ASSIGNMENT OF REINSURANCE CONTRACT RIGHTS

BY

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Abstract: Reported decisions involving the assignment of reinsurance contracts are scarce. When the validity of the assignment of a reinsurance contract is in dispute, the courts have focused on whether the "personal performance" of the substituted party was essential to the contractual rights of the non-consenting party.

Introduction

This article discusses reported decisions of courts that have resolved disputes involving the assignment of reinsurance contracts. We have located only two reported decisions in which the validity of the assignment of a reinsurance contract was attacked. The question presented in both of those cases was whether the unconsented substitution of a new cedent or reinsurer materially increased the contract-related risks to which the non-consenting party would be subject. Both courts answered this question by determining whether the "'personal performance" of the substituted party was essential to the bargained-for rights of the non-consenting party. The other reported decisions addressed in this article involving the assignment of reinsurance contracts do not address the validity of the assignments. Rather, these cases illustrate the procedural complications that the assignment of a reinsurance contract can engender.

Boundaries of the Concept of "Assignment"

The Restatement defines "assignment" as follows:

> An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.

RESTATEMENT (SECOND) CONTRACTS, § 317(1) (1979 Main Vol.).[1] Unlike a novation, an assignment can be validly accomplished without the participation of the other original contracting party. Because the original obligor is not necessarily involved in the assignment, the assignee obtains only the rights possessed by the assignor at the time of the assignment, and no more. RESTATEMENT (SECOND) CONTRACTS § 336 (1981). The assignee "stands in the shoes" of the assignor.

Reinsurance contract rights are assignable because, with limited exceptions, all contracts are assignable. *Special Products Manufacturing, Inc. v. Douglass*, 553 N.Y.S.2d 506, 509 (Sup. Ct. 1990); *Robert Lamb Planners & Architects v. Evergreen, Ltd.*, 787 F. Supp. 753, 757 (S.D. Ohio 1992); *Michigan State University v. Research Corp.*, 898 F. Supp. 519, 521 (W.D. Mich. 1995); *Vaughn v. DAP Financial Services, Inc.*, 982 S.W.2d 1, 7 (Tex. Ct. App. 1997); *Browning-Ferris Indus. of Wis. v. Sundance Photo, Inc.*, 573 N.W.2d 901 (Wisc. Ct. App. 1997), *In re Brooks*, 248 B.R. 99, 105 n.9 (Bankr. W.D. Mich. 2000); RESTATEMENT (SECOND) OF CONTRACTS § 317 (1979 Main Vol.); SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 412, at 31 (3d Ed. 1957); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 11.2, at 704 (3d Ed. 1999); 6 AM. JUR. 2d *Assignments* § 17 (2003). And, under the law of most jurisdictions, "[a] reinsurance contract is governed by the rules of construction applicable to contracts generally." *Christiania Gen'l Ins. Corp. v. Great Amer. Ins. Co.*, 979 F.2d 268, 274 (2d Cir. 1992). *See also Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485, 506 (1882); *Unigard Sec. Ins. Co. v. North*

River Ins. Co., 4 F.3d 1049, 1064 (2d Cir. 1993); *O'Connor v. Ins. Co. of N. America*, 668 F. Supp. 1183 (N.D. Ill. 1987); *Fortress Re, Inc. v. Jefferson Ins. Co. of New York*, 465 F. Supp. 333 (E.D.N.C. 1978); *Arrow Trucking co. v. Continental Ins. Co*., 465 So. 2d 691 (La. 1985); *Neff v. Cherokee Ins. Co*., 704 S.W.2d 1 (Tenn. 1986); *Ott v. All-Star Ins. Corp.*, 299 N.W.2d 839 (Wisc. 1981); JOHN A. APPLEMAN, INS. LAW & PRACTICE § 7686, at 500 (1943); 19 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 80:48 (Rev. 2d ed. 1983). The three exceptions to the general rule of free assignability are: (1) the contract itself prohibits assignment; (2) a statute or public policy prohibits the assignment; and (3) the contract calls for the performance of "personal services." RESTATEMENT (SECOND) OF CONTRACTS § 317 (1979 Main Vol.); SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 412 (3d Ed. 1957); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 11.4, at 713 *et seq.* (3d Ed. 1999).[2]

First Exception To The General Rule That Contracts Are Freely Assignable

With respect to the first exception, courts will enforce prohibitions to assignment according to their plain meaning. *See, e.g.*, *Green v. Safeco Life Ins. Co.*, 727 N.E.2d 393, 397 (Ill. Ct. App. 2000) (holding it was an abuse of discretion for circuit court to approve petitioner's request for an assignment when "the plain and ordinary meaning of the language of the anti-assignment provision in the settlement agreement is to prohibit petitioner from making an assignment of his periodic payments. The terms of the contract are clear"); *Fiorentino v. Lightning Rod Mut. Ins. Co.*, 682 N.E.2d 1099, 1101 (Ohio Ct. App. 1996) (where contract provision stated that the "policy is void if it is assigned without [LRM's] written consent," trial court properly recognized that, while contract rights are generally freely assignable, "[t]hat general proposition . . . may be modified by agreement of the plain words of the contract. A plain reading of LRM's policy does not require this Court to engage in any lexicological acrobatics to come to the conclusion that its plain meaning is to refuse assignment of any contract rights under

its policy unless LRM has agreed to that assignment in writing"). Accordingly, since the "plain meaning" doctrine applies to reinsurance contracts, a court would very likely find that an unambiguous prohibitory clause in a reinsurance contract would render invalid an unconsented assignment of the contract. *See, e.g., ReliaStar Life Ins. Co. v. IOA Re Inc.*, 303 F.3d 874, 878-80 (8th Cir. 2002) (reinsurance contracts are interpreted based upon the plain and ordinary meaning of their terms); *USX Corp. v. Adriatic Ins. Co*., 64 F. Supp. 2d 469, 477 (W.D. Pa. 1998) (same).

Second Exception To The General Rule

As for a statutory or public policy prohibition, this exception to the rule that contracts are freely assignable, at least as of this writing, is not applicable to the assignment of reinsurance contracts. There is no statutory prohibition to such an assignment. Furthermore, we have not located any precedential authority for the proposition that assignment of reinsurance contracts violates public policy.

'Personal Performance Exception To The "Freely Assignable" Rule

Although there is scant authority addressing the assignability of a reinsurance contract, the 'personal performance exception is the one most likely to be the subject of litigation in a dispute over the assignment of a reinsurance contract. Generally speaking, and as discussed further below, courts employ the 'personal performance exception when a contract assignment would alter the substance of the contract or otherwise materially affect the rights of the original contract obligee. The practical implications of a legal challenge to assignment of a reinsurance contract are patent:

- If the personal services exception applies, then a cedent may be left without reinsurance recovery;
- If the personal services exception does not apply, then a reinsurer may be forced to pay an entity with which it had never contracted.

The gist of the 'personal performance exception is that, if a contract requires a particular person's skill or judgment, the original obligee should have the right to reject or accept a substitute performer. *See, e.g.*, *Logical Networks, Inc. v. Murdock*, No. 239779, 2002 WL 31187877, at *2 (Mich. Ct. App. Oct. 1, 2002) (contracts that contemplate personal association and services are not assignable without consent because they involve personal trust or the special skills and knowledge of a particular individual or group); *In re The Greater Southeast Community Hosp. Fdn., Inc.*, 267 B.R. 7, 17-18 (Bankr. D.C. 2001) (employment contracts were not assignable with other assets because each employee has right to determine whether to accept or reject employment by new employer); *Schlesinger v. Regenstreif*, 135 N.Y.S.2d 858, 862 (Sup. Ct. 1954) (agreement to use patented embossing machine could not be assigned without consent because it was of a personal nature). Or, put more elegantly: "All painters do not paint portraits like Sir Joshua Reynolds, nor landscapes like Claude Lorraine, nor do all writers write dramas like Shakespeare or fiction like Dickens. Rare genius and extraordinary skill are not transferable, and contracts for their employment are therefore personal, and cannot be assigned." *Taylor v. Palmer*, 31 Cal. 240, 247-48 (Cal. 1866).

In *Farm and Ranch Life Ins. Co. v. Wheels Life Ins. Co.*, No. 92-35456, 1994 WL 20082 (9th Cir. Jan. 26, 1994), the court reasoned that a cedent's underwriting staff could possess those qualities of "rare genius and extraordinary skill" in the eyes of the cedent's reinsurer. Under the certificate at issue in *Farm & Ranch*, Wheels reinsured credit life insurance policies issued by Empire. *Farm and Ranch Life Ins. Co. v. Wheels Life Ins. Co*., Nos. 90-35638, 90-35905, 1991 WL 275336, at *1 (9th Cir. Dec. 24, 1991) ("*1991 Farm & Ranch*"). Empire assigned its entire book of credit business, including the reinsurance agreement with Wheels, to Farm and Ranch. *Id.* Wheels was not a party to the assignment and did not consent to it. *Id*. When Farm and

Ranch sought reinsurance recovery from Wheels, Wheels refused to pay, citing the unconsented assignment as grounds for the refusal. *Id*. at *2. Farm and Ranch sued. *Id.*

The district court granted summary judgment in favor of Wheels, holding that the reinsurance certificate was not assignable. *Farm & Ranch*, 1994 WL 20082 at *1. The Ninth Circuit affirmed, concluding that Empire could not assign its reinsurance agreement to Farm and Ranch because the assignment "materially increase[d] the obligor's [Wheels'] risk … or materially impair[ed] the obligor's chance of obtaining return performance." *Id*. at *1-2. The risk to Wheels increased because, pursuant to the assignment, a third party unknown to Wheels would have had the right to underwrite new risks and cede them to Wheels. *Id.*

Similarly, in *Colonial Penn*, the court voided an attempted unilateral assignment of a reinsurance contract by an American reinsurer to its intended British assignee. *Colonial Penn Ins. Co. v. American Centennial Ins. Co*., No. 96 Civ. 6051 (MBM), 1997 WL 10004 (S.D.N.Y. Jan. 10, 1997). The court found that the reinsurer's attempted assignment of its obligation to pay required the consent of the reinsured because there was "no doubt" that a "purported assignment from an American to a foreign corporation may adversely affect the obligee's rights." *Colonial Penn*, 1997 WL 10004 at *9 (*quoting Beck v. Manufacturers Hanover Trust Co*., 481 N.Y.S.2d 211, 217 (N.Y. Sup. Ct. 1984)). The case that the *Colonial Penn* court relied on, *Beck*, set forth the reasoning behind this conclusion: where the original parties contemplate "undertaking an obligation in the United States, performable in the United States, measured by American money, and governed by, and enforceable under, American law," then transfer of that obligation from an American to a foreign corporation substantially alters the original parties' bargain to the extent it makes it more difficult to enforce under American law. *Beck*, 481 N.Y.S.2d at 217. For both the

Colonial Penn and *Beck* courts, the diminution of enforceability of the contract constituted a material adverse effect on the original obligee's rights.

In contrast to the paucity of case law analyzing assignment of reinsurance contracts, there are many cases addressing the assignment of primary insurance contracts. As a general rule, unconsented assignment of rights under a primary policy is not allowed because the 'personal performance exception necessarily bars the assignment.[3] *Beck-Brown Realty Co. v. Liberty Bell Ins. Co*., 241 N.Y.S. 727, 728 (Sup. Ct. 1930) illustrates why the 'personal performance exception is usually applicable in the direct insurance context. When a direct insurer issues a liability policy, it "underwrites" the policy, making judgments about the prospective insured's integrity, good faith, and habits of carefulness, prudence and vigilance in deciding whether she meets the insurer's standards for insurability. *Id.* Because a direct insurer's ultimate business success depends upon the particular attributes of the insured it has underwritten, courts require that the insured obtain the insurer's consent to any assignment of the insurer's policy. *Id.* As the *Beck-Brown* court observed, this rule "is designed . . . to afford substantial protection to the underwriters, by enabling them to preserve, during the continuance of the risk, the safeguards which existed at its origin – those found in the honesty and watchfulness of the assured." *Id.* (internal quotations omitted). Thus, for example, the 'personal performance exception protects a property insurer from having its policy assigned to a known arsonist.

Assignment Of A Reinsurance Contract Can Raise Procedural Issues

In addition to the important question of the effect of an assignment on reinsurance coverage, there are also procedural implications that flow from such an assignment. Although the cases discussed below do not address the question whether an assignment was valid, they do illustrate some of the procedural disputes that have involved assignment of reinsurance contracts.

Jurisdiction

American Centennial Insurance Company v. Aseguradora Interacciones, S.A., No. 96 CIV 4062 (JFK), 1997 WL 742530 (S.D.N.Y. Dec. 1, 1997) (*"ACIC '97"*), pitted Aseguradora (a Mexican company) against American Centennial ("ACIC") (a Delaware corporation). ACIC had assigned all of its interest in the reinsurance contracts at issue to British International Insurance Company ("BIIC"), a Bermuda company. *Id*. at *2. Aseguradora sought dismissal of the action on the grounds that that the assignment destroyed diversity jurisdiction and, accordingly, destroyed the U.S. District Court's subject matter jurisdiction. *Id*. at *3.

Aseguradora argued that, following the assignment, the two real parties in interest in the suit were Aseguradora and BIIC, both alien corporations, and therefore not "diverse" for purposes of falling within the purview of the federal court's jurisdiction. *Id*. Although ACIC brought the suit, ACIC did not effect service on Aseguradora until after ACIC had assigned its rights to BIIC. *Id*. at *4. Thus, Aseguradora argued, even though diversity jurisdiction existed at the time of filing, the complaint should not "relate back," but should be assessed as of the time that Aseguradora was served for purposes of determining jurisdiction. *Id*. at *3-4.

The court rejected the argument, relying on the rule that "once established, jurisdiction may not be divested by subsequent events, including a transfer of interest under a contract." *Id.* at *4, *citing Freeport-McMoRan, Inc. v. K N Energy, Inc*., 498 U.S. 426, 428 (1991). The *Freeport-McMoRan* Court held, in part, that:

> [I]f jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events… [T]he plaintiffs and defendant were diverse at the time the breach-of-contract action arose and at the time the federal proceedings commenced. The [lower court] opinions also confirm that [plaintiffs' transferee] was not an "indispensable party" at the time the complaint was filed; in fact, it had no interest whatsoever in the outcome of the litigation until sometime after suit was commenced. Our cases require no more than this.

> Diversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action. *A contrary rule could well have the effect of deterring normal business transactions during the pendency of what might be lengthy litigation.*

Id. at *5 (alterations and emphasis by the *ACIC '97* court).

Statutory Requirement For Posting Pre-Answer Security

In a separate action involving some of the same parties, ACIC and Seguros litigated the question whether ACIC's assignment to BIIC nullified an earlier-occurring court order that Seguros post pre-answer security. *American Centennial Insurance Company v. Seguros La Republica*, S.A., No. 90 CIV 2370 (JFK), 1998 U.S. Dist. LEXIS 16633 (S.D.N.Y. Oct. 21, 1998) (*"ACIC '98"*). As in *ACIC '97*, suit was filed in *ACIC '98* before ACIC's assignment to BIIC, and the court granted ACIC's request that Seguros, an unauthorized foreign insurer, post security for any judgment that might be entered against it, as required under New York Insurance Law Section 1213(c)(1)(A). *Id*. at *3-4. [4] Seguros argued that although ACIC could properly invoke the pre-answer security statute, BIIC – not a New York resident – could not because the sole purpose of the statute is to protect New York residents. *Id*. at *3.

Although the court rejected Seguros' motion on procedural grounds, it also rejected the argument on the merits. Specifically, the *ACIC '98* court held that the substitution of parties pursuant to Federal Rule of Civil Procedure 25(c) "does not affect the substantive rights of the parties." *Id*. Rather, "[t]he impact of Rule 25(c) is entirely procedural … [s]ubstantive rights are not affected." *Id., quoting* JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 25.30[3] (3d ed.).

Similarly, in *Allstate Insurance Co. v. Administratia Asigurarilor de Stat*, 875 F. Supp. 1022 (S.D.N.Y. 1995), the court examined whether an assignee could invoke the protection of New York Insurance Law Section 1213(c)(1)(A) if the assignor could not. In *Allstate*, a

retrocedent (SLR – a Mexican company) assigned to Allstate its rights against thirty-three retrocessionaires. *Id.* at 1024. Allstate sued the retrocessionaires and moved to compel all of the defendants to post pre-filing security. *Id.* The court rejected Allstate's request, holding that Allstate was not entitled to protection under Section 1213 because:

> Allstate brings suit as the assignee of SLR and as the successor-in-interest to NESCO, and it is undisputed that neither SLR nor NESCO was ever authorized to do business in New York. Thus, neither NESCO nor SLR falls within the class of persons protected by section 1213, which the legislature enacted to protect New York residents. … [T]he legislature made it clear that [this] statute was enacted to aid New York residents who bring suit against unauthorized foreign insurance companies.

Id. at 1026. Further, the court reasoned, "[b]ecause Allstate stands in the shoes of its assignor and in the shoes of its predecessor-in-interest, and because neither its assignor nor its predecessor-in-interest qualifies for protection under section 1213, Allstate does not qualify for protection under this statute." *Id.* at 1026-27.

A Way Around The Standing Problem For The Insured Or Third-Party Claimant

The *Arkwright* case involved a seaman, Sosa, who was injured while working on a ship owned and operated by Tracey, the insured. *Arkwright-Boston Manufacturers Mut. Ins. Co. v. Ross*, Civ. a. No. H-84-2907, 1990 U.S. Dist. LEXIS 18593 (S.D. Tex. Sept. 28, 1990). Oceanus Mutual, the company that issued a $5,000,000 policy to Tracey, had, in turn, ceded the risk to various reinsurers. *Id.* at *1. In March 1984, Oceanus was liquidated, and in November 1984 Sosa obtained a judgment against Tracey in the amount $13,642,556. *Id.* Subsequently, in satisfaction of the judgment, Tracey assigned to Sosa its rights against its insurers, including Oceanus. *Id.* at *2. In turn, Oceanus's liquidator assigned to Sosa Oceanus's claims against its reinsurers. *Id.* at *2.

When Sosa sought payment from the reinsurers, the reinsurers objected, arguing that Sosa had no right of action against them. *Id.* at *2. The court rejected this argument, holding that the assignment from the cedent (Oceanus in liquidation) obviated the rule that an insured or an assignee of the insured has no third party right against the reinsurer. *Id.* The reinsurers then argued that Sosa's lawsuit against them should be stayed in favor of arbitration because the reinsurance certificates contained an arbitration clause. *Id.* at *4. The court agreed. *Id.* at *5. "As Oceanus's assignee, Sosa must comply with the terms of the contract under which he seeks recovery." *Id.* at *5. In other words, Sosa, as the assignee of both the insurance contract and the reinsurance contract, stood in the shoes of the insured and the cedent, and had no more or fewer rights or obligations than the assignors.

Conclusion

Under the general rules of contract law, a party to a reinsurance contract may assign its rights and obligations under the contract to a new entity. However, the assignment can raise issues, ranging from the right to payment, to the right to litigate in a particular court. Because there is very little reported case law analyzing assignment of reinsurance contracts, a party planning such an assignment can gain insight into possible consequences from the case law concerning assignment of direct insurance policies.

End Notes

[1] In contrast, novation requires the express consent of the original obligee and actually results in the release of the original obligor from liability under the contract. RESTATEMENT (SECOND) CONTRACTS § 280 (1981). For an excellent discussion of novation of direct insurance policies, *see* Robert M. Hall, *Reinsurance and Assumption Agreements: How does the Novation Take Place?*, Mealey's Litigation Report: Reinsurance, Apr. 26, 2001 at 20-30.

[2] As a practical matter, few prospective reinsurance treaties will be silent on this issue of assignability. However, in such a situation, the case law regarding assignment of direct insurance contracts, which is discussed in this article, is instructive. A prospective reinsurance treaty necessarily indicates an intent on the part of the reinsurer to continue dealing in the future with a particular cedent -- the treaty reinsurer has made a judgment that the underwriting acumen of the cedent meets the reinsurer's standards.

[3] Indeed, in the direct insurance context, the courts hold generally that a contract of insurance is a personal contract that cannot be assigned without the consent of the insurer. *See, e.g*., *Allied v. Frola*, Civ. A. No. 87-462, 1992 WL 281114 (D.N.J. Oct. 6, 1992) (stating that direct insurance policy constitutes personal contract); *Feiereisen v. O'Dwyer*, 56 B.R. 167, 168 (Bankr. D. Or. 1985) (same); *R.O. Collier v. General Exchange Ins. Corp*., 118 P.2d 74, 76-77 (Ariz. 1941) (same); *Founders Mutual Cas. Co. v. Mark*, 302 N.E.2d 142, 144 (Ill. App. Ct. 1973) (same); *Touchet v. Guidry*, 550 So.2d 308, 313 (La. Ct. App. 1989) (same); *Kase v. Hartford Fire Ins. Co.*, 32 A. 1057 (N.J. 1895) (same); *Mobilia v. Security Taxpayers Mut. Ins. Co*., 90 N.Y.S.2d 895 (N.Y. Sup. Ct. 1949) (same); *Crook v. Hartford Fire Ins. Co*., 178 S.E. 254 (S.C. 1935) (same); *see also Ins. Co. of North America v. Snyder Moving and Storage, Inc. of Phoenix*, No. 01-15975, 2002 U.S. App. LEXIS 25173, at *11 (9th Cir. December 6, 2002) (recognizing proposition that liability and indemnity insurance policies are regarded as personal contracts, and cannot be assigned) (citations omitted); *Feutz v. Massachusetts Bonding & Ins. Co*., 85 F. Supp. 418, 423 (E.D. Mo. 1949) (same); *Allied Corp. v. Frola*, No. 87-462, 1992 U.S. Dist. LEXIS 15778, at *15 (D.N.J. October 6, 1992) (same); *German-American Ins. Co. v. Sanders*, 46 N.E. 535, 536 (Ind. 1897) (same); *Mechanics & Traders Ins. Co. v. Boyce*, 74 So. 821 (Miss. 1917) (same); *see also Nat'l. American Ins. Co. v. Jamison Agency, Inc.*, 501 F.2d 1125, 1128 (8th Cir. 1974) (stating general proposition that policies of fire insurance are personal contracts and not assignable before loss without insurer consent); *American Bonding & Trust Co. v. Baltimore & O.S.W.R. Co*., 124 F. 866, 882 (6th Cir. 1903) (same); *Commerical Union Assurance Co. v. Commercial Bank*, 118 So.2d 714 (Ala. 1960) (same); *Bergson v. The Builders' Ins. Co*., 38 Cal. 541, 543 (Cal. 1869) (same); *Antal's Restaurant, Inc. v. Lumbermen's Mutual Cas. Co*., 680 A.2d 1386, 1388 (D.C. 1996) (same); *Conrad Brothers v. John Deere Ins. Co*., 640 N.W.2d 231, 236 (Iowa 2001) (same); *Stephenson v. Germania Fire Ins. Co*., 160 N.W. 962, 963 (Neb. 1916) (same); *New York Underwriters v. Denson*, 227 P. 122, 124 (Okla. 1924) (same); *American Equitable Assurance Co. of New York v. Pioneer Cooperative Fire Ins. Co*., 216 A.2d 139, 140 (R.I. 1966) (same); *CLS Mortgage, Inc. v. Bruno*, 937 P.2d 1106, 1110 (Wash. Ct. App. 1997) (same); *Cf.* SAMUEL WILLISTON, WILLISTON ON CONTRACTS, § 49:119 (4th Ed.) ("A contract of insurance . . . may be assigned, transferred or sold by its owner, subject to certain limitations and restrictions").

[4] New York Insurance Law Section 1213(c)(1)(A) provides:

> Before any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:
>
> > (A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure payment of any final judgment which may be rendered in the proceeding, but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding….