

PROTECTING THE INSURER WHEN THE INSURED FILES FOR BANKRUPTCY

BY

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The recent shutdown of the Yellow Corporation trucking company (and its impending bankruptcy) is an opportunity to examine on some of the considerations for filing and, if necessary, prosecuting a claim in the bankruptcy court for large deductibles, retrospective premiums and other types of insured or policyholder obligations. Even if the debtor/insured insurance obligations are fully secured, insurance companies will want to file a claim in the bankruptcy case to prevent an attack on their collateral.

By way of background, deferred premium primary casualty programs, (usually for workers compensation, general liability and commercial automobile liability) allow the insured to pay the insurance company just a portion of what can be millions of dollars insurance premiums due for a year of coverage. In return for this deferral, the insured must pay the balance of the premium (or reimburse the insurance company under a claims deductible) as the insurance company pays the underlying losses, which greatly benefits the insured's cash flow. The programs vary but usually involve retrospective rating of the premium for the medium sized accounts and large deductible programs and in each case the insured will pay losses or premiums based on losses up to some per claim/per accident amount that ranges from \$50,000 to \$1,000,000 or more. Captive reinsurance may also be involved. Prudent management and some minimal NAIC rules require the insurer to obtain collateral or security from its insured for deferred obligations, but actuaries and underwriters must estimate losses 5 to 8 into the future and poorer than expected loss experience or business pressures may render the collateral inadequate.

Yellow was the fifth largest trucking company and the third largest less-than-truckload trucker. It was a large employer with a reported 30,000 employees plus numerous warehouses and no doubt thousands of trucks and trailers. Thus, the bankruptcy of Yellow is likely to result in claims in the bankruptcy for any of Yellow's deferred premium and claim obligations for one or more insurance carriers. The Legal Department of the carrier will probably want to do the following put them in the best position to protect or prosecute their claim in bankruptcy:

- Obtain an estimate of current losses or premiums due that are unpaid, an estimate of outstanding and IBNR losses, and the current amount of letters of credit or other collateral on hand from the insured. That information will become part of bankruptcy claim.
- Determine which Bankruptcy court the insured filed in and take note of claims agent (usually appointed in the first 30 to 60 days). The claims agent's website is

a convenient way to access important documents, keep track of deadlines and determine whether the debtor is going to allow or deny your claim.

- Set up a diary/calendar reminder to make sure the insurance company receives a claims package and then confirm the amount of the insurance company's claim that the debtor plans to allow. Many debtors/bankrupt insureds assign a value of zero dollars (\$0) for deferred premium and loss obligations so, in the absence of a properly filed claim and if collateral is inadequate, the insurer will suffer a financial loss.
- Even with collateral, I've always filed a claim since a few debtors attempt to claw back collateral and that fight is harder to defend in the absence of properly filed claim in the bankruptcy.

Things become a little more complicated if the insured wants to deny the insurer's claim or force a haircut on the amount. Most disputes with the debtor can be resolved with good documentation, actuarial backup and persistence. A few disputes on the allowed amount may proceed to a contested hearing.

While some recoveries are pennies on the dollar there can also be substantial recoveries and any attempt to unwind collateral must be fiercely contested. Harris Insurance Law is experienced in representing insurance companies in bankruptcy and with many other legal matters and issues facing property casualty insurance companies.

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