy for the consent judgment.

STANDARD OF REVIEW

In reviewing a certified question of law, the Court employs the same legal standards applicable to its review in appellate cases. *See Unruh v. Davison Cty.*, 2008 S.D. 9, ¶ 5, 744 N.W.2d 839, 842. The Court's review of the certified question here, which requires interpretation and application of a South Dakota statute, is *de novo*. *See First Dakota Nat'l Bank v. BancInsure, Inc.*, 2014 S.D. 57, ¶ 7, 851 N.W.2d 924, 927. Additionally, the certified question effectively asks the Court to interpret the terms of an insurance contract, which, under South Dakota law, is also a question of law subject to *de*

novo review. *See Stover v. Critchfield*, 510 N.W.2d 681, 683 (S.D. 1994) (observing that "construction of a written contract is . . . a question of law").

ARGUMENT

I. It Is Undisputed That The Claim Against The D&Os Falls Outside Of The Excess Policy's Claims-Made Coverage.

Because no Optional Extension Period was purchased for the Excess Policy, the Excess Policy's coverage is potentially available only for a claim first made against an Insured in the Policy Period from July 1, 2017 to July 1, 2018. The MITFCU claim filed in late October 2018 and the Liquidator's subsequent claim against the D&Os on November 1, 2018, reiterating MITFCU's allegations concerning RSC's issuance of loans to RHC, undeniably were not made until several months after the Excess Policy's claims-made coverage period expired on July 1, 2018.

"[A] claims made policy 'allows the insurer to more accurately fix its reserves for future liabilities and compute premiums with greater certainty.'" *H&R Block, Inc. v. Am. Int'l Specialty Lines Ins. Co.*, 546 F.3d 937, 942 (8th Cir. 2008) (quoting *FDIC v. St. Paul Fire & Marine Ins. Co.*, 993 F.2d 155, 158 (8th Cir. 1993)). "'Claims made' insurance policies, as opposed to occurrence-based policies, are intended by insurers to avoid the 'hazard of an indefinite future: Once the policy period has expired, the book can be closed on everything, except then-pending claims." *Ameriwood Indus. Int's Corp. v. Am. Cas. Co.*, 840 F. Supp. 1143, 1148-49 (W.D. Mich. 1993) (quoting *Nat'l Union Fire Ins. Co. v. Cont'l Ill. Corp.*, 673 F. Supp. 300, 304 (N.D. Ill. 1987)). As courts have noted, an occurrence-based insurer, "faced with an unlimited tail that extends beyond the policy period," is prevented "from making a precise calculation of premiums based upon the cost of the risks assumed." *Zuckerman v. Nat'l Union Fire Ins. Co.*, 495 A.2d 395,

399 (N.J. 1985).[6] Premiums on claims-made professional liability policies, which do not have unlimited tails, can therefore be set at lower rates than comparable coverage under an occurrence liability policy. *See Zunenshine v. Exec. Risk Indem., Inc.*, No. 97 Civ. 5525, 1998 U.S. Dist. LEXIS 12699, at *16 (S.D.N.Y. Aug. 17, 1998), *aff'd*, 182 F.3d 902 (2d Cir. 1999) (unpublished); *Pizzini v. Am. Int'l Specialty Lines Ins. Co*., 210 F. Supp. 2d 658, 668 (E.D. Pa. 2002).

South Dakota courts, along with courts around the country, strictly enforce claims-made provisions in insurance policies, recognizing that not doing so would provide coverage that was not purchased. *See, e.g., Cromwell v. Rapid City Police Dep't*, 2001 S.D. 100, ¶ 4, 632 N.W.2d 20, 22 (observing that a claims-made policy "did not cover any claims made before" the policy incepted); *S.D. Network, LLC v. Twin City Fire Inc. Co.*, No. 4:16-CV-04031-KES, 2017 U.S. Dist. LEXIS 154886, at *17 (D.S.D. Sept. 22, 2017) (applying South Dakota law) (holding that no "claim" had been made under a claims-made policy on or before the policy's expiration); *Lodgenet Entm't Corp. v. Am. Int'l Specialty Lines Ins. Co.*, 299 F. Supp. 2d 987, 991 (D.S.D. 2003) ("To obtain coverage under a claims-made policy . . . 'a claim must be made against the insured during the coverage period of the policy . . . ."); *FDIC*, 993 F.2d at 1424 (holding that a

[6] "Unlike an occurrence policy, a claims-made policy requires that the claim be made during the policy period. Also unlike an occurrence policy that can have a long tail—the tail on claims-made policies is short." Kristen Davis, et al., *It's Too Late Baby Now It's Too Late: New Developments with the Notice/Prejudice Rule in Late Notice Cases in Both Claims Made and Occurrence Policies* (Mar. 2018), available at https://www.thesjslawfirm.com/wp-content/uploads/sites/2066/2018/03/It%E2%80%99s-Too-Late-Baby-Now-It%E2%80%99s-Too-Late.pdf. Extended tail coverage can sometimes be purchased when a claims-made policy is not renewed. *See, e.g.*, *Chi. Ins. Co. v. Kreitzer & Vogelman*, 265 F. Supp. 2d 335, 340 (S.D.N.Y. 2003) (noting that, if the policy had not been renewed, the insured could have purchased tail coverage under the same terms of the policy).

claim was not made during the claims-made policy period); *Fremont Indem. Co. v. FSLIC*, No. 88-6080, 1989 U.S. App. LEXIS 22937, at *2 (9th Cir. June 16, 1989) (finding no coverage under a claims-made policy where "[a]ll of the suits against [the insured directors and officers] were filed after the policy period expired" (emphasis in original)); *Md. Cas. Co. v. Ben-Hur*, 553 N.W.2d 535, 538 (Wis. Ct. App. 1996) (holding that a demand letter received by the insured after the claims made policy period expired was not a claim first made during the policy period); *see also* Allan D. Windt, *Insurance Claims and Disputes* § 1:7 (6th ed. 2013) ("The requirement in the insuring agreement of a claims-made policy that a claim must be made against the insured during the policy period is essential to the very nature of a claims-made policy. It is that requirement that is an essential part of the bargained-for exchange under a claims-made policy.") (emphasis in original).

Here, the MITFCU claim made in October 2018 and the Liquidator's November 2018 claim against the D&Os, with allegations similar to those asserted by MITFCU, were made approximately fourth months after the Excess Policy's claims-made coverage had expired. Moreover, while the Primary Policy permits the providing of notice to the insurer of circumstances that can give rise to a Claim, a subsequent Claim arising out of such circumstances is "deemed made . . . *at the time such notice was first given*." *See* Primary Policy, § VI.C., as amended by Endorsement No. 9, § VI.D. (emphasis added) (Fed # 34-2). Thus, if the Liquidator's November 1, 2018 letter is viewed as a notice of circumstances, the Claim against the D&Os still would be deemed first made on November 1, 2018, when the notice was provided four months after the Excess Policy's claims-made coverage had expired.

II. It Is Undisputed That An Optional Extension Period For The Excess Policy Was Neither Sought Nor Obtained from XL Specialty.

There is no dispute that an Optional Extension Period was purchased for the Primary Policy, but was not sought or purchased for the Excess Policy. *See* Pl.'s Resp. to Def.'s SUMF ¶ 17 (Fed # 36). The Liquidator does not attempt to contradict these facts, but rather attempts only to downplay their significance.

The Liquidator argues that "neither RHC, nor its officers and directors are given the statutory extension benefit of Section 56." Br. at 17. This misstatement shows the fundamental flaw underlying the Liquidator's arguments in this matter. Specifically, the Liquidator continuously loses sight of the fact that the policy at issue is a "liability" policy, which provides coverage for Insureds *who have a claim made against them*. Any hypothetical extension of coverage here by way of the Liquidation Statute provides defense and indemnity coverage under the Excess Policy *for the D&Os against whom the Liquidator's claim was made.* Thus, the D&Os would receive the very benefit of free extended coverage through the Liquidation Statute, which the Liquidator otherwise acknowledges the D&Os are *not* entitled to receive without paying premium for an Optional Extension Period.

While courts have extended the period for exercising options under option contracts or periods of redemption to correct a default, they have *not* permitted the actual obtaining of shares, property, or anything else for free. *See, e.g., Johnson v. First Nat'l Bank*, 719 F.3d 270, 278 (8th Cir. 1983) (holding that bankruptcy code extended time for debtor to redeem interest in mortgaged property but since debtor did not make payment to redeem, the property had vested in the bank holding the mortgage); *In re G-N Partners*, 48 B.R. 462, 468-69 (Bankr. D. Minn. 1985) (extending time for exercise of option under

bankruptcy code, but not excusing payment in exercising the option). Here, there was an option to extend the Excess Policy's period of coverage—it was never exercised, and the Liquidator does not contend otherwise. The Liquidator cannot use the Liquidation Statute to create insurance coverage *for the D&Os* that was never purchased.

III. By Its Express Terms, The Liquidation Statute Does Not Extend The Period Of Coverage Provided By The Claims-Made Excess Policy.

The Liquidator unabashedly seeks to extend the "core" coverage period of the Excess Policy by six months, which is half of the original one-year Policy Period, without XL Specialty receiving a single penny of premium for that six months of claims-made coverage. The Liquidator relies exclusively (and erroneously) on the Liquidation Statute in trying to accomplish that inequitable outcome. The Liquidator's reliance on the Liquidation Statute is misplaced because, by the express terms of the time-extension provision in the Statute, the provision does not apply to the insuring agreement in the Excess Policy.

The Court has provided ample guidance on the interpretation and application of statutes:

> The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result.

U.S. W. Commc'ns, Inc. v. Pub. Utils. Comm'n, 505 N.W.2d 115, 122-23 (S.D. 1993) (citations omitted) (considering the statutory chapter as a whole in construing a discrete statute's meaning); *see also Martinmaas v. Engelmann*, 2000 S.D. 85, ¶¶ 49-51, 612 N.W.2d 600, 611 (reviewing a particular statute in *pari materia* to the rest of the statute's chapter to discern legislative intent). "To determine legislative intent, [the] Court will take other statutes on the same subject matter into consideration and read the statutes together, or in *pari materia*." *Onnen v. Sioux Falls Indep. Sch. Dist.*, 2011 S.D. 45, ¶ 16, 801 N.W.2d 752, 756 (citing *Loesch v. City of Huron*, 2006 S.D. 93, ¶ 8, 723 N.W.2d 694, 697).

Here, the Liquidator argues that the following time-extension provision in the Liquidation Statute creates claims-made liability insurance coverage when it otherwise does not exist:

> If, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for filing any claim, proof of claim, proof of loss, demand, notice, or the like, . . . and where in any such case the period has not expired at the date of the filing of the petition, the liquidator may, for the benefit of the estate, take any such action or do any such act, required or permitted to the insurer, with a period of one-hundred eighty days subsequent to the entry of an order for liquidation . . . .

SDCL 58-29B-56.

By its express and unambiguous terms, this time-extension provision only applies where there is "an agreement" that fixes a period of limitation for proceeding upon any claim, or for filing any claim, proof of claim, proof of loss, etc. The Liquidator contends that the "XL Policy is [such] an agreement . . . that fixes a period of limitation for claims, notices of claims, and other notices such as notices of investigation." Br. at 12. In so contending, the Liquidator paints with far too broad a brush and ignores the actual terms of the relevant agreement in the Excess Policy—specifically, its insuring agreement.

It is well-settled that "the scope of coverage of an insurance policy is determined from the contractual intent and the objectives of the parties as expressed in the contract." *Ass Kickin Ranch, LLC v. N. Star Mut. Ins. Co.*, 2012 S.D. 73, ¶ 9, 822 N.W.2d 724, 727 (quoting *Saint Paul Fire & Marine Ins. Co. v. Schilling*, 520 N.W.2d 884, 887 (S.D. 1994)).

> Further, a court may not seek out a strained or unusual meaning for the benefit of the insured. Instead, an insurance contract's language must be construed according to its plain and ordinary meaning and a court cannot make a forced construction or a new contract for the parties. Essentially, this means that when the terms of an insurance policy are unambiguous, these terms cannot be enlarged or diminished by judicial construction.

Hanson Farm Mut. Ins. Co. of S.D. v. Degen, 2013 S.D. 29, ¶ 17, 829 N.W.2d 474, 478 (citation omitted).

As set forth above, the Excess Policy's insuring agreement states that XL Specialty will provide excess liability coverage (defense and/or indemnity coverage) "for claims first made against the **Insured** during the **Policy Period** . . . ." Excess Policy, § I. (Fed # 34-1). The insuring agreement does *not* fix a time for the Insureds to assert a claim, provide notice, or do anything. Instead, the insuring agreement between XL Specialty and the Insureds, states only that the insurers will provide defense and/or indemnity liability coverage to the Insureds if someone asserts *a claim against the Insureds* during the Policy Period. The insuring agreement is a promise of liability coverage for "*claims made against the Insureds*." The insuring agreement says nothing about the time frame for the Insureds to do anything, let alone set a time frame for the Insureds to make a claim.

The Excess Policy's insuring agreement therefore is *not* an agreement with claimants fixing the time when they can make claims or file proceedings. It is an

agreement with Insureds who are subject to, and recipient of, a *claim made against them*. Pursuant to the insuring agreement, XL Specialty will provide excess defense and indemnity liability coverage to the Insureds *who have a claim made against them* by someone else during the Policy Period. Anyone was free and unrestricted to make a claim against the D&Os in October/November 2018, including MITFCU or the Liquidator, but the Excess Policy simply was not in existence then. Consequently, the D&Os cannot turn to XL Specialty for defense or indemnity coverage in response to the Liquidator's claim made against them because it does not fall within the Excess Policy's insuring agreement.

There are other terms and conditions in the Excess Policy, beyond the insuring agreement, that impose obligations on the Insureds to do and take different steps (e.g., providing notice) to perfect coverage. For example, the followed Primary Policy requires Insureds to provide notice of any Claim "as soon as practicable . . ., but in no event later than sixty (60) days after the end of the **Policy Period**." Primary Policy, § VI.A. (Fed # 34-2). Additionally, as set forth in the Primary Policy, written notice with full payment of the premium must be given to the insurer within thirty (30) days of the Policy's expiration to preserve the ability to purchase an Optional Extension Period. *See id.*, § IX.D.1. But such provisions requiring the Insureds to provide notice or perform some other act within a certain time period are *not* at issue here. Rather, at issue is the undisputed fact that *the claim against the D&Os* was *not* first made during the Policy Period, and therefore it does *not* fall within the Excess Policy's *insuring agreement*.

Application of the Primary Policy's notice of circumstances provision does not alter that unavoidable conclusion. Under the Primary Policy, the Insureds had the option,

but were not required to, report circumstances that could potentially result in a Claim against the Insureds. *See id.*, § VI.C. Importantly, a Claim ultimately made that arises from such reported circumstances is, by the Primary Policy's express terms, "deemed . . . to have been made . . . at the time such notice was first given." *Id.* This provision of the Primary Policy provides how the ultimate Claim, if one is asserted, is treated under the insuring agreement and whether it is a Claim first made in the claims-made Policy Period.

Here, even if the Primary Policy terms were modified by the Liquidation Statute such that a notice of circumstances could be submitted after the Policy Period, any post-Policy Period Claim arising from circumstances in a post-Policy Period notice would, by definition, be first made after the Policy Period and therefore would not fall within the Primary Policy's insuring agreement and, by extension, would not fall within the Excess Policy's insuring agreement. The practical sense of this is established by the chronology of events here.

MITFCU made a claim against the D&Os in October 2018. That claim was made long after the Excess Policy had expired and there seemingly is no dispute that the Excess Policy does not afford coverage for that claim. The Liquidator then, in November 2018, sent a letter to XL Specialty making a claim against the D&Os, essentially parroting MITFCU's allegations. That claim against the D&Os, likewise, was first made long after the Excess Policy expired and not covered. Treating the Liquidator's claim as a notice of circumstances, rather than as a claim as it presented itself to be, does not magically create coverage for the Liquidator's claim against the D&Os. To the extent the Liquidator's November 2018 claim is viewed as a notice of circumstances, the Liquidator's post-

Policy Period claim against the D&Os still was made long after the Excess Policy expired.

In sum, the time-extension provision in the Liquidation Statute applies only to an "agreement" that fixes a time period for a party to that agreement to do something. The insuring agreement in the Excess Policy, by its plain terms, is not such an agreement. The insuring agreement, which is between XL Specialty and the Insureds, places no obligations on the Insureds to do anything (the Insureds are passive in the insuring agreement), but rather only places obligations on the insurer to do something (i.e., provide defense and indemnity liability coverage) in response to claims made against the Insureds during the Policy Period. The Liquidation Statute therefore does not extend the coverage period for a claims-made liability policy, such as the Excess Policy. Accordingly, the Court should answer the question certified by the Federal Court in the negative.

IV. There Is No Evidence That The Liquidation Statute Is Intended To Extend Claims-Made Liability Coverage.

As shown above, the time-extension provision in the Liquidation Statute does not match up with and apply to an insuring agreement in a claims-made liability policy, and therefore the Liquidation Statute does extend the period of claims-made coverage. Nevertheless, the Liquidator maintains that "the claims-made policy is precisely what Section 56 . . . is designed for." Br. at 13. The Liquidator purportedly finds support in this position through yet another false construct. Specifically, the Liquidator contends that the Liquidation Statute's time-extension provision has no impact on occurrence-based liability policies because those "policies do permit claims and notices after policy period expiration," and therefore the time-extension provision must be intended

specifically to extend claims-made coverage. This purported evidence of legislative intent does not withstand minimal scrutiny.

As an initial matter, the Liquidator completely ignores the existence of all sorts of first-party insurance policies that provide direct coverage for losses sustained by insureds (rather than their liability for claims made against them) for, among other things, property damage, business interruption, and theft losses. Those policies often include agreements that require insureds to provide notice of accidents or submit claims or proofs of loss within specified time periods. *See, e.g.*, *Versailles Sur La Mer Condo. Ass'n v. Lexington Ins. Co.*, No. 6:18-cv-1125-Orl-37TBS, 2018 U.S. Dist. LEXIS 135281, at *1–2 (M.D. Fla. July 24, 2018) (involving first-party property policy covering property damage caused by a hurricane during the policy period); *Shuford v. Fid. Nat'l Prop. & Cas. Ins. Co.*, 508 F.3d 1337, 1339 (11th Cir. 2007) (finding no coverage where insured failed to file a proof of loss within one year for property damage caused by a hurricane). The time-extension provision in the Liquidation Statute applies to such agreements in first-party policies. Additionally, even occurrence-based liability policies place timing requirements on insureds for the reporting of occurrences and claims "as soon as practicable." *See, e.g.*, *Anderson v. Aul*, 2015 WI 19, ¶ 24, 361 Wis. 2d. 63, 78, 862 N.W.2d 304, 311 ("An occurrence policy may . . . require the insured to provide notice of a claim 'as soon as practicable' or within a stated period."). The time-extension provision of the Liquidation Statute can excuse a delay in reporting under such policies and extend the time for reporting.

Thus, it is not at all difficult to identify a wide variety of insurance policies with agreements setting forth applicable time periods in which insureds must do something to

which the time-extension provision in the Liquidation Statute would apply. With that reality established, there simply is no support for the Liquidator's contention that the time-extension provision was "specifically designed" to extend the coverage period for claims-made liability policies.

And not surprisingly, the Liquidator does not cite to any legislative history stating that the time-extension provision in the Liquidation Statute was "specifically designed" to extend coverage periods in claims-made liability policies. Presumably, if that had been the specific purpose of the provision, there would be some reference to it in the legislative history. Moreover, the Liquidation Statute and its time-extension provision, enacted by South Dakota in 1989, is patterned after largely identical statutes and provisions enacted by other states in the 1970s, well before claims-made policies became a prevalent form of professional liability insurance. *See, e.g.*, 40 PA. CONS. STAT. § 221.26 (2021) (enacted 1977); WIS. STAT. § 645.49 (2021) (enacted 1979); *see also Bos. Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290, 299 n.16 (Mass. 2009) ("Most insurance policies issued before the mid-1980s provided 'occurrence' based coverage rather than 'claims-made' coverage.") (quoting Rebecca M. Bratspies, *Splitting the Baby: Apportioning Environmental Liability Among Triggered Insurance Policies*, 1999 B.Y.U.L. REV. 1215, 1217). All of which is further indication that legislators did not have extending claims-made coverage periods in mind in drafting or enacting time-extension provisions for the various liquidation statutes.

Recognizing that it is not precedence or legal guidance, it is nonetheless remarkable that the *Receiver's Handbook for Insurance Company Insolvency* (the "Handbook"), published by the National Association of Insurance Commissioners of

which the Liquidator is a member, in discussing time-extension provisions in liquidation statutes, makes no mention that such provisions actually extend the coverage period for claims-made liability policies. Instead, the Handbook recommends that liquidators consider options for purchasing extended claims-made coverage. *See* Handbook at 591 (App-27). It states:

> Many companies purchase E&O and D&O insurance that may provide coverage for certain types of conduct described above. As part of the receiver's investigative examination, all such policies should be identified and examined. These policies will almost certainly be claims-made policies that should be reviewed to determine the deadline for notifying the carrier concerning possible claims. Additionally, the policies may provide for the purchase of "tail coverage," which could extend the time in which to file a claim. In most cases, the receiver should purchase the tail coverage if his/her investigation has not been completed.

Id. The Liquidator argues that the Handbook's guidance in this regard is of no consequence because the Receivership Model Act provides for a two-month extension of time rather than the six-month extension in the South Dakota Liquidation Statute. That argument ignores, however, that two months of free additional claims-made insurance coverage would be significant and something the Commissioners presumably would want to flag for their constituency. Moreover, many states, like South Dakota, retain the six-month extension period, and it is remarkable—if the extension provisions are specifically designed to expand the coverage period for claims-made liability policies—that the Handbook does not even mention that and instead encourages liquidators to consider purchasing coverage extensions.

Perhaps most tellingly, with time-extension provisions existing in liquidation, receivership, and bankruptcy statutes for numerous decades, not a single case has extended an original claims-made policy period pursuant to such time-extension provisions. Indeed, counsel are unable to locate another case where that relief was even

sought by a party. At the very start of his argument, the Liquidator observes that "[i]n the liquidation of insolvent insurers, claims against officers and directors are not at all uncommon." In this one instance, XL Specialty absolutely agrees. Indeed, it is commonplace in bankruptcies, receiverships, and liquidations for claims to be made against directors and officers. There has been a countless number of such claims; yet remarkably, if the Liquidator's position is accepted, there have been no cases seeking to extend purchased claims-made coverage periods based on time-extension provisions in liquidation, receivership, and bankruptcy statutes. The reason for that is self-apparent: the time-extension provisions, which apply to agreements fixing a time period for something to be done, do not apply to the insuring agreement in a claims-made policy, which does not require the insureds to do anything.

With all of those decades to draw upon, the Liquidator points to a single case from almost thirty years ago that did not address whether a time-extension provision extended a purchased original claims-made coverage period and did not address the specific claims-made terms found in the Excess Policy and the Primary Policy here. In *Federal Insurance Co. v. Sheldon,* 150 B.R. 314 (S.D.N.Y. 1993), Federal Insurance Company ("Federal") issued a claims-made directors and officers liability policy to Donald Sheldon & Co., Inc. ("DSCO") with a purchased original policy period "September 23, 1985." *Id*. at 317. On September 9, 1985, *weeks before the original policy period expired*, the DSCO bankruptcy trustee sent notice to Federal of a potential claim against Donald Sheldon. *Id*.

The court initially held that Federal's attempted early termination of the policy violated the bankruptcy's automatic stay. *Id*. at 317, 320. As a result, the court held that

the original policy period, which ran through September 25, 1985, remained in effect. *Id*. at 320. As a back-up holding, the court ruled that even if the stay did not preclude Federal's unilateral effort to terminate the policy early, Federal's termination notice was not properly sent and delivered, and therefore it was ineffective. *Id*. at 322. It was, in effect, a tertiary alternative ruling in which the court addressed the potential impact of the bankruptcy code's time- extension provision "[a]ssuming *arguendo* that Federal's notice of termination of the policy was effective." *Id*. at 320 (emphasis in original).

In that alternative ruling, the court observed that "the Trustee does not seek an extension of the *coverage* of the policy; rather, the Trustee merely requires an extension of the period in which it may report potential claims" following the insurer's purported unilateral early termination of the policy. *Id*. at 321 (emphasis in original). The court further observed that the Code's extension provision in section 108 "may be applied to extend insurance coverage *when read in conjunction with the terms of the policy*." *Id*. (emphasis added). The court discussed cases holding that section 108, when read in conjunction with policy "grace periods," permitted debtors additional time to cure defaults on premiums and provided coverage during those extended grace periods. *Id*. (citing *In re John J. Sullivan, Inc.*, 128 B.R. 7, 10 (D. Mass. 1990); *In re Econo-Therm Energy Sys. Corp*., 80 B.R. 137, 140 (D. Minn. 1987)).

While *Sheldon*'s principal holding applying the automatic stay to preclude early termination of the policy has been cited in later decisions, no court since 1993 has cited or followed *Sheldon*'s tertiary alternative holding as to the potential effect of section 108 on the trustee's notice of a potential claim, *which actually was sent before the original policy period expired on September 25, 1985*. In any event, however, the issue here is

not about the timing of notice; it is about when the claim against the D&Os was made. The Liquidator concedes it was months after the original Policy Period expired on July 1, 2018. Thus, unlike the trustee in *Sheldon*, the Liquidator actually seeks an extension of coverage here.

And unlike in *Sheldon*, there are no terms in the Excess Policy to be "read in conjunction with" SDCL 58-29B-56 to extend the Excess Policy's coverage. In *Sheldon*, the court applied policy terms in a notice provision that afforded coverage "for claims brought after the termination of the policy period, provided the conduct underlying the claim occurred and was reported to the insurer during the policy period." 150 B.R. at 316. Here, the Primary Policy has a provision for the reporting of potential claims, but it specifically states that if such notice is given, then a later claim arising out of such reported circumstances "*shall be deemed to have been made . . . at the time such notice was first given*." *See* Pl.'s Resp. to Def.'s SUMF ¶ 14 (emphasis added) (Fed # 36). Accordingly, even if the Liquidator's November 1, 2018 letter is considered to be a notice of potential claim rather than a "claim" as presented in the letter, a claim arising out of the noticed circumstances must be deemed made no earlier than *November 1, 2018*—long after the Excess Policy expired on July 1, 2018.

The Excess Policy's terms must be followed and, as set forth in the case law discussed in *Sheldon*, a statutory time-extension provision, such as those found in the Bankruptcy Code and the Liquidation Statute, cannot extend insurance coverage absent policy terms that can be read "in conjunction with" the statute to permit such an extension. For example, in *In re John J. Sullivan, Inc.*, the court permitted an extension of coverage for one policy that expressly had a "grace period" for the payment of

premium which permitted the extension of coverage with the extended grace period (with the payment of the premium), but did not permit a similar extension in those policies that did not expressly include any similar form of "grace period." 128 B.R. at 9-11. In this case, there is nothing remotely akin to a grace period provision in the Excess Policy, and SDCL 58-29B-56 cannot be applied in a way that effectively creates insurance coverage out of thin air and without payment of any premium.

As demonstrated in the preceding section, the plain terms of the insuring agreement in the Excess Policy does not bring it within the scope of the time-extension provision in the Liquidation Statute. The absence of legislative history, publicity, and case law indicating that such provisions extend claims-made coverage periods is all the more reason for comfort in the correct legal conclusion that the Liquidation Statute does not extend the Excess Policy's claims-made coverage period.

V. Neither The Liquidation Statute Nor The Excess Policy's Terms Extends the Excess Policy's Coverage To Claims Made In 2019.

Although the issue is beyond the scope of the certified question, the Liquidator argues to the Court that claims made after the MITFCU complaint and the Liquidator's November 1, 2018 claim are covered even though first asserted in April and October 2019. Br. at 17. In so arguing, the Liquidator glibly contends that such an extension of coverage would not be prejudicial to XL Specialty and therefore should be permitted under the Liquidation Statute. *Id*. But requiring XL Specialty to provide additional claims-made coverage for free is the epitome of prejudice. Moreover, without any facts or analysis showing how the Primary Policy's "Interrelated Wrongful Acts" provision applies to the other claims asserted by the Liquidator, the Liquidator has obviously not met, or even attempted to meet, the burden of establishing that all of his

claims should be deemed a single Claim under the Primary Policy. While all of this is beyond the scope of the certified question, XL Specialty will not, at this juncture, respond further on these issues other than to assert that the subject claims do not allege Interrelated Wrongful Acts, as that term is defined in the Policy. XL Specialty respectfully asks the Court to permit XL Specialty to submit additional briefing if the Court for any reason determines that it should address these issues.

CONCLUSION

For all of the foregoing reasons, XL Specialty respectfully asks the Court to answer the certified question from the Federal Court in the negative: specifically, that SDCL 58-29B-56 does not extend the claims-made coverage under the Excess Policy to insured D&Os in response to a claim made against them four months after the expiration of the Excess Policy.

Dated at Sioux Falls, South Dakota, this 24th day of August, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief of Defendant XL Specialty Insurance Company complies with the type volume limitations set forth in SDCL § 15-26A-66(b)(2). Based on the information provided by Microsoft Word 2016, this Brief contains 7,420 words, excluding the Table of Contents, Table of Authorities, Appendix, and any Certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

Dated at Sioux Falls, South Dakota, this 24th day of August, 2021.

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APPENDIX TO

BRIEF OF DEFENDANT XL SPECIALTY INSURANCE COMPANY

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 29663

LARRY DEITER, DIRECTOR OF INSURANCE
OF THE STATE OF SOUTH DAKOTA, AS LIQUIDATOR
OF RELIAMAX SURETY COMPANY, IN LIQUIDATION

Plaintiff,

v.

XL SPECIALTY INSURANCE COMPANY,

Defendant.

CERTIFICATION OF QUESTION FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF SOUTH DAKOTA, CENTRAL DIVISION
THE HONORABLE ROBERTO A. LANGE, UNITED STATES DISTRICT JUDGE

APPENDIX TO BRIEF OF DEFENDANT XL SPECIALTY INSURANCE COMPANY

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APPENDIX TO

BRIEF OF DEFENDANT XL SPECIALTY INSURANCE COMPANY

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Page

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

MASSACHUETTS INSTITUTE OF TECHNOLOGY FEDERAL CREDIT UNION, Plaintiff, vs. RELIAMAX SURETY COMPANY; RELIAMAX HOLDING COMPANY; MICHAEL VAN ERDEWYK, JOHN VAN ERDEWYK, BRADLEY MESSERLI, MARK PAYNE, RANDY SCHAEFER INDIVIDUALLY AND AS THE DIRECTORS OF RELIAMAX SURETY COMPANY AND DIRECTORS OF RELIAMAX HOLDING COMPANY, Defendants.	49CIV18-_____ **COMPLAINT**

COMES NOW the Plaintiff by and for its causes of action against Defendants, states and alleges:

1. Plaintiff, Massachusetts Institute of Technology Federal Credit Union, ("Plaintiff") is a federally chartered credit union doing business in Cambridge, Massachusetts.
2. ReliaMax Surety Company ("ReliaMax Surety") is a South Dakota domiciled subsidiary of ReliaMax Holding Company ("ReliaMax Holding") and is in the business of insuring the defalcation of student loans.
3. ReliaMax Holding was originally formed as a South Dakota holding company and now claims it corporate residence as the State of Delaware.

4. Defendants, Michael VanErdewyk, John VanErdewyk, Bradley Messerli, Mark Payne, and Randy Schaefer, were the Board of Directors, during all pertinent times of the allegations of this Complaint, of both ReliaMax Holding, the parent holding company, and ReliaMax Surety, the insurance company.
5. Plaintiff purchased insurance from Defendant, ReliaMax Surety, to protect its student loans portfolio.
6. In 2017, Plaintiff paid ReliaMax Surety, in excess of one million two hundred and fifty thousand dollars ($1,250,000.00) of premiums to insure risk.
7. On June 13, 2018, Plaintiff was informed by ReliaMax Surety that it was insolvent.
8. That ReliaMax Surety had over a period of time, lent to ReliaMax Holding, its parent holding company, a sum in excess of twenty million dollars ($20,000,000.00) at a date unknown at this time.
9. The Board of Directors, of both ReliaMax Holding and ReliaMax Surety were aware that ReliaMax Holding did not have the resources to repay any part of the twenty million dollars ($20,000,000.00) loan.
10. That all insurance sold after date upon which the Board of Directors knew that ReliaMax Holding was unable to repay all or portion of the loan from ReliaMax Surety, the sale of insurance was fraudulently and unlawful as set forth in SDCL 58-5-118.
11. The Board of Directors of ReliaMax Surety, the insurance company, had all of the same knowledge as the debtor, ReliaMax Holding. As a result, the Board of Directors of ReliaMax Surety knew or should have known the continuing lending of capital to ReliaMax Holding of its own capital and surplus affected its solvency

to the extent that it should have ceased the sale of insurance products to third parties.

12. The Board of Directors of ReliaMax Surety failed and neglected to require ReliaMax Holding to produce collateral and other means to ensure the capital of ReliaMax Surety would not be impaired.

13. The Plaintiff has a portfolio of insured student loans in the sum of thirty-six million, eight hundred seventy-two thousand, six hundred twenty-two dollars ($36,872,622.00).

14. The student loan portfolio of Plaintiff has a fair market value to the financial community.

15. The collapse of ReliaMax Surety has caused damage to Plaintiff's student loans portfolio in a sum of at least three million dollars ($3,000,000.00) or as the proof shall show.

16. The Board of Directors had a duty and obligation to determine whether the continued operation of ReliaMax Surety transacting in the insurance business was hazardous to the policyholders and creditors.

17. The Board of Directors failed to follow the standard for determining the hazardous financial condition of ReliaMax Surety.

18. The Board of Directors failed to ensure the continued operation of ReliaMax Surety in transacting insurance business in the State of South Dakota was not hazardous to the policyholders and creditors.

19. The Board of Directors authorized ReliaMax Surety, its officers and employees to continue to sell insurance products when they knew the capital of ReliaMax Surety was impaired and in violation of state law.

20. The Board of Directors of ReliaMax Surety were aware of the impairment or insolvency and deceitfully failed to inform the Plaintiff, its staff, or other persons engaging in the business of insuring student loans.

Count II – Deceit

21. Plaintiff re-alleges all prior allegations set forth in its Complaint.
22. SDCL § 20-10-2 states, in part, deceit is the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact.
23. Each member of Board of Directors and the corporate Defendants were required, by law, to disclose to insureds the fact of their impairment of capital or insolvency prior to the sale of insurance policy to a consumer such as Plaintiff.
24. The suppression of the fact caused loss to the Plaintiff in that the insurance would have covered unpaid loans and protected its financial investment in its portfolio.
25. The suppression of fact by each member of the Board of Directors and corporations, misled the Plaintiff for want of communication of the fact of the insolvency and was the cause of financial loss to Plaintiff.

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

1. Damages for the premiums paid while Defendants knew it would be unable to provide insurance coverage as set forth in policy.
2. Damages to Plaintiff's student loans portfolio in the amount of $1,293,653.35.
3. Punitive damages resulting from the Defendants' fraud and deceit.

Filed: 10/23/2018 3:29 PM CST Minnehaha County, South Dakota 49CIV18-003330

4. For such other and further relief as the Court may deem just and equitable.

DATED 23rd day of October, 2018.

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DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all issues.

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NAIC
National Association of Insurance Commissioners

Receiver's Handbook for Insurance Company Insolvencies

2018

NAIC
National Association of Insurance Commissioners

The NAIC is the authoritative source for insurance industry information. Our expert solutions support the efforts of regulators, insurers and researchers by providing detailed and comprehensive insurance information. The NAIC offers a wide range of publications in the following categories:

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6. E&O and D&O Insurance

Many companies purchase Errors and Omissions (E&O) and Directors and Officers (D&O) policies, which may provide coverage for certain types of conduct described above. As part of the investigative examination, all E&O and D&O policies should be found and examined. These policies will almost certainly be claims made policies and should be reviewed to determine the deadline for notifying the carrier concerning possible claims. Additionally, the policies may provide for the purchase of tail coverage to extend the time to file a claim. The presence of insurance can determine which causes of action against officers and directors should be brought. Certain causes of action may be excluded by the language of the policy; it is, therefore, important for counsel to thoroughly review the policies before any suits are filed. One common exclusion that should be considered is a regulatory exclusion, which will likely be present in the policy under review.

7. Failure to Mitigate Damages

Defendants may allege that the receiver has not done everything possible to reduce the damages to the estate. For instance, the defendants may claim that the receiver pursued certain actions, such as entering into reinsurance commutations, that did not benefit the estate or failed to pursue other reinsurance commutations that might have prevented further deterioration of the insurer's financial position.

As a litigation tactic, defendants may attempt to use such a defense to convert the litigation into an examination of the receiver's conduct, rather than a review of defendants' conduct contributing to the insurer's insolvency.

8. Public Policy

Another litigation tactic, particularly where the receiver is suing former officers and directors, is to argue that since the receiver represents the defunct insurer's policyholders and creditors, which may include the officers and directors, a claim against them should not, for public policy reasons, be funded by those policyholders and creditors. Where this tactic has been attempted, the attempt has been universally unsuccessful.[232]

K. Discovery Issues

1. Receiver's Right to Preliquidation Documents

As the statutory successor to the insurer, the receiver owns the preliquidation documents of the insurer. If this is challenged, legal counsel should be consulted.

Texas 1990); *FDIC v. Farris*, 738 F. Supp. 444 (W.D. Okla. 1989); *FDIC v. Carlson*, 698 F. Supp. 178 (D. Minn. 1988); *FDIC v. Butcher*, 660 F. Supp. 1274 (E.D. Tenn. 1987); *FDIC v. Buttram*, 590 F. Supp. 251 (N.D. Ala. 1984); *FSLIC v. Williams*, 599 F. Supp. 1184 (D. Md. 1984); *FDIC v. Bird*, 516 F. Supp. 647 (D.P.R. 1981). But see *Mutual Sec. Life Ins. Co. v. Fidelity & Deposit Co.*, 659 N.E.2d 1096 (Ind. Ct. App. 1995) (In action for coverage under fidelity bond issued to insolvent insurer limiting coverage to losses discovered by insurer during bond period, liquidator could not use "adverse domination" to toll discovery period, despite allegation that discovery delay was caused by insurer's officer).

[232] The defense has been routinely disapproved in cases brought on behalf of failed financial institutions. E.g., *FDIC v. Crosby*, 774 F. Supp. 584 (W.D. Wash. 1991); *FDIC v. Stanley*, 770 F. Supp. 1281 (N.D. Ind. 1991), *aff'd*, 2 F.3d 1424; *FDIC v. Stuart*, 761 F. Supp. 31 (W.D. La. 1991); *FDIC v. Ekert Seamans Cherin & Mellot*, 754 F. Supp. 22 (E.D.N.Y. 1990); *FDIC v. Baker*, 739 F. Supp. 1401 (C.D. Cal. 1990). The few courts considering the defense in cases involving insolvent insurance companies have also disapproved it. See e.g., *Meyers v. Moody*, 475 F. Supp. 232 (N.D. Tex. 1979) *aff'd*, 693 F.2d 1196 (5th Cir. 1982), cert. denied, 464 U.S. 920 (1983); and *Bonhiver v. Graff*, 248 N.W.2d 291 (Minn. 1976).

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 29663

LARRY DEITER, DIRECTOR OF INSURANCE
OF THE STATE OF SOUTH DAKOTA, AS LIQUIDATOR
OF RELIAMAX SURETY COMPANY, IN LIQUIDATION,

Plaintiff,

vs.

XL SPECIALTY INSURANCE CO.,

Defendant.

CERTIFICATION OF QUESTION FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF SOUTH DAKOTA, CENTRAL DIVISION
THE HONORABLE ROBERTO A. LANGE,
UNITED STATES DISTRICT JUDGE

REPLY BRIEF OF PLAINTIFF LARRY DEITER, DIRECTOR OF INSURANCE OF THE STATE OF SOUTH DAKOTA, AS LIQUIDATOR OF RELIAMAX SURETY COMPANY, IN LIQUIDATION

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Introduction

As shown below, XL's Brief simply reinforces the essential elements that answer both parts of the Certified Question in the affirmative, namely[1]:

1. The XL Policy is an agreement. p.12.

2. ReliaMax Surety Company ("RSC") is an Insured under that agreement. pp. 5, 8.

3. The Liquidation Proceeding was started by Court Order on June 27, 2018. The XL Policy Period ended July 1, 2018, four days after commencement of the Liquidation. pp. 4, 5.

4. By statute, the Liquidator has succeeded to all rights of RSC under all agreements. pp 9-10.

5. By its express terms, the XL Policy provides coverage only for claims made during the policy period and for which notice is given to XL. p.5. Thus, the XL Policy is an agreement that fixes a "period of limitation" [i.e. the policy period end-date] for making a claim.

6. By settled South Dakota law, SDCL 58-29B-56 becomes part of the XL Policy. p.12.

7. As part of the XL Policy, Section 56 grants to the Liquidator a 180-day extension from June 27, 2018 to make a claim against the insured officers and directors and to give notice of that claim to XL. p.10.

[1] Citations are to pages of the Liquidator's initial brief. Points 8-11 are not completely necessary to answer the Certified Question, but provide context.

8. It is undisputed that the Liquidator did exactly that, i.e. made a claim and gave notice of it to XL, within that 180-day extension timeframe. p.6.

9. As defined by the underlying Pioneer Policy, whose provisions are incorporated by reference in the XL Policy, later claims and notices were for Interrelated Wrongful Acts; and thus those claims and notices relate back to the time of the first claim and first notice within that 180-day period. p.17.

10. Under normal circumstances, RSC as an Insured could not make a claim against directors and officers, also Insureds under the XL Policy, because such a claim is excluded. But there is an exception to the exclusion for a liquidator in the case of liquidation. p.8. That is exactly our situation.

11. Since the Liquidator's claim was made and noticed within the extension period by which the XL Policy was bound, the directors and officers were entitled to defense and indemnity by XL, just as though the claim was made and notice given before July 1, 2018. Unfortunately, XL has repeatedly repudiated and refused to honor its obligations.

Argument and Authorities

1. RSC is a party to XL's Agreement.

Throughout consideration and analysis of XL's arguments, it is important to bear in mind an essential provision of the XL Policy. At the end of the declarations page, it is stated:

> THESE **DECLARATIONS** AND THE POLICY, WITH THE ENDORSEMENTS, ATTACHMENTS, AND THE **APPLICATION** SHALL CONSTITUTE THE ENTIRE *AGREEMENT* BETWEEN THE INSURER AND THE **INSURED** RELATED TO THIS INSURANCE.

Fed #23, Ex. C, Declarations p.2 of 2. "Insured" is a defined term in the XL Policy, as follows:

> **II. DEFINITIONS.**
>
> (A) "**Insured**" means, either in the singular or plural, those persons or organizations designated as insureds in the **Underlying Insurance**

Fed. #23, Ex. C, Excess Policy Coverage Form p.1 of 3.

The Underlying Insurance, i.e. the Pioneer Policy, defines "Insureds" as "The **Company** and the **Insured Persons**." In turn, the Pioneer Policy defines "Company" to include "any **Subsidiary**." RSC is a subsidiary of RHC.

In other words, the XL Policy clearly states that it is an agreement and that RSC is a party to the agreement. One possible question about interpretation of SDCL 58-29B-56 is whether, when the statute uses the term "any agreement", that phrase means only agreements to which the insolvent insurer [RSC] is a party or also includes all agreements by which it would be bound, even if not a party. In the context of this case, such question is merely theoretical and irrelevant, because RSC is clearly a party to the XL Policy, expressly stated by XL to be an agreement with the Insureds.

2. XL's Discussion of Claims-Made Coverage Proves that the XL Policy Fixes "A Period of Limitation."

At pages 10-12 of its Brief, XL presents plenty of authority describing claims-made insurance policies, their requirements and consequences for failing to comply, particularly with timeliness requirements. No doubt, the cited authorities stand for the propositions asserted by XL, when isolated apart from South Dakota statutes that determine the outcome of this case. Indeed, this portion of XL's argument simply

establishes conclusively that the XL Policy, as a claims-made policy, is an agreement that fixes "a period of limitation" as contemplated by SDCL 58-29B-56. Remarkably, XL then contends that the XL Policy does not fix a "period of limitation" after so convincingly demonstrating that, under case law, the requirement of claim assertion before policy period expiration is strictly enforced.

If in fact the XL Policy does not fix a period of limitation for making and noticing claims, then the Liquidator's November 1, 2018 communications were timely. But it is clear and indisputable that the claim under the XL Policy must be made before expiration of the Policy Period. It thereby fixes a "period of limitation" . . . "for filing any claim, proof of claim, proof of loss, demand, notice, or the like . . . " and thereby fits into §56's wheelhouse. XL goes on to argue that because the claim was not made during the Policy Period, it is not covered. Arguing that coverage is denied for failure to comply with a policy-imposed deadline, but that deadline is not a period of limitation, defies all logic.

3. Section 56 Contains No Exception for Claims-Made Policies.

XL next argues that there supposedly is no evidence that §56 was intended to apply to a claims-made insurance policy. Of course, this ignores that the statute applies to "any agreement . . . ." It does not say "any agreement except . . . ." XL cites a number of examples of other types of insurance coverage; and certainly the statute applying to "any agreement" would also apply to those. Since the XL claims-made policy fixes by its terms an absolute deadline for asserting a claim, it stands front and center as the "any agreement" contemplated by the plain language of the statute. The more relevant question is how §56 could be interpreted to apply to all insurance policy coverages except claims-made policies. XL offers no authority whatsoever.

It is elemental and settled that statutes are to be construed according to their plain language and evident purpose. *Fin-Ag, Inc. v. Cimpl's, Inc.,* 754 N.W.2d 1, 2008 SD 47; *Lewis & Clark Rural Water System, Inc. v. Seeba*, 709 N.W.2d 824, 2006 SD 7; *Discover Bank v. Stanley*, 757 N.W.2d 756, 2008 SD 111. The obvious purposes of §56 are (i) to give the Liquidator breathing room to investigate and discover agreements "inherited" under SDCL 58-29B-42 and (ii) to protect the Liquidator in asserting the rights of the liquidated insurer under any agreement for which something must be done by a certain deadline to avoid loss or forfeiture of rights thereunder. When placed "inside" the XL Policy, as South Dakota law requires [see cases cited at p.12 of the Liquidator's Initial Brief], §56 accomplishes those very purposes. If it did not, it would be rendered meaningless. As this Court has held many times, an interpretation should not be given to a statute that renders it meaningless. *Argus Leader v. Hagen,* 739 N.W.2d 475, 484; 2007 SD 96, ¶31.

4. The Lack of Prior Authority Works Against XL.

The Liquidator agrees that interpretive case authority is sparse. Certainly, the one Bankruptcy Court case on the subject does not directly concern an insurance liquidation statute. But more importantly, XL *has not cited a single case, statute or secondary authority* for the proposition that §56 does not apply to claims-made insurance policies. In essence, XL argues that the fact it has no authority to cite for its proposition must mean that its argument is correct. What?

XL concedes that the NAIC Handbook is not authority, but argues its supposed significance anyway. NAIC in its Disclaimer states:

> . . . . This is not an instructional manual. These materials are not intended to serve as a definitive statement of the law or procedural requirements of any particular jurisdiction . . . . They are not intended and should not be construed as being binding upon a receiver in any jurisdiction, nor should a receiver act solely in reliance on the contents of this Handbook. . . . .
>
> . . . .
>
> The users of these materials ***should consult the applicable statutory provisions*** and regulatory authority . . . .

(Emphasis supplied). Liquidator's Initial Brief, Appendix F. For nearly three years, the Liquidator has been asking XL to take NAIC's advice and to "consult the applicable statutory provisions." Its apparently unprecedented refusal to effectively do so has culminated in the need for this Court to do just that.

5. The Option Extension Purchase by RHC Adds Nothing to XL's Argument.

XL continues to argue the significance of RHC's purchase of an Optional Extension Period under the Pioneer Policy, the failure to purchase an extension for the XL Policy and the supposed outcome-determinative failure of the Liquidator to do so. As demonstrated in our Initial Brief, the effect of §56's inclusion within the XL Policy renders the Liquidator's purchase wholly unnecessary. Viewing that failure of the Liquidator to purchase an Optional Extension Period as outcome-determinative simply renders §56 useless, contrary to this Court's rules of statutory interpretation.[2]

It is certainly understandable why RHC would make the purchase for the Optional Extension Period. While it was unnecessary to protect directors and officers against claims of the Liquidator [because of §56], it would be necessary to protect against post-

[2] Interestingly, unlike the Pioneer Policy, the XL Policy contains no provision allowing for purchase of an Optional Extension Period or stating the premium cost of the extension.

July 1, 2018 claims asserted by other Plaintiffs who did not have the benefit of statutes such as §56. Thus such purchase really has no bearing whatsoever on the interpretation of §56.

Conclusion

For all the reasons above-stated and those stated in his Initial Brief, the Liquidator respectfully requests that both parts of the Certified Question be answered in the affirmative. The Liquidator joins in XL's request for oral argument.

Dated: August 31, 2021

CADWELL SANFORD DEIBERT
& GARRY LLP

By _/s/ SW Sanford_____

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Certificate of Compliance

Under SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements of the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 1,725 words from the Introduction through the Conclusion. I have relied on the word count feature of Microsoft Word to prepare this Certificate.

Dated: August 31, 2021

_/s/ SW Sanford_____

Steven W. Sanford

Certificate of Service

The undersigned attorney hereby certifies that, pursuant to SDCL 15-26C-4, a true and correct copy of the foregoing was served via email on those listed below:

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on August 31, 2021.

_/s/ SW Sanford_____

Steven W. Sanford

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

LARRY DEITER, DIRECTOR OF INSURANCE OF THE STATE OF SOUTH DAKOTA, AS LIQUIDATOR OF RELIAMAX SURETY COMPANY IN LIQUIDATION, **Plaintiff,** **vs.** **XL SPECIALTY INSURANCE CO.,** **Defendant.**	**ORDER GRANTING PLAINTIFF'S MOTION TO AMEND REPLY BRIEF** **#29663**

Plaintiff in the above-entitled matter having served and filed a motion to amend his reply brief by inserting the following at the end of the paragraph that ends on page 4 of the Reply Brief:

> The idea of a supposed exception to "any agreement" runs directly counter to the view of this Court expressed in *Central Monitoring Service, Inc. v. Zakinsld,* 553 N.W.2d 513,517, 1996 SD 116 ,r24 that the word "'any' as used in a statute means 'all' or 'every' and suggests a broad and expansive meaning." See also *Granite Re, Inc. v. National Credit Union Administration Board,* 956 F.3d 1041, 1045 (8th Cir. 2020) (the federal statute phrase "any contract" includes a letter of credit, partly because "the word 'any' has expansive meaning, that is 'one or some indiscriminately of whatever kind."').

and no response having been served and filed thereto, and the Court having considered the motion and being fully advised in the premises, now, therefore, it is

#29663, Order

ORDERED that the motion be and it is hereby granted. The Clerk of this Court is directed to include plaintiff's motion and the Court's order granting plaintiff's motion to amend reply brief with the briefs previously filed in this appeal.

DATED at Pierre, South Dakota, this 14th day of October, 2021.

BY THE COURT:

ATTEST:

Clerk of the Supreme Court
(SEAL)

Steven R. Jensen, Chief Justice

PARTICIPATING: Chief Justice Steven R. Jensen and Justices Janine M. Kern, Mark E. Salter, Patricia J. DeVaney and Scott P. Myren.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

OCT 14 2021

Clerk