

## **New York Court of Appeals Recognizes that Insured's Contractual Right to Notice of Cancellation Becomes Vested upon Insurer's Liquidation**

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## DEVELOPMENTS IN THE LAW

*New York Court of Appeals recognizes that insured's contractual right to notice of cancellation becomes vested upon insurer's liquidation*

Although the insurance industry is primarily state-regulated,<sup>1</sup> the nationwide repercussions of insurance carrier insolvencies have spurred the development of uniform regulations, based on the Uniform Insurers Liquidation Act ("Uniform Act"), which is geared toward the efficient administration of multi-state insurer liquidations.<sup>2</sup> Consistent with the goal of uniformity, the claims of a defunct insurer's creditors are generally fixed and valued as of the date of adjudication of insolvency,<sup>3</sup> and all policies, including those held by out-of-state insureds, are cancelled by operation of law as of the same date.<sup>4</sup> Consequently, claims stemming from losses oc-

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<sup>1</sup> See 2A MARK S. RHODES, COUCH ON INSURANCE 2D, § 21:1 (rev. vol. 1984).

<sup>2</sup> UNIF. INSURERS LIQUIDATION ACT §§ 1-15, 13 U.L.A. 321, 321-53 (1990). Since its enactment in 1939, thirty states, including New York, have adopted The Uniform Insurers Liquidation Act ("Uniform Act"). *Id.* prefatory note at 321. The Uniform Act recognizes that an insurance carrier's assets, as well as its policy obligations, are usually scattered throughout the entire region in which the company does business, often covering a multitude of states. *Id.* at 322. As a result, the multiplicity of state regulations governing these widespread assets and liabilities can be problematic when an insurer becomes insolvent and must liquidate. *Id.* The Uniform Act anticipates that the states' adoption of a uniform set of provisions would "greatly facilitate proceedings commenced for the liquidation, rehabilitation or reorganization of insurance companies and [would] promote the equitable distribution of the assets of defunct insurers." *Id.* at 323; see also N.Y. Ins. LAW §§ 7408-7415 (McKinney 1985) (New York version of Uniform Act); *Skandia Am. Reins. Corp. v. Schenck*, 441 F. Supp. 715, 726 (S.D.N.Y. 1977) (stating goal of Uniform Act to provide fair procedure for distributing assets of bankrupt insurer); *Ace Grain Co. v. Rhode Island Ins. Co.*, 107 F. Supp. 80, 82 (S.D.N.Y.) (noting Uniform Act promulgated to ensure that all similarly situated creditors receive equal treatment), *aff'd*, 199 F.2d 758 (2d Cir. 1952); John N. Gavin, *Competing Forums For the Resolution of Claims Against an Insolvent Insurer*, 23 TORR & INS. L.J. 604, 606 (1988) (stating that Uniform Act "intended to establish an orderly, efficient and fair process" for liquidation of insolvent insurers).

<sup>3</sup> See 2A RHODES, *supra* note 1, §§ 22:74-22:75; see also *In re Empire State Sur. Co.*, 214 N.Y. 553, 567, 108 N.E. 825, 828 (1915) (establishing definite date to fix rights and liabilities of all persons interested in insolvent estate); *People v. Metropolitan Sur. Co.*, 205 N.Y. 135, 140, 98 N.E. 412, 413 (1912) (determining that claims involving policies of insolvent life insurance company under direction of receiver be confirmed and valued as of dissolution commencement date) (citing *People v. Commercial Alliance Life Ins. Co.*, 154 N.Y. 95, 98, 47 N.E. 968, 969 (1897)).

<sup>4</sup> See 17 RHODES, *supra* note 1, § 67.10. It should be noted that the appointment of a receiver for an insurance company does not automatically cancel or terminate the insurer's

curing after this date are ordinarily disallowed as untimely.<sup>5</sup> Recently, however, in *Digirol v. Superintendent of Insurance*,<sup>6</sup> the Court of Appeals held that an insured's right to notice of cancellation pursuant to an express policy provision became vested upon the insurer's liquidation, thereby requiring the insurer's domiciliary or ancillary receiver<sup>7</sup> to notify the policyholder that coverage had terminated before cancellation would be effective.<sup>8</sup>

In *Digirol*, plaintiff Alan Digirol purchased a multi-peril insurance policy in 1984 for a hotel that he owned in upstate New York.<sup>9</sup> The three-year policy, which included fire insurance, was issued by Transit Casualty Company ("Transit"), a corporation domiciled in Missouri and authorized to conduct business in New York State.<sup>10</sup> According to the explicit terms of the policy, if Transit cancelled coverage prior to the stated expiration date, Digirol was entitled to written notification before the cancellation would become effective.<sup>11</sup>

contracts. *Id.* Rather, it is "an actual adjudication of insolvency [that] ipso facto cancels all outstanding policies and precludes any claim for subsequently occurring loss." *Id.* § 67:12; see, e.g., *Thomas v. Land*, 30 S.W.2d 1035, 1039 (Mo. Ct. App. 1930) (terminating surety bond by operation of law and releasing surety company from liability for future claims upon adjudication of insolvency).

<sup>5</sup> See 2A RHODES, *supra* note 1, § 22:75. Whether an insolvent insurer remains liable for a loss depends on the date of the triggering event. See *id.* §§ 22:74-22:75. Generally, a carrier is held liable for losses occurring prior to an adjudication of insolvency because they arose while the policy was in effect. *Id.* § 22:74. Conversely, since an adjudication of insolvency usually cancels an insurer's policies by operation of law, all losses occurring after this date are considered categorically invalid, shielding the bankrupt carrier from further liability. *Id.* § 22:75; see also *North River Ins. Co. v. Walker*, 65 F.2d 116 (8th Cir. 1933) (treating all outstanding policies as automatically canceled upon adjudication of insolvency); *Carr v. Hamilton*, 129 U.S. 252, 256 (1889) (treating policyholder losses incurred prior to insurer's insolvency as creditors entitled to *pro rata* share of defunct company's assets); *Boston A.R. Co. v. Mercantile Trust & Deposit Co.*, 34 A. 778, 783 (Md. 1896) (barring claims based upon accidents occurring after liquidation due to cancellation of all policies as of insolvency date).

<sup>6</sup> 79 N.Y.2d 13, 588 N.E.2d 38, 580 N.Y.S.2d 140, *cert. denied*, 113 S.Ct. 199 (1992).

<sup>7</sup> See N.Y. INS. LAW § 7408(4), (5). According to the statute, a carrier's "[d]omiciliary state" refers to "the state in which an insurer is incorporated or organized", and an "[a]ncillary state" means any state except a company's domiciliary state." *Id.*; see also UNIF. INSURERS LIQUIDATION ACT § 1(5)-(6), 13 U.L.A. 328-29 (employing identical definitions in Uniform Act).

<sup>8</sup> *Digirol*, 79 N.Y.2d at 15, 588 N.E.2d at 39, 580 N.Y.S.2d at 141.

<sup>9</sup> *Id.* at 16, 588 N.E.2d at 39, 580 N.Y.S.2d at 141. The claimant had purchased the Transit policy through a New York insurance agent. *Id.*

<sup>10</sup> *Id.* The effective dates of the three-year policy were February 29, 1984 to February 29, 1987. *Id.* Notably, February 29 did not occur in 1987.

<sup>11</sup> *Id.* The policy stipulated that Transit could cancel coverage prior to the expiration date "by mailing to the named insured at the mailing address shown in the Declarations,

On December 4, 1985, a Missouri court declared Transit insolvent, ordered it liquidated, and mandated the cancellation of all policies as of December 20, 1985.<sup>12</sup> Transit's domiciliary receiver in Missouri published the liquidation order and mailed notice of cancellation to all policyholders. Digirol's notice, however, was sent erroneously to his prior address and returned undelivered.<sup>13</sup> Although his current address was listed in a policy amendment, the Missouri receiver made no further effort to notify Digirol.<sup>14</sup>

On February 16, 1986, Digirol's hotel was destroyed by fire.<sup>15</sup> After learning of Transit's insolvency, Digirol submitted a claim to the carrier's ancillary receiver, the New York Superintendent of Insurance ("Superintendent").<sup>16</sup> The Superintendent rejected

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written notice stating when not less than ten days thereafter such cancellation shall be effective." *Id.*

<sup>12</sup> *Id.* By order of a Missouri court, permanent and deputy special receivers were appointed to oversee the liquidation within Transit's domiciliary state. *Id.* In accordance with the Uniform Act, the New York Supreme Court commissioned the New York Superintendent of Insurance as ancillary receiver to Transit's assets and creditors located in New York. *Id.* at 16, 588 N.E.2d at 40, 580 N.Y.S.2d at 142; see also N.Y. INS. LAW § 7410(a) ("Whenever under the laws of this state [New York] an ancillary receiver is to be appointed in delinquency proceedings for an insurer not domiciled in this state, the court shall appoint the superintendent as ancillary receiver.").

<sup>13</sup> *Digirol*, 79 N.Y.2d at 16, 588 N.E.2d at 40, 580 N.Y.S.2d at 142. The Missouri deputy receiver published the liquidation order in the New York Law Journal on December 6 and 10, 1985. *Id.* In addition to receiving a copy of the liquidation order indicating cancellation of all policies as of December 20, 1985, all policyholders were mailed a memo advising them that "many states require a longer period from the order of liquidation until the date of policy cancellation." *Id.* The letter also suggested that some state guaranty associations might provide coverage beyond the date of cancellation, and recommended that an insured seek local counsel in the event of a post-liquidation loss. *Id.* Nevertheless, Digirol never received this notice. *Id.*

<sup>14</sup> *Id.* When the post office returned the notice of cancellation as undeliverable, the Missouri receiver merely filed it away. *Id.*

<sup>15</sup> *Id.* at 17, 588 N.E.2d at 40, 580 N.Y.S.2d at 142.

<sup>16</sup> *Id.*; see also N.Y. INS. LAW § 7412(a). The New York statute provides:

In a delinquency proceeding in a *reciprocal state* against an insurer domiciled in that state, claimants residing in this state may file claims either with the ancillary receiver, if any, appointed in this state, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary proceeding.

*Id.* (emphasis added). Under the New York statute, the term "reciprocal state" refers to a state other than New York "in which in substance and effect the provisions of [the Uniform Act] are in force, including the provisions requiring that the insurance commissioner or equivalent insurance supervisory official be the receiver of a delinquent insurer." *Id.* § 7408(b)(6); cf. *G.C. Murphy Co. v. Reserve Ins. Co.*, 54 N.Y.2d 69, 78, 429 N.E.2d 111, 115, 444 N.Y.S.2d 592, 596 (1981) (holding claimant must proceed against an insolvent carrier's domiciliary receiver if no ancillary receiver has been appointed in New York); *Vlasaty v. Avco Rent-A-Car Sys.*, 60 Misc. 2d 928, 930-31, 304 N.Y.S.2d 118, 120 (Sup. Ct. Kings

Digirol's claim because the Missouri liquidation order had canceled Digirol's policy prior to the date of the fire.<sup>17</sup>

After denial of the claim again on reconsideration by the Superintendent, the matter was presented to a referee, who concluded that Digirol failed to receive prior written notice of cancellation as required by the policy and recommended that the claim be honored.<sup>18</sup> Although the supreme court confirmed the referee's finding of fact, it rejected the recommendations and sustained the Superintendent's denial of Digirol's claim.<sup>19</sup> The Appellate Division, First Department, affirmed.<sup>20</sup>

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County 1969) (requiring New York plaintiff to pursue claim against Ohio domiciliary receiver of insolvent insurer where no ancillary receiver is available).

<sup>17</sup> *Digirol*, 79 N.Y.2d at 17, 588 N.E.2d at 40, 580 N.Y.S.2d at 142. By rejecting the claim, the Superintendent was applying the provisions of the Missouri liquidation order to the New York insured. *Id.* at 19, 588 N.E.2d at 41, 580 N.Y.S.2d at 143. The drafters of the Uniform Act were concerned that domiciliary receivers had insufficient authority in ancillary states. See UNIF. INSURERS LIQUIDATION ACT, 13 U.L.A. 321, 322. In addition, the diversity of applicable state laws led the drafters to conclude that "[a]dministration would be simplified and greater equity would be obtained if the laws of a single state, preferably the state of domicile of the insurance company, were made to govern all such preferences [of creditors]." *Id.* at 323; see, e.g., *Dardar v. Insurance Guar. Ass'n*, 556 So. 2d 272, 274 (La. 1990) (recognizing authority of domiciliary New York court to issue liquidation order affecting insureds in Louisiana).

The New York statute expressly grants authority to the domiciliary receiver. N.Y. Ins. LAW § 7410(b). "The domiciliary receiver for the purpose of liquidating an insurer domiciled in a reciprocal state, shall be vested by operation of law with the title to all of the property, contracts, and rights of action . . . of the insurer located in this state. . . ." *Id.*; see also *Kelly v. Overseas Investors, Inc.*, 24 A.D.2d 157, 159, 264 N.Y.S.2d 586, 589 (1st Dep't 1965) (noting that domiciliary receiver of insurer domiciled in reciprocal state generally considered vested with title to all New York assets of insurer), *rev'd on other grounds*, 18 N.Y.2d 622, 219 N.E.2d 288, 272 N.Y.S.2d 773 (1966).

<sup>18</sup> *Digirol*, 79 N.Y.2d at 17, 588 N.E.2d at 40, 580 N.Y.S.2d at 142. The referee determined that Digirol did not receive the notice of cancellation required by the policy since his correct address was available to the liquidator. *Id.*; cf. *Dardar*, 556 So. 2d at 275 (determining that claimant did not receive prior notice of cancellation because insurer's affidavit of mailing lacked verification of names and addresses to whom notices were sent).

<sup>19</sup> See *Digirol*, 79 N.Y.2d at 17, 588 N.E.2d at 40, 580 N.Y.S.2d at 142.

<sup>20</sup> See *In re Transit Casualty Co.*, 169 A.D.2d 564, 565, 564 N.Y.S.2d 418, 419 (1st Dep't), *rev'd sub nom. Digirol*, 79 N.Y.2d 13, 588 N.E.2d 38, 580 N.Y.S.2d 140. Affirming the supreme court's denial of Digirol's claim, the appellate division concluded that under existing New York law an insured had no further rights against a carrier once the insurer had been placed in liquidation. *Id.*; see also *People v. American Loan & Trust Co.*, 172 N.Y. 371, 378, 65 N.E. 200, 201 (1902) (holding that claims of creditors are presentable and fixed as of date receiver is appointed). The principle is similar under Missouri law. See, e.g., *Thomas v. Land*, 30 S.W.2d 1035, 1039 (Mo. Ct. App. 1930) (terminating surety bond by operation of law and releasing surety company from future liability upon judgement of insolvency). *But see* 17 RHODES, *supra* note 1, §§ 67:10, 67:12 (noting that initiation of insolvency proceedings does not cancel outstanding policies but actual adjudication of insolvency does).

In *Transit*, the appellate division also rejected claimant's contention that he had a due

In a four-to-three decision, the Court of Appeals reversed, holding that Digirol's contractual right to notice of cancellation had matured upon Transit's liquidation,<sup>21</sup> thus requiring notice to the policyholder before the coverage could effectively terminate.<sup>22</sup> Writing for the court, Chief Judge Wachtler reasoned that since Digirol's proper address was included in the policy, the Missouri receiver's publication and misdirected mailing failed to satisfy the contractual obligation to send notice of cancellation to the policyholder.<sup>23</sup> Emphasizing the lack of adequate notice, the court deemed the cancellation ineffective and allowed Digirol's claim.<sup>24</sup>

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process right to continued insurance coverage pending notice of Transit's liquidation and cancellation of all policies. See *Transit*, 169 A.D.2d at 565, 564 N.Y.S.2d at 419. The court stated that just as one has no due process right prior to the time that right is created by law, due process cannot preserve this right after it has perished by operation of law. *Id.*; cf. *Jewish Memorial Hosp. v. Whalen*, 47 N.Y.2d 331, 340, 391 N.E.2d 1296, 1300, 418 N.Y.S.2d 318, 322 (1979) (denying that vested property rights were created by health department notice that interim rates would be set for reimbursement proceedings, with final rates to be revised upward or downward).

<sup>21</sup> *Digirol*, 79 N.Y.2d at 15, 588 N.E.2d at 39, 580 N.Y.S.2d at 141. The court determined that the claimant's contractual right to prior written notice of cancellation must be recognized as a valuable property right independent of the right to insurance coverage during the policy term. *Id.* In support of this proposition, the court cited *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260 (1987), in which a contractual right created by a collective bargaining agreement was considered a property right protected by due process, *id.* at 260-61.

The Court of Appeals did not decide whether due process protected the contract-derived property right, but nevertheless concluded that the claimant's entitlement to notice was preserved as a vested contractual right. *Digirol*, 79 N.Y.2d at 17, 588 N.E.2d at 40, 580 N.Y.S.2d at 142.

<sup>22</sup> *Digirol*, 79 N.Y.2d at 18, 588 N.E.2d at 4, 580 N.Y.S.2d at 143. "At the time of liquidation in this case that right [to notice of cancellation] matured and what remained to be done was for the company, or its successor, to perform the contractual obligation by informing the insured of the impending cancellation." *Id.*

<sup>23</sup> *Id.* Though the court emphasized that the claimant's right to notice of cancellation was contract-based, two of the cases cited refer to a statutorily-grounded right to notice, and a third validates a policy cancellation despite notice having been sent to the wrong address. *Id.*; see *McCann v. Scaduto*, 71 N.Y.2d 164, 177, 519 N.E.2d 309, 314-15, 524 N.Y.S.2d 398, 404 (1987) (requiring mailing actual notice of impending tax lien sale to affected homeowners because of sale's "momentous consequences" under Nassau County Administrative Code); *Allstate Ins. Co. v. Altman*, 21 Misc. 2d 162, 167-68, 191 N.Y.S.2d 270, 276-77 (Sup. Ct. Queens County 1959) (examining notice provisions of Motor Vehicle Financial Security Act requiring insurers to mail notification of cancellation of automobile insurance to policyholder's known address); *Byard v. Royal Indem. Co.*, 49 N.Y.S.2d 60, 61 (Sup. Ct. Chemung County 1944) (lacking proof that insured advised broker of change of address, carrier properly canceled coverage by mailing notice, pursuant to policy provision, to insured's old address).

<sup>24</sup> *Digirol*, 79 N.Y.2d at 19-20, 588 N.E.2d at 42, 580 N.Y.S.2d at 144. In addition to creditors, statutes controlling the liquidation of bankrupt insurers are concerned with the interests of policyholders and the public at large. *Id.* at 19, 588 N.E.2d at 41, 580 N.Y.S.2d

In a critical dissent, Judge Kaye maintained that the court's decision "lack[ed] any basis in law and add[ed] unwarranted uncertainty to liquidation proceedings involving multi-state insurers."<sup>25</sup> Noting that the court's holding will force New York receivers to comply with the specific notice terms of all policies issued by out-of-state insurers to New York residents, Judge Kaye cautioned that such a requirement not only unreasonably burdens ancillary receivers,<sup>26</sup> but also undermines the authority of domiciliary receivers.<sup>27</sup>

Although arguably achieving a laudable result, the court's recognition of a policyholder's vested right to notice of cancellation

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at 143. To this end, applicable statutes are intended to furnish a liquidation framework that is at once "comprehensive, economical, and efficient." *Id.*; see *Motlow v. Southern Holding & Sec. Corp.*, 95 F.2d 721, 724 (8th Cir.) (deciding that Superintendent of Insurance is state official best suited to wind up affairs of insolvent insurance companies), *cert. denied*, 305 U.S. 609 (1938); see also *In re Knickerbocker Agency Inc.*, 4 N.Y.2d 245, 250, 149 N.E.2d 885, 888-89, 173 N.Y.S.2d 602, 606 (1958) (recognizing that exclusive jurisdiction of New York Supreme Court, in conjunction with Superintendent of Insurance, provides efficient mechanism for considering all parties' interests in liquidation proceeding); *In re Empire State Sur. Co.*, 214 N.Y. 553, 568, 108 N.E. 825, 828-29 (1915) (forecasting that efficient administration of liquidation proceeding dependent on establishing uniform standard for determining relative rights of all creditors).

<sup>25</sup> *Digirol*, 79 N.Y.2d at 21-22, 588 N.E.2d at 43, 580 N.Y.S.2d at 145 (Kaye, J., dissenting). Judge Kaye noted that although the liquidation order did not require that notice of cancellation be given to Transit's policyholders, the Missouri receiver voluntarily published the order in a variety of states and mailed notice to each insured. *Id.* at 21, 588 N.E.2d at 43, 580 N.Y.S.2d at 145 (Kaye, J., dissenting). Allowing Digirol's claim, Judge Kaye argued, effectively held "New York liable for Missouri's misfeasance" of sending the notice to the wrong address. *Id.* at 21, 588 N.E.2d at 43, 580 N.Y.S.2d at 145 (Kaye, J., dissenting).

<sup>26</sup> *Id.* at 22-23, 588 N.E.2d at 43-44, 580 N.Y.S.2d at 145-46 (Kaye, J., dissenting). By expanding the scope of the court's recognition of a vested right to notice, Judge Kaye posited that the particular notice terms of each policy issued by foreign insurers within this state would now survive liquidation. *Id.* at 21, 588 N.E.2d at 43, 580 N.Y.S.2d at 145 (Kaye, J., dissenting). Judge Kaye envisioned that the New York receiver would now be required to examine and satisfy the notice requirements of every out-of-state policy issued to New York residents, an outcome at odds with the Uniform Act's goals of efficient and equitable administration of insurer liquidation. *Id.* at 23, 588 N.E.2d at 44, 580 N.Y.S.2d at 146 (Kaye, J., dissenting).

<sup>27</sup> See *id.* Although both Missouri and New York adopted the Uniform Act, the court's granting of Digirol's claim undercut Missouri's authority to establish a definite cancellation date for all Transit policies, resulting in added exposure to liability for the New York receiver. *Id.*; see also *supra* note 13 and accompanying text (holding Missouri receiver's decision to cease attempts to notify Digirol of policy cancellation resulted in New York receiver's liability for post-liquidation claim). Judge Kaye further argued that this result contravened "the uniform scheme established for liquidation of multi-state insurers." *Id.* at 23, 588 N.E.2d at 44, 580 N.Y.S.2d at 146 (Kaye, J., dissenting); see also *supra* notes 2 and 17 and accompanying text (explaining development of Uniform Act and drafter's concern for domiciliary receiver's lack of authority in other states).

lacks foundation in established New York law<sup>28</sup> and may unduly expose New York receivers of foreign insurers to liability beyond that of domiciliary receivers.<sup>29</sup> Generally, a bankrupt insurer's rights and liabilities are fixed and assessed as of the date of the liquidation order,<sup>30</sup> rendering unenforceable all claims involving

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<sup>28</sup> See N.Y. INS. LAW § 7412(a). Under New York insurance law, when a foreign insurer has been adjudicated insolvent and placed in liquidation, a claimant may initiate a claim with either the domiciliary or ancillary receiver, provided that "[a]ll such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary proceeding." *Id.* (emphasis added).

Lacking authority to support a "vested" right to notice of cancellation, the court instead relied on the analogous situation in which a creditor fails to receive notice of the deadline for submitting claims against a carrier in liquidation, thus requiring acceptance of the late claim. *Digirol*, 79 N.Y.2d at 19-20, 588 N.E.2d at 42, 580 N.Y.S.2d at 144. Nevertheless, that situation is distinguishable from *Digirol*, because when a claim arises prior to liquidation, notice of the claim deadline is specifically required by statute. See N.Y. INS. LAW § 7432(b) ("The superintendent shall notify all persons who may have claims against such insurer . . . to present the same to him within the time as fixed."); see, e.g., *New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293, 296 (1953) (holding that publication of period for which claims may be filed does not comport with notice requirements of controlling Bankruptcy Act). Furthermore, the statutory protection, afforded to a claim arising before an insurer enters liquidation, does not apply where a claimant is deemed to possess a vested right to notice of cancellation. *Digirol*, 79 N.Y.2d at 23, 588 N.E.2d at 44, 580 N.Y.S.2d at 146 (Kaye, J., dissenting). Judge Kaye asserted

[t]hat an insured may be a creditor for purposes of a fixed obligation arising prior to liquidation does not support the quite different conclusion that an insured is also a "creditor" for notice purposes. Are all executory contract obligations—or the expectation that the obligation will be fulfilled—now to be considered "vested" at the time of entry of a liquidation order? That would signal a remarkable change in the law.

*Id.* Hesitant to rely on judicial introduction of such a significant change in the administration of insurer liquidations, Judge Kaye observed that the court's holding "points up the need for statutory reform, to provide for notice to policyholders in a way that discourages forum-shopping and assures the objectives of fairness and uniformity that were seemingly secured by the adoption of the Uniform Insurers Liquidation Act." *Id.* at 25, 588 N.E.2d at 45, 580 N.Y.S.2d at 147 (Kaye, J., dissenting) (emphasis added); see also *In re Professional Ins. Co.*, 67 A.D.2d 850, 851, 413 N.Y.S.2d 17, 18 (1st Dep't 1978) (maintaining that only legislature may establish and amend notice provisions for claim deadlines against insolvent insurers), *aff'd*, 49 N.Y.2d 716, 402 N.E.2d 143, 425 N.Y.S.2d 804 (1980); cf. *Dardar v. Insurance Guar. Ass'n*, 556 So. 2d 272, 274 (La. Ct. App. 1990) (mandating that Louisiana Commissioner of Insurance as liquidator of insolvent insurer comply with statutory termination procedure requiring notice to policyholder before policy cancellation is effective).

<sup>29</sup> See *Digirol*, 79 N.Y.2d at 23, 588 N.E.2d at 44, 580 N.Y.S.2d at 146 (Kaye, J., dissenting).

<sup>30</sup> See *In re Empire State Sur. Co.*, 214 N.Y. 553, 567-68, 108 N.E. 825, 828 (1915). In a liquidation proceeding, the court possesses the "discretionary power to fix at that time some date other than the date of the entry of the order of liquidation as the date upon which the rights and liabilities of the persons interested shall be fixed." *Id.*; *Home Indem. Co. v. O'Brien*, 104 F.2d 413, 419 (6th Cir. 1939) ("[R]ights and liabilities of creditors of domestic insurance companies become fixed as of the date of the entry of the order directing liquida-

losses occurring after this date.<sup>31</sup> In effect, the *Digirol* court's refusal to honor the termination date of the Missouri liquidation order creates two deadlines for the accrual of prospective claims: the date assigned in the domiciliary proceeding and the date, if ever, that the policyholder receives actual notice of cancellation.<sup>32</sup> Consequently, the ancillary receiver will be liable for claims arising between the court-ordered cancellation date and receipt of actual notice by the policy holder.<sup>33</sup>

It is submitted that the court's decision undermines the legislative goals of continuity and equality underlying the Uniform Act.<sup>34</sup> By creating a vested property right to notice of cancellation, the Court of Appeals has placed the late-notified claimant in the same category as creditors whose claims were fixed by the liquidation order.<sup>35</sup> As a result, the "late" claim will erode the limited assets of the extinct insurer, diluting the recovery of pre-existing creditors.<sup>36</sup>

tion of the corporation."); *In re Lawyers Title and Guar. Co.*, 266 A.D. 322, 327, 42 N.Y.S.2d 177, 181 (1st Dep't 1943) (permanently establishing rights of creditors as of date of liquidation order), *aff'd*, 293 N.Y. 675, 56 N.E.2d 293 (1944).

<sup>31</sup> See *supra* note 4 and accompanying text. As the dissent notes, the Missouri liquidation order did not require notice to policyholders in order to effectuate cancellation; it merely decreed that all of Transit's insurance policies would be terminated as of December 20, 1985. *Digirol*, 79 N.Y.2d at 21, 588 N.E.2d at 43, 580 N.Y.S.2d at 145 (Kaye, J., dissenting).

<sup>32</sup> See *id.*

<sup>33</sup> See *Digirol*, 79 N.Y.2d at 20, 588 N.E.2d at 42, 580 N.Y.S.2d at 144. Generally, the only claim available to a policyholder, whose coverage has been terminated prematurely by carrier liquidation, is for a refund of the unused portion of the premium. See, e.g., *Boston & A.R. Co. v. Mercantile Trust & Deposit Co.*, 34 A. 778, 783 (Md. 1896) (finding that company's insolvency resulted in breach of insurance contracts entitling policyholders to value of canceled policies); *Thomas v. Land*, 30 S.W.2d 1035, 1039 (Mo. Ct. App. 1930) (upholding policyholder's claim for unearned premiums paid on policies extinguished by liquidation of company); *Digirol*, 79 N.Y.2d at 20, 588 N.E.2d at 42, 580 N.Y.S.2d at 144 (noting that policyholders whose coverage had ceased prior to policy expiration and who properly received notice of cancellation made whole by return of excess premium); *People v. Commercial Alliance Life Ins. Co.*, 154 N.Y. 95, 100, 47 N.E. 968, 970 (1897) (holding that policyholders were creditors only to extent of premium paid, given that no loss occurred on policy before insurer's liquidation); *People v. Security Life Ins. & Annuity Co.*, 78 N.Y. 114, 127 (1879) (concluding that "policyholders are creditors of the [insolvent] company for the present value of their policies" as of date of insurer's dissolution).

<sup>34</sup> See *supra* note 2 (discussing legislative purpose of Uniform Act).

<sup>35</sup> *Digirol*, 79 N.Y.2d at 22, 588 N.E.2d at 43, 580 N.Y.S.2d at 145 (Kaye, J., dissenting); see also *People v. Metropolitan Sur. Co.*, 205 N.Y. 135, 145-46, 98 N.E. 412, 415 (1912) ("If one contingent claim is allowed why should not all be allowed, for they all stand on the same footing? . . . While the result in this case is harsh . . . [i]n the great mass of cases for which general rules are necessarily made, the result will not be harsh.")

<sup>36</sup> See *In re Professional Ins. Co.*, 67 A.D.2d 850, 851, 413 N.Y.S.2d 17, 18 (1st Dep't

The *Digirol* court, it is proposed, contradicted existing authority by preserving coverage under a policy containing a contractual right to notice until the claimant received actual notice of termination. In effect, the court ignored the Missouri tribunal's ruling of cancellation and established independent standards for the qualification of claims against insolvent foreign carriers.<sup>37</sup> By subordinating the liquidation order to the particular terms of the policy, the court has constructively bound the New York receiver to the precise notice terms of all policies issued by out-of-state insurers. In sum, this decision has subverted the objective of "orderly and equitable administration of liquidation proceedings,"<sup>38</sup> and has further clouded the already confusing area of multi-state insurer insolvencies.

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1978) (allowing deferred claim to impinge on timely filed claims, causing accelerated dissipation of security fund and higher insurance premiums to replenish fund), *aff'd*, 49 N.Y.2d 716, 402 N.E.2d 143, 425 N.Y.S.2d 804 (1st Dep't 1978); *cf.* Alliance of Am. Insurers v. Chu, 77 N.Y.2d 573, 578, 571 N.E.2d 672, 674, 569 N.Y.S.2d 364, 366 (1991) (declaring unconstitutional state legislation diverting existing resources of Property and Liability Insurance Security Fund to State's general fund, since insurers had protected property right in fund). See generally Davis J. Howard, *Standing to Sue a Carrier's Killers*, 17 PEPP. L. REV. 311, 315 (1990) (noting that depletion of insurance fund causes higher premiums, shifting cost to public).

<sup>37</sup> See *supra* notes 25-27 and accompanying text.

<sup>38</sup> *Digirol*, 79 N.Y.2d at 18, 588 N.E.2d at 41, 580 N.Y.S.2d at 143.

