Interplay Between Reinsurance and Self-Insured Workers' Compensation

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There is a somewhat complicated statutory scheme in many states concerning an employer's ability to self-insure its workers' compensation obligations. Reinsurance often plays a role where an employer self-insures. Typically, that role is to provide "reinsurance" in excess of a self-insured retention to protect the employer's top end. If an employer fails to insure or to qualify as a self-insured entity, many states have workers' compensation trust funds that step in and pay benefits to injured workers when there is no alternative source of funding.

In a recent case under Massachusetts law, a Massachusetts appeals court addressed the interplay between a reinsurer and a self-insured employer that became insolvent.?

In *Janocha's Case,* No. 16-P-1181, 2018 Mass. App. LEXIS 50 (May 2, 2018), an injured worker's employer was an approved self-insurer under Massachusetts law and had a surety bond to protect its self-insured position. The employer also had a reinsurance contract, also permitted under Massachusetts law, which had a $400,000 self-insured retention per accident.

The employer issued direct payments to the injured worker and after the employer became insolvent, payments were made by the surety. At the time the surety bond became exhausted, payments had not yet reached the $400,000 self-insured retention.

The employee filed a claim with the Massachusetts Department of Industrial Accidents to compel the reinsurer to resume benefit payments. An administrative judge found that the Workers' Compensation Trust Fund was responsible for the benefits and not the reinsurer until the retention was reached. On appeal to the reviewing board, the board reversed and ordered the reinsurer to make the direct payments and to reimburse the trust fund for any payments it made.

On appeal, the court held that the review board's interpretation of the statute was correct. The court focused on the statute's consideration of the date of injury to determine whether there is a right of reimbursement from the trust fund. The trust fund, held the court, responds if, on the date of injury, the employer was uninsured. Because the employer qualified as a self-insurer on the date of injury, the trust fund had no obligations to pay the benefits to the employee.

The reinsurer, however, was found by the court to be responsible for continuing benefits payments.

To qualify as a self-insurer, the employer is required to purchase reinsurance. The court found that the statute was created to protect injured employees and, therefore, the reinsurer was required to pay benefits when the self-insurer becomes insolvent and the surety bond becomes exhausted. The court also rejected the argument that the self-insured retention had to be reached before the reinsurer was obligated to pay. The reinsurance contract issued to a self-insurer was, by statute, a further guarantee of the payment of benefits to the injured employee and the retention provision was null and void under these circumstances. Accordingly, the reinsurer was compelled to continue benefits payments even though the self-insured retention set out in the reinsurance agreement had not been met.

National Law Review, Volume VIII, Number 127