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# Rhode Island's Voluntary Restructuring of Solvent Insurers Law and Similar Efforts in Other States

Matthew Gendron, Esq.\*

## INTRODUCTION

This Article discusses a small, but unique, area of insurance law—voluntary restructuring—in the smallest state, Rhode Island. This Article begins with the initiative that led Rhode Island to address this topic, and then looks at the two methods of voluntary restructuring currently available in Rhode Island, as well as the two methods' influences. Next, this Article goes on to describe the Rhode Island process and the single time the courts have addressed this law. Finally, this Article will discuss activity in other states to adopt alternative voluntary restructuring laws.

Before diving in, some nomenclature may be helpful. Insurers write contracts and sell them to policyholders. The contracts<sup>1</sup> delineate when and how much the insurer must pay in the case of a fortuitous event, and how much the policyholder must pay in

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\* Matthew Gendron is an attorney for the Rhode Island Department of Business Regulation, but is writing this Article outside of that capacity. He expresses his appreciation to Beth Dwyer and Jack Broccoli for their continued willingness to talk about this and many other topics, to his loving wife Julie for her endless patience, and to Tommy, Charlie, and Robby for being the best kinds of distractions. And to Katelyn Kalmbach for still wanting to hear more about insurance.

1. Most insurance contracts are traditionally contracts of adhesion. See John Aloysius Cogan, Jr., *Readability, Contracts of Recurring Use, and the Problem of Ex Post Judicial Governance of Health Insurance Policies*, 15 ROGER WILLIAMS U. L. REV. 93, 98 (2010).

premium in exchange for the coverage.<sup>2</sup> There are times that insurers or policyholders seek to change their contracts, and if both parties agree, the contract can be novated. There could also be a reason that the insurer and policyholder would agree to end the coverage. In such an instance, the parties could agree to commute the policy.<sup>3</sup> Insurers sometimes seek protection of their own policies from “reinsurers,” where the reinsurer assumes a portion of the risk written by the insurer. A “run-off company” is an insurer that is no longer writing new business. Insurance is a highly regulated area, and the decision to cease new offerings could be voluntary (such as a decision to focus on other areas) or involuntary (as part of a regulator’s plan to turn around a troubled company, the regulator might order the company to stop writing new business).<sup>4</sup> Whatever the reason for the run-off status, many insurers have considerable assets in a run-off business,<sup>5</sup> to the point that there is now plenty of competition among insurance groups that specialize in managing run-off books of business for other companies.<sup>6</sup> In the context of voluntary restructuring, “unlocking capital” is often referenced and refers to

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2. For example, if Company A guaranteed to pay \$1 to Policyholder B on January 1, 2020, without any other restrictions or provisos, that is not an insurance contract. For a contract of insurance to exist, there must be certain indicia, including a risk transferred between the parties. For example, if Company A agreed to pay Policyholder B \$10 if Policyholder B was not able to dance on January 1, 2020, that would likely be considered insurance. *See id.* at 113–14.

3. *See* Bill Goddard, *The New World Order: Financial Guaranty Company Restructuring and Traditional Insurance Insolvency Principles*, 6 BROOK. J. CORP. FIN. & COM. L. 137, 145–47 (2011) (providing an example of a fascinating situation where insurance commutations were well employed in helping the troubled mortgage insurer, Ambac, through its unique rehabilitation).

4. *See* NAT’L ASS’N OF INS. COMM’RS RESTRUCTURING MECHANISMS FOR TROUBLED COMPANIES SUBGROUP OF THE FIN. CONDITION (E) COMMITTEE, ALTERNATIVE MECHANISMS FOR TROUBLED COMPANIES 5 (2010), <http://www.naic.org/store/free/AMT-OP.pdf> [hereinafter NAIC WHITE PAPER 2010] (discussing considerations for a troubled insurer where they are put into “regulatory run-off”).

5. *See* PWC, GLOBAL INSURANCE RUN-OFF SURVEY 3–4 (2018), <https://www.pwc.com/gx/en/insurance/assets/pdf/global-insurance-run-off-survey-2018.pdf> (indicating \$350 billion in North American run-off assets and \$380 billion more in the rest of the world).

6. *Id.* at 11 (citing Berkshire Hathaway as well as five “run-off specialists”: Armour Re, Catalina, Enstar, R&Q, and RiverStone).

the capital that insurers must hold to pay possible future claims.<sup>7</sup> Insurers invest the premiums they receive and hope to earn money on their investments before claims must be paid.<sup>8</sup>

In the United States, statutory accounting principles issued by the National Association of Insurance Commissioners (NAIC) provide guidance to insurers about the quantity and quality of capital the company should maintain to support its operations.<sup>9</sup> Insurers must hold capital to reserve against possible claims, sometimes for decades, tying up resources that could be used elsewhere, such as reinvesting in the company.<sup>10</sup> Many of these cases are related to environmental or asbestos policies that were written with occurrence-based triggers that can seemingly last forever.<sup>11</sup> In addition, long-term care insurance has been a developing area where insurers recently have been in regular need of additional reserves with the expectation of paying claims for decades on business written upwards of thirty years ago. For example, General Electric, the former lightbulb and consumer appliance giant that now focuses on jet engines and wind turbines, announced in January 2018 that it was planning to add fifteen billion dollars more in reserves to one of its insurance run-off subsidiaries for previously underpriced long-term care obligations.<sup>12</sup>

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7. John Winter, *Unlocking Capital*, INSIDER Q., Winter 2013–14, at 68.

8. The NAIC issues and revises its Statements of Statutory Accounting Principles (SSAP) regularly and methodically. Recently, the NAIC issued a revision to SSAP No. 26R-Bonds, which amended several phrases in the seventeen-page description of insurance accounting rules that identify what securities should be considered bonds for insurance company investing purposes, because bonds are considered to be more secure for capital requirement purposes. See NAT'L ASS'N OF INS. COMM'RS, EXPOSURE DRAFT SSAP NO. 26R-BONDS 4–5 (2017), [http://www.naic.org/documents/cmte\\_e\\_app\\_sapwg\\_exposure\\_13\\_36\\_ssap26r.docx](http://www.naic.org/documents/cmte_e_app_sapwg_exposure_13_36_ssap26r.docx).

9. See *id.* at 5, 10.

10. *GE reignites breakup talk after \$11 billion insurance, tax hit*, BUS. INS. (Jan. 17, 2018, 8:25AM), [http://www.businessinsurance.com/article/20180117/NEWS06/912318551/GE-reignites-breakup-talk-after-\\$11-billion-insurance,-tax-hit](http://www.businessinsurance.com/article/20180117/NEWS06/912318551/GE-reignites-breakup-talk-after-$11-billion-insurance,-tax-hit).

11. See James A. Johnson, *Long-Tail Liability Claims*, 96 MICH. B.J. 28, 28–29 (2017).

12. Gen. Elec. Co., Current Report (Form 8-K) (Jan. 15, 2018) (noting General Electric's plan to allocate \$8.9 billion to future policy benefit reserves, incurring a \$6.2 billion charge under GAAP accounting, and continued contributions of \$2 billion a year for 6 years).

I. RHODE ISLAND HAS A UNIQUE LAW THAT ALLOWS SOLVENT  
INSURERS TO RESTRUCTURE THEIR BUSINESSES

A. *How the Unique Rhode Island Laws Were Created*

In 1995, Governor Lincoln Almond issued an Executive Order that created the Rhode Island Insurance Development Task Force (the Task Force).<sup>13</sup> The Governor's order also appointed the first nine members and assigned them to identify how Rhode Island could become a center of insurance excellence and recommend statutory or regulatory changes to effectuate that plan.<sup>14</sup> The Task Force was to issue a report that the legislature could act upon, and by 2002, the Rhode Island General Assembly enacted legislation that provided for the voluntary restructuring of solvent insurers.<sup>15</sup> The bill that became what is now codified as Rhode Island General Laws Chapter 27-14.5 was sponsored by Senator William Irons, who was also one of Governor Almond's initial nine appointees to the Task Force, filling the seat reserved for a member of the State's General Assembly.<sup>16</sup>

B. *The Legislature Created a Legal Structure to Permit Voluntary Restructuring*

In 2002, the Legislature passed the law to allow voluntary restructuring, and Governor Almond signed the law in his last full year in office.<sup>17</sup> However, the public law as enacted would only take effect once the Rhode Island Department of Business Regulation's Division of Insurance (the Division) promulgated rules and regulations to effectuate the law,<sup>18</sup> and once the Commissioner of Insurance certified that certain other preconditions had been met (regarding staffing in the Division).<sup>19</sup> The Division proposed a new regulation entitled Regulation 68—Commutation Plans on June 21, 2004, which took effect on

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13. R.I. Exec. Order No. 95-21, § I (Aug. 22, 1995), <https://almond.apps.uri.edu/execord/95-21.html>.

14. *Id.* § II.

15. 2002 R.I. Pub. Laws ch. 381.

16. *Id.*

17. *Id.*

18. 27 R.I. GEN. LAWS § 27-14.5-6 (2017).

19. 2002 R.I. Pub. Laws ch. 381, § 3.

September 5, 2004.<sup>20</sup> The regulation detailed the costs to an insurer that wished to commute business from a solvent insurer,<sup>21</sup> the items that the Division required in a plan, and the mechanical steps that an insurer would follow.<sup>22</sup> Subsequent versions of the regulation added clarity to the process<sup>23</sup> by implementing the best practices after the first commutation plan was enacted and addressed by the Rhode Island Superior Court,<sup>24</sup> and broadened the scope of the regulation to allow insurance business transfers (IBTs).<sup>25</sup>

The Rhode Island law and regulation now allow two unique functions that had not been previously available to insurers in the United States: commutations of solvent insurers and insurance business transfers. The commutation portion of the law and regulation allow that “a solvent insurance or reinsurance company in run-off may propose a commutation plan extinguishing its liabilities for past and future claims of its creditors and then terminate its business.”<sup>26</sup> The more recently allowed IBT portion of the regulation allows that a mature and closed book of business may be transferred into a Rhode Island domestic insurer, and the contracts be novated by order of the Superior Court.<sup>27</sup> Each of these mechanisms is somewhat unique in the United States, but both are based on well-established insurance systems in England,

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20. R.I. Dep’t of Business Regulation, Division of Insurance, Regulation 68, effective Sept. 5, 2004. In the past year, Insurance Regulation 68 has been recodified at 230 RICR 20-45-6 (LexisNexis 2018), but throughout this paper it will be referred to as Regulation 68 or 68 R.I. Ins. Reg. for consistency.

21. 68 R.I. Ins. Reg. § 5(a) (Sept. 5, 2004) (recodified at 230 RICR 20-45-6 (LexisNexis 2018)) (setting the amount as “\$125,000 or such lesser amount as the Commissioner shall deem adequate,” in addition to costs associated to the Division’s review of the Plan).

22. *Id.* § 4.

23. In 2009, the Division added a definition and gave itself authority to modify or waive any of the requirements for “good cause shown” after a written application is made by the applicant. 68 R.I. Ins. Reg. §§ 3(B), 10(A) (Dec. 31, 2009) (recodified at 230 RICR 20-45-6 (LexisNexis 2018)).

24. In 2014, the Division added several procedural steps and broke Section 4-Plan Procedure into five discrete steps. 68 R.I. Ins. Reg. §§ 3(B), 10(A) (Jun. 21, 2014) (recodified at 230 RICR 20-45-6 (LexisNexis 2018)).

25. 230 RICR 20-45-6.3(A)(11), -6.4 (LexisNexis 2018).

26. *In re* GTE Reinsurance Co., No. PB 10-3777, 2011 WL 7144917, at \*5–6 (R.I. Super. Ct. Apr. 25, 2011).

27. 230 RICR 20-45-6 (LexisNexis 2018).

other Commonwealth countries such as Bermuda,<sup>28</sup> the European Union, and is not unheard of in courts in the United States because of the international nature of modern insurance and bankruptcy law.<sup>29</sup>

*C. Commutation Plans in Rhode Island*

Commutation plans represent one way that an insurer in run-off status might quickly wind down its affairs. A run-off company can exist for years beyond its useful life span, and indeed, there are many companies in regulator-mandated run-off that are required to pay claims, collect premiums, and wind down their businesses over years or decades.<sup>30</sup> One of the problems with long-lasting run-off companies is that every year, companies incur legal, accounting, regulatory, and other administrative costs. These costs take money away from the company's stockpile of assets that it uses to pay future claims, and if done over a long enough time period, could eliminate an insurer's ability to satisfy its creditors or pay the claims that it promised to pay. Instead of existing for decades and paying claims as they arise out of the dwindling investment proceeds, commutation plans allow an insurer to make an offer to the policyholder to extinguish the coverage. To do this, all parties usually rely on actuaries to determine the likelihood of a claim being filed and the likely severity of the claim to boil it down to a present value figure. This payment could come as a lump sum paid to each insured to

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<sup>28</sup> See CONYERS DILL & PEARMAN, SCHEMES OF ARRANGEMENT FOR INSURANCE COMPANIES IN BERMUDA (2017) (presenting a summary of the solvent scheme available in Bermuda based on Bermuda's Companies Act of 1981).

<sup>29</sup> See *In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd.*, 238 B.R. 25, 35–37 (Bankr. S.D.N.Y. 1999) (discussing the options available to distressed and solvent companies in Bermuda under their solvent schemes statute, finding many similarities to various aspects of United States' bankruptcy law, including Chapter 11 for Bermuda's solvent scheme).

<sup>30</sup> See James Veach et al, *The New "Three Rs": Regulators, Run-Off, and "Restructuring Mechanisms,"* AIIROC MATTERS, Spring 2009, at 11–12, for an anecdote about a regulatory run-off company that went insolvent in the 1980's, was ordered rehabilitated in 1985, and deferred in 2007—twenty-two years later—when the New York court was asked to close the liquidation. See also NEW YORK LIQUIDATION BUREAU, UNION INDEMNITY INSURANCE COMPANY OF NEW YORK (Feb. 19, 2018), <http://www.nylb.org/UnionIndem.htm> (providing additional information on the Union Indemnity liquidation).

extinguish the remaining insurance coverage, in essence reimbursing the insured for lack of continued insurance coverage.

When regular (non-insurance) companies become insolvent, they usually turn to federal bankruptcy courts; however, insurance is state-regulated, and most states have laws that govern the conservation, rehabilitation, or liquidation of insurance companies.<sup>31</sup> New York's insurance regulators have used commutation plans in their rehabilitation of impaired or insolvent insurers since 1989, when the insurance commissioner sought that specific authority to commute reinsurance agreements in order to better carry out his duties.<sup>32</sup> However, the New York commutation plans are only available to impaired or insolvent companies, and the New York legislature specifically said, "a commutation of a reinsurance agreement . . . shall not be voidable as a preference,"<sup>33</sup> which both mean that it is not a corollary to the United Kingdom or Rhode Island commutation plans.<sup>34</sup>

There are a number of mechanical steps that the statute, regulation, and courts require in order to entertain and ultimately approve such a plan. The Legislature created certain steps to ensure fairness in the commutation plans for policyholders by requiring that insurers convince a substantial number of their insureds that the commutation plan makes sense for all parties. This was ensured by requiring a vote of the creditors for (or against) the plan, in addition to giving unsatisfied parties an opportunity to object to the plan in court.<sup>35</sup> The Division must also approve the plan, which requires either adherence to the numerous requirements of Regulation 68 or a waiver for a specific subsection.<sup>36</sup> Additionally, the statute requires that after the

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31. NAT'L ASS'N OF INS. COMM'RS, RECEIVER'S HANDBOOK FOR INSURANCE COMPANY INSOLVENCIES 5 (2016).

32. N.Y. COMP. CODES R. & REGS. tit. 11, §§ 128.0–128.6 (2018); *see also* SHEIK H. MOHAMED, N.Y. INS. DEP'T, REPORT ON EXAMINATION OF THE CONSTELLATION REINSURANCE COMPANY AS OF DECEMBER 31, 2009, at 7 (2010) (offering a brief recap on the company's net impairment that was eliminated after the commutation plan, whereas it had been negative \$12,432,161 immediately prior to the plan).

33. N.Y. INS. LAW § 7425(d) (McKinney 2016).

34. NAIC WHITE PAPER 2010, *supra* note 4, at 16–18.

35. 27 R.I. GEN. LAWS § 27-14.5-4(b)(3)–(4) (2017).

36. 230 RICR 20-45-6.7 (LexisNexis 2018) (providing for the modification or waiver of other regulatory requirements upon "good cause shown" by the requestor).



Division approves the plan, the applicant must petition the superior court to issue an order and make certain findings in approving the plan.<sup>37</sup> The court must find that “implementation of the commutation plan would not materially adversely affect either the interests of the objecting creditors or the interests of the assumption policyholders.”<sup>38</sup> One piece of evidence the court could look to for that finding is the requirement mentioned above that at least fifty percent of each class of creditors and the holders of seventy-five percent in value of the liabilities owed to each class of creditors vote for the plan.<sup>39</sup> One might call the Rhode Island process a forced commutation whereby the court’s order can force insureds who did not approve the plan to surrender their coverage in exchange for money. An alternative approach could have been to let insurers simply negotiate with their policyholders to come to agreement over the amount to be paid,<sup>40</sup> but any insurer and insured could reach such an agreement at any time without need for a court to approve it. And the efficiencies derived from the commutation and business transfer processes include that they may both proceed over the objection of some small number of parties.<sup>41</sup>

This method of forced commutation is not without critics.<sup>42</sup>

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37. 27 R.I. GEN. LAWS § 27-14.5-4(b)(1).

38. *Id.* § 27-14.5-4(c)(1).

39. *Id.* § 27-14.5-4(b)(4).

40. Unfortunately, this creates a situation akin to a reverse Prisoner’s Dilemma. Because of the advantages to the insurer to eliminate their policyholders, the insurers might be willing to pay a premium in order to incentivize the last few holdouts to agree. But that might incentivize others to not accept an early payout in hope or fear that later payouts would be higher. Where the traditional Prisoner’s Dilemma always leads to better outcomes for the prisoners for cooperating with the authorities, in these cases, policyholders seem to always benefit from withholding their cooperation with their insurer who wants to commute their business.

41. See *In re* GTE Reinsurance Co., No. PB 10-3777, 2011 WL 7144917, at \*20 (R.I. Super. Ct. Apr. 25, 2011). At issue in this case was the first commutation plan submitted and approved in Rhode Island, where five cedents (likely companies) had objected to the proposed plan at the meeting of the creditors. *Id.* The five cedents represented 2.13% of GTE RE’s total composite reserve, and the court approved the commutation plan in spite of the objectors. *Id.*

42. See Susan Power Johnston, *Why U.S. Courts Should Deny or Severely Condition Recognition to Schemes of Arrangement For Solvent Insurance Companies*, 16 NORTON J. OF BANKR. L. & PRAC. 953 (2007) (citing concerns with the amounts that policyholders end up receiving on claims,

In the only instance where a commutation plan was considered by the Rhode Island courts, two of the insured parties objected and filed suit to oppose the court's approval. In 2010, GTE re-submitted a commutation plan for approval under Rhode Island General Laws section 27-14.5 and Insurance Regulation 68.<sup>43</sup> The plan was reviewed and eventually approved by the Division after an independent actuary had reviewed the proposal, and a petition was filed with the Rhode Island Superior Court.<sup>44</sup> At an initial hearing, the court ruled that there would only be a single class of creditors<sup>45</sup> for purposes of meeting and sufficiently approving the proposed plan both on the basis of a favorable vote by the majority of the members and of seventy-five percent of the value of liabilities owed to the single class of creditors.<sup>46</sup> After the creditors met and voted on the proposed plan, the court held a fairness hearing to consider whether to ultimately approve the plan over the objection of several creditors.<sup>47</sup> One of the five objecting creditors raised legal arguments with the court at the fairness hearing, including challenges to the constitutionality of the restructuring statute under several theories, including the contract clause and due process.<sup>48</sup> In a well-written opinion, Judge Silverstein addressed these concerns and found that the contract clause was not violated, in part because Bermuda has similar commutation-like laws; additionally, the court held that the Rhode Island Legislature had a significant and legitimate public purpose, and the Restructuring Act represented a

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deficiencies in the notice that is given to insured, and other problems); *see also* Susan Power Johnston & Martin Beeler, *Solvent Insurance Schemes Should Not Be Recognized [Reprised]*, 17 NORTON J. OF BANKR. L. & PRAC. 6 (2008) (reaffirming stance on solvent insurance schemes). *But see* Howard Seife & Francisco Vazquez, *U.S. Courts Should Continue to Grant Recognition to Schemes of Arrangement of Solvent Insurance Companies*, 17 NORTON J. OF BANKR. L. & PRAC. 571, 571 (2008) (critiquing Johnston, *Why U.S. Courts Should Deny or Severely Condition Recognition to Schemes of Arrangement For Solvent Insurance Companies*, *supra*).

43. *In re GTE Reinsurance Co.*, 2011 WL 7144917, at \*16.

44. *Id.* at \*18.

45. *Id.* at \*18–19. Creditors are more commonly known as policyholders or cedents, and, as GTE RE was a reinsurer, the policies it wrote had ceded GTE RE risks.

46. *Id.* at \*19–20. This procedure is required by 27 R.I. GEN. LAWS § 27-14.5-4(b)(4).

47. *In re GTE Reinsurance Co.*, 2011 WL 7144917, at \*20.

48. *Id.* at \*1.

“reasonable and necessary means by which to address a legitimate public purpose.”<sup>49</sup>

The decision of *In re GTE Reinsurance Co.* has been well received by the Rhode Island legal community<sup>50</sup> and beyond.<sup>51</sup> However, the Rhode Island Supreme Court did not have an opportunity to review the constitutional matters or the commutation law itself because of the subsequent partial vocateur that allowed the settlement of two of the objectors, presumably at higher values of commutation than had previously been offered.<sup>52</sup>

#### *D. Insurance Business Transfers in Rhode Island*

The regulation issued pursuant to Rhode Island General Laws section 27-14.5 was amended in 2015 to allow for a second type of voluntary restructuring—the insurance business transfer.<sup>53</sup> The United Kingdom had, for several decades, allowed insurance companies to transfer insurance policies from one solvent insurer to another, through a court sanctioned process that had since 2000 been called a Part VII transfer. By the time Rhode Island amended its regulation, the United Kingdom had experienced fourteen years of evidence that Part VII transfers could work and help insurers without causing major harm on policyholders. Based on the statute’s rulemaking authority,<sup>54</sup> the Division promulgated an addition to Regulation 68 that allowed insurers the ability to transfer business from another solvent insurer company into a Rhode Island domestic insurer, known as an

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49. *Id.* at \*52, \*59, \*65.

50. See John J. Partridge, *Rhode Island’s Commutation Statute: Constitutional Issues Remain Open*, 23 FORC J. 19 (2012). But see J.H. Oliverio, Note, *The Great Instrument of Chicanery: An Appeal for Greater Judicial Scrutiny of Solvent Insurers’ Schemes of Arrangement*, 17 ROGER WILLIAMS U. L. REV. 439 (2012). One reason the decision was well received could be the fact that Rhode Island has a business calendar with a judge that is able to devote his full attention to business matters. See Administrative Order No. 2011-10 (R.I. Super. Ct. 2011).

51. See Thomas F. Bush, *Solvent Schemes Come To America*, LAW 360 (June 8, 2011, 1:01 PM), <https://www.law360.com/articles/248309/solvent-schemes-come-to-america>.

52. *In re GTE Reinsurance Co.*, No. PB 10-3777, 2012 R.I. Super. LEXIS 4, at \*3 (Super. Ct. Jan. 12, 2012).

53. 27 R.I. GEN. LAWS § 27-14.5-4(e)(ii) (2017).

54. *Id.* § 27-14.5-6.

Insurance Business Transfer (IBT).<sup>55</sup> For policy reasons and to ensure that Rhode Island was setting a high bar with regards to this new kind of transfer in the United States, the transferring business was limited to commercial run-off business sold more than sixty months prior that had been part of a “closed book of business or a reasonably specified set of policies.”<sup>56</sup> These restrictions together ensure that business being actively marketed is not immediately available to be commuted and operate as a minimum set of standards. To some, this signaled the opportunity to use both forms of voluntary restructuring together (commutation and IBT), to first transfer business into Rhode Island, and then commute the business once it was within the State.<sup>57</sup>

## II. RHODE ISLAND’S LAW IS BASED ON CONCEPTS THAT HAVE LONG EXISTED OUTSIDE THE UNITED STATES

### A. *Solvent Schemes of Arrangement in the United Kingdom*

A scheme of arrangement (or commutation plan) is a court sanctioned U.K. process through which insurers take policies and exchange them with their policyholders for money, unwinding the insurance arrangement, or as the NAIC wrote “[a] scheme of arrangement is essentially a statutory compromise between a company and its creditors.”<sup>58</sup> In 2006, the United Kingdom updated a 1985 law that specifically allowed judicially approved solvent schemes of arrangement.<sup>59</sup> The 2006 update left the

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55. 230 RICR 20-45-6.2 (LexisNexis 2018).

56. *Id.* pt. 6.4(A)(1).

57. Andrew Rothseid, Cas. Actuarial Soc’y, U.S. Options for Accelerated Closure of Legacy Liabilities 42 (Sept. 10, 2015), <https://www.casact.org/education/CLRS/2015/presentations/R-5.pdf>.

58. NAIC WHITE PAPER 2010, *supra* note 4, at 14. Also, note that the broad concept of “schemes of arrangement” or even “schemes” are viewed with some skepticism in the United States. But in the United Kingdom and other Commonwealth nations, several have similar insurance commutation plans available without any apparent negative connection to the term “schemes.” I will often replace scheme of arrangement for commutation because of the negative connotation in the United States.

59. Companies Act, 2006, c. 46, §§ 895–901 (Eng.); see Dominic McCahill, *English Schemes of Arrangement Expand to Continental Europe and Beyond*, SKADDEN INSIGHTS (Jan. 16, 2014), <https://www.skadden.com/insights/publications/2014/01/english-schemes-of-arrangement-expand-to-continent> (providing general information on U. K. schemes).

statute quite succinct, which continued to leave much of the process to the courts' discretion. U.K. courts have established a history of cases exercising the power to commute business when presented with a reasonable plan that had the support of a majority of their insureds representing a supermajority of the value protected.

Insurers can receive numerous benefits in using a commutation plan instead of continuing to service the insurance.<sup>60</sup> One benefit is the efficiency through which the process can be undertaken. Another is that a U.K. commutation plan can be approved without the full cooperation of all policyholders, and thus, could be approved even over the objection of a small number of policyholders. If there are objectors that disagree with the value to be paid to the policyholders under the plan, the court will give the matter greater scrutiny. However, the court, ultimately, has the authority to move forward and approve the transaction regardless of such opposition, assuming the court concludes that the proposed plan is fair to the class members.<sup>61</sup>

In those thirty years of U.K. law, a line of cases has established some helpful guidelines for the similar but distinct process. Under the 2006 U.K. Companies Act (and its similar 1985 predecessor), the process begins when a plan is submitted to the court. Unlike the Rhode Island commutation and Part VII transfers, there is no regulatory approval required for a U.K. commutation, and the plan is filed directly with the court.<sup>62</sup> Next,

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60. Rothseid, *supra* note 57, at 23.

61. One standard articulated by the courts in turning down commutation plans has been the Buckley test, as identified in the *In re The British Aviation Ins. Co.* decision. [2005] EWHC 1621 (Ch.) [74] (Eng.). There, the court's primary ruling was that the creditor meeting was insufficient, but it also opined that the Buckley test would have applied had the creditor meeting been sufficient, and that the plan would not have been approved for lacking fairness. *Id.* paras. 142–44. The Buckley test seems to derive from *Buckley on the Companies Act*, a longstanding treatise on U.K. corporate law dating to the 1872. *Id.* para. 74. One passage articulating the standard for approval of schemes in *British Aviation* citing Buckley is “that the court should normally sanction a scheme if: *‘the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.’*” *Id.* para. 74.

62. See Companies Act, 2006, c. 46, §§ 896–7 (Eng.). Some believe a “no objection” letter from the Financial Services Authority regarding an insurer

the court reviews the plan for compliance with the statute, and then reviews the proposed classes of policyholders. If satisfied, the court can allow the plan's proponents to proceed to host policyholder meetings, which requires notices and statements to be sent out and advertised.<sup>63</sup> The law then requires that in each class a majority of the creditors present, in addition to seventy-five percent of the value to be commuted, must approve the plan as a condition to the court's approval.<sup>64</sup> U.K. courts can scrutinize these plans for reasons other than those raised by objectors, as they have considerable discretion in approving plans and responsibility to review other aspects of plans before issuing approval.<sup>65</sup> Also as time has passed, more insureds have become aware of the risks that they would be taking on in the face of a commutation of their policy, leading to more policyholders raising better and more effective objections to these plans, and seeming to help ensure that all policyholders are treated appropriately.<sup>66</sup>

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that they regulate has some influence in the court approval process. MICHELLE KIERCE ET AL., SCHEMES OF ARRANGEMENT AND THEIR ONGOING CURRENCY 14 (2010), PLC Cross-Border Insurance and Reinsurance Handbook, reprinted in SIDLEY AUSTIN LLP, [https://www.sidley.com/~media/files/publications/2010/01/schemes-of-arrangement-and-their-ongoing-currency/files/view-article/fileattachment/schemes-of-arrangement-and-their-ongoing-currenc\\_.pdf](https://www.sidley.com/~/media/files/publications/2010/01/schemes-of-arrangement-and-their-ongoing-currency/files/view-article/fileattachment/schemes-of-arrangement-and-their-ongoing-currenc_.pdf) (last visited Mar. 23, 2018).

63. Companies Act, 2006, c. 46, § 897 (Eng.).

64. *Id.* § 899(1).

65. See, e.g., *In re Hawk Ins. Co.*, [2001] EWCA (Civ) 241. There, the lower court had previously denied a scheme of arrangement plan based upon her own judgment and absent objectors, including whether there should have been multiple classes of shareholders, and specifically, whether IBNR shareholders should be in the same group as more recognized claimants. *Id.* para. 7. On appeal, Justices Pill, Chadwick and Wright overturned that decision and allowed the scheme to continue, in part because there had not been any objectors to the plan before the lower court. *Id.* para. 6. Their decision was based on the 1985 law, and that law had required 3 steps for approval. *Id.* para. 11. The appeals court found that the trial court had initially approved the proposed plan in the first approval stage, allowed notices to be distributed to the impacted policyholders, and then denied approval in the third stage without any policyholders objecting. *Id.* para. 21.

66. One such well-argued objection to a proposed commutation plan was the proposed scheme in the *In re British Aviation* decision. [2005] EWHC 1621 (Ch.) (Eng.). There, the justice dismissed certain objections to the scheme, but determined that the class meeting had not been properly provided because he determined that there should have been two classes of creditors: those with current claims, and those with Incurred but Not Reported (IBNR) claims. *Id.* paras. 91–92, 97; see KIERCE ET AL., *supra* note 62, at 14. Current claims have already occurred, and the parties are aware of

*B. Transfers of Insurance Business in the United Kingdom*

Part VII transfers have been a part of U.K. law since 2000, when the Financial Services and Markets Act of 2000 modernized insurance business transfers in England in its seventh part, titled Part VII—Control of Business Transfers.<sup>67</sup> Part VII transfers have established a growing utility in the United Kingdom, in part likely influenced by their flexibility, and the fact that no Part VII transferor has encountered financial difficulties.<sup>68</sup>

Once a company has decided to conduct a Part VII transfer, the transferee must prepare a plan that would identify the liabilities and assets being transferred from one company to another, identify the notice that they intend to circulate to insureds, identify the opportunity to object to the plan, among other requirements.<sup>69</sup> This plan is referred to in England as the Scheme Document, and it requires the approval of the U.K. regulators before it can be submitted to the court.<sup>70</sup> In the United Kingdom, there are two regulators with authority over these transfers, the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA), both taking roles in the process and review of Part VII plans.<sup>71</sup> Then, a Part VII transfer

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them, but IBNR claims are less certain to lead to a claim because they have not been reported yet by definition and are more difficult to quantify. To resolve this, actuaries could offer opinions as to how likely such an event is, and thus can assign a future value to such events.), and thus two meetings and two separate votes.

67. Financial Services and Markets Act 2000, c. 8, §§ 104–117. Previously this Act had been codified in the United Kingdom Insurance Companies Act of 1982. Insurance Companies Act, 1982, c. 50, §§ 49–52 (Eng.).

68. See also Luann M. Petrellis, *Welcome to the New World of Run-off*, 11 AIRROC MATTERS 6, 7 (2015) (stating several uses for Part VII transfers for U.K. insurers in addition to extolling the virtues of insurance business transfers in general for insurers, and for the transferring and assuming of companies).

69. See *infra* note 71.

70. *Id.*

71. The English Prudential Regulation Authority (PRA) and their Financial Conduct Authority (FCA) both have oversight over Part VII transfers. See Financial Services and Markets Act 2000, c. 8 §108(1) (authorizing that “the Treasury may impose by regulation impose requirements under Section 107”). The FCA leads the review, but the PRA has published guidance on the topic. See FIN. CONDUCT AUTH., PROPOSED GUIDANCE ON OUR APPROACH TO THE REVIEW OF PART VII INSURANCE BUSINESS

requires several approvals during its process, including ultimately the approval of the High Court, which issues the order novating the contracts. Their reviews can take several months to conclude, including actuarial review, to ensure that sufficient ability to pay the transferred claims exists.<sup>72</sup> Once the regulators are satisfied and notice is disseminated, there is another required waiting period to ensure that insureds have both received the notice and had sufficient time to review it.<sup>73</sup> After the notice process is approved and notice is disseminated, a time period is allowed for any policyholders to object to the transfer. If policyholders object, the court is more likely to scrutinize the transfer.<sup>74</sup> One of the final pieces of the Part VII process is the court order, which applies to all members of the class, regardless of objecting status.

*C. Cases in the United States Acknowledging Solvent Schemes and Part VII Transfers*

Although there has been limited experience in the U.S. courts in approving commutations and insurance business transfers, some U.S. courts have had opportunities to review these issues because European, U.K., and American insurers have been involved with U.K.-based commutations or transfers. Since the 2000 and 2005 revisions to U.K. laws, solvent schemes and Part VII Transfers have been employed much more frequently in the

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TRANSFERS 11 (2017), <https://www.fca.org.uk/publication/guidance-consultation/gc17-05.pdf>.

<sup>72</sup> See FIN. CONDUCT AUTH., *supra* note 71, at 15. English actuaries rely on a 99.5% confidence level that the transferred business will be able to pay claims for the first year after the transfer. This standard is not unique for Part VII transfers. It is the U.K. general standard for insurance regulatory capital and is based on the FSA's adoption of Solvency II capital standards. See FIN. SERVICES AUTH., INSURANCE SECTOR BRIEFING: RISK AND CAPITAL MANAGEMENT UPDATE (2008), [http://www.fsa.gov.uk/pubs/other/isb\\_risk\\_update.pdf](http://www.fsa.gov.uk/pubs/other/isb_risk_update.pdf).

<sup>73</sup> See *Insurance Business Transfers*, MILLIAM BRIEFING (Milliam, Inc., U.K.), Aug. 2017, at 1, <http://careers.milliman.com/uploadedFiles/Solutions/email-marketing/Insurance-Business-Transfers.pdf>.

<sup>74</sup> See *In re Hawk Ins. Co.*, [2001] EWCA (Civ) 241. There, a U.K. appeals court overturned the lower court's denial that raised issues on its own without objections to the proposed commutation scheme. *Id.* para. 21. As of this writing, the author is unaware of another Part VII case with a similar denial for lack of objectors with a subsequent overturn on appeal, but the *Hawk* decision might guide any such future cases.



United Kingdom.<sup>75</sup> This has led to more frequent reviews by U.S. courts of the underlying U.K. transactions due to financial markets becoming more interconnected. Some of the impact on the United States is felt in bankruptcy courts, which often are implicated because U.S. policyholders obtain coverage from U.K.-based insurers on such a regular basis, while others involve non-bankruptcy situations, such as when a policyholder wants to submit a claim for payment, but no longer has coverage.<sup>76</sup>

There are several interesting cases that provide guidance to Rhode Island courts. One such case, *Narragansett Electric Co. v. American Home Assurance Co.*, involved damage dating back over sixty years.<sup>77</sup> In *Narragansett Electric Co.*, the court reviewed claims by London-based insurer, Equitas, that the plaintiff had sued the wrong insurer.<sup>78</sup> Equitas argued that it had not assumed the obligations at issue.<sup>79</sup> As the court summarized, “Equitas’s motion to dismiss raises the question whether this [Part VII] transfer of insurance obligations from Lloyd’s to Equitas is effective and enforceable under U.S. law.”<sup>80</sup> First, the court decided that it was sitting in diversity jurisdiction and that

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75. See SIDLEY AUSTIN LLP, PART VII TRANSFERS EFFECTUATED PURSUANT TO THE UK FINANCIAL SERVICES AND MARKETS ACT 2000 (2017), <https://www.sidley.com/-/media/publications/part-vii-transfers.pdf>.

76. See Jennifer D. Morton, Note, *Recognition of Cross-Border Insolvency Proceedings: An Evaluation of Solvent Schemes of Arrangement and Part VII Transfers under U.S. Chapter 15*, 29 FORDHAM INT’L L.J. 1312, 1314–15 (2006).

77. See No. 11 Civ. 8299(PKC), 2012 WL 4075171 (S.D.N.Y. Sept. 12, 2012). Oddly enough, this was a Rhode Island utility and involved a claim originating in Pawtucket, Rhode Island, but with waste disposed near Attleboro, Massachusetts (the next town over, but across the state line). *Id.* at \*1–2. In subsequent decisions in related matters, the Massachusetts Appeals Court found that Massachusetts law would govern whether the pollution was discharged in sudden and accidental ways. *OneBeacon America Ins. Co. v. Narragansett Elec. Co.*, 57 N.E.3d 18, 24 (Mass. App. Ct. 2016).

78. *Narragansett Elec. Co.*, 2012 WL 4075171, at \*2; see Steven E. Sigalow & Richard E. Stewart, *How Lloyd’s Saved Itself*, 37 THE INS. FORUM (2010), reprinted in JONES DAY, <http://www.jonesday.com/files/Publication/dae28676-d6c8-4de6-9cbb-c05aee419d4b/Presentation/PublicationAttachment/533860ba-d4f1-4056-85d9-78b84dc71af5/How%20Lloyd’s%20Saved%20Itself.pdf> (last visited Mar. 23, 2018).

79. *Narragansett Elec. Co.*, 2012 WL 4075171, at \*2.

80. *Id.*

the appropriate substantive law to apply was English.<sup>81</sup> Next, the court discussed a prior District Court case where another Part VII transfer was discussed at length and not recognized as a foreign bankruptcy proceeding.<sup>82</sup> In reaching a conclusion to not dismiss the claims against the Equitas defendants, the court relied on a letter sent by Equitas to American policyholders notifying them that Equitas was assuming the obligations of the original insurer.<sup>83</sup> The court found that regardless of whether the Part VII had any effect, the letter sent to American policyholders raised sufficient basis to let the suit continue.<sup>84</sup> Equitas attempted to argue that the Part VII transfer did not state that it would become effective in the United States, rather that it was only effective in certain countries of Europe.<sup>85</sup> Nevertheless, the utility company alleged that it had not relied on the English High Court Order executing the Part VII transfer, but rather relied on the notice letter it received as the evidence of obligation by the new named insurer.<sup>86</sup>

Another case, *Air & Liquid System Corp. v. Allianz Insurance Co.*, dealt with an interesting discovery dispute as to whether a policyholder impacted by a Part VII transaction could later have access to the information that went into a U.K.'s independent expert's report.<sup>87</sup> Ultimately, the special master in the District Court allowed discovery to proceed with a not-inconvenient deposition of the expert.<sup>88</sup> *Allianz Insurance Co.* is an example of one way that Part VII transfers can be used to add complication to an insurance coverage dispute, embroiling all involved in later litigation. *Allianz Insurance Co.* also shows how the approval of such a transfer, even though well vetted originally, can later come under scrutiny in unintended or unforeseen locations.

*Allianz Insurance Co.* concerned General Star, which wrote policies for excess coverage outside the United States for only three years, 1998–2000, and then was put into runoff and ceased

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81. *Id.* at \*8.

82. *Id.* at \*9.

83. *Id.* at \*10.

84. *Id.*

85. *Id.*

86. *See id.*

87. *Air & Liquid Sys. Corp. v. Allianz Ins. Co.*, No. 2:11-CV-00247-JFC, 2012 U.S. Dist. LEXIS 121553 (W.D.P.A. 2012).

88. *Id.* at \*59.

writing new policies.<sup>89</sup> By 2010, it had substantially wound down its business and decided to transfer its policies to a new insurer via a Part VII transfer.<sup>90</sup> Both General Star (the transferor) and the transferee taking over the policies shared an ultimate parent company—Berkshire Hathaway.<sup>91</sup> At issue here was whether the expert who opined on the Part VII transfer had properly included one particular U.S.-based insured, Howden North America, and all three policies it had purchased from General Star.<sup>92</sup> That insurance contract had been for excess coverage, and Howden had informed General Star of 13,500 potential asbestos related claims that were likely to exceed the initial layers of insurance, making it likely that the General Star excess policy would be required to pay out claims.<sup>93</sup> The real issue at play in *Allianz Insurance Co.* seemed to be that the post-Part VII insurer was put into voluntary liquidation days after the Part VII transfer concluded, leading to questions about whether and how the independent expert had valued Howden's potential asbestos claims.<sup>94</sup>

In the *In re Board of Directors of Hopewell International Insurance Ltd.* decision, a New York bankruptcy judge analyzed a scheme of arrangement that occurred in Bermuda, and applied Bermuda law, rather than the requested Minnesota law.<sup>95</sup> The court further determined that, given the location of the petitioner's assets, respondents had failed to object to the scheme as proposed when they had been provided notice, and that petitioner had been subjected to a foreign proceeding, it had jurisdiction. As such, the court enjoined the respondent from taking action against petitioner based on the underlying action.<sup>96</sup>

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89. *Id.* at \*10.

90. *Id.* at \*11–12.

91. *Id.* at \*12. This interrelated nature is not unusual and is referred to as an intra-company transaction.

92. *See id.* at \*8–10.

93. *See id.* at \*9, \*15–16.

94. *See id.* at \*15–16.

95. *In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd.*, 238 B.R. 25, 31–32 (Bankr. S.D.N.Y. 1999).

96. *See id.* Written by then the chief United States bankruptcy judge in the Southern District of New York Tina Brozman, this decision detailed relevant history behind the Bermuda schemes of arrangement, including the different methods available to companies. *Id.* at 35. One arrangement involves a cut-off scheme, developed in 1995, in which companies have no more than five years to submit additional claims prior to a bar date. *Id.* at

The court in *Hopewell* also recognized the Bermuda scheme as one qualifying as a foreign proceeding under U.S. Bankruptcy Code.<sup>97</sup>

### III. VERMONT WAS AN EARLY STATE TO ALLOW FOR INSURANCE BUSINESS TRANSFERS IN THE UNITED STATES

In 2013, Vermont adopted a law that would allow companies to transfer closed blocks of certain insurance coverage into Vermont-based companies through a regulatory approval process.<sup>98</sup> The Legacy Insurance Management Act (LIMA) lays out mechanisms akin to those existing in the United Kingdom and other traditional locations for insurance business transfers.<sup>99</sup> However, there are a few key differences in LIMA that companies might have noted, which could be keeping the act from being utilized as frequently as the U.K. version.<sup>100</sup> Additionally, it appears that, at least through early 2018, the mechanisms created in LIMA have not been utilized by any insurers.

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35–36. This scheme had its advantages in that it greatly reduced the time for a run-off to wind down its business. *See id.*

97. *Id.* at 48 (citing to 11 U.S.C. § 101(23) (2012)). The court applied a standard that “a foreign proceeding is a foreign judicial or administrative process whose end is to liquidate the foreign estate, adjust its debts or effectuate its reorganization.” *Id.* at 49 (internal quotations omitted).

98. *See* Legacy Insurance Management Act, 2014 Vt. Acts & Resolves 93 (codified as amended at VT. STAT. ANN. tit. 8, §§ 7111–7121 (West 2017)).

99. *See* Anna Petropoulos, *Vermont’s new law enables smooth transfer of legacy insurance portfolios*, APETROP USA (Apr. 8, 2014), <http://apetropusa.com/2014/04/08/vermonts-new-law-enables-smooth-transfer-of-legacy-insurance-portfolios/>; *see also* VT. STAT. ANN. tit. 8, § 7112(b)(1)–(21). This section identifies what is required in the plan submitted to the Commissioner for approval, including: identify what is to be transferred; identify the insureds; a no-objection letter from the domicile regulator; audited financials and annual statements; actuarial opinion that “quantifies the liabilities to be transferred”; three years of pro-forma financial statements showing the assuming company to be solvent; sign-off from the assuming company’s officers; copy of the notice to be given to policyholders; statement about pending disputes; and, business plan, investment policies, etc. VT. STAT. ANN. tit. 8, § 7112(b)(1)–(21). This section also lays out the other requirements of the Act, such as subsection (d)’s requirement for the Commissioner to let the applicant know if their application is complete within 10 days of filing, and subsections (h)’s timing requirement. *Id.* §§ 7112(d), 7112(h).

100. *See* Andrew Rothseid, *Cutting on the Gordian Knot on Run Off Insurance*, 1 INT’L CORP. RESCUE, 373, 376–77 (2016) (summarizing differences between the Rhode Island and Vermont LIMA business transfer processes and identifying similar concerns).

One major limitation of LIMA could be its scope, which may have been set as intentionally smaller than the U.K. predecessor. Several things limit the scope of LIMA, including the types of insurance eligible, the ability of policyholders to exclude themselves, and the exclusion of policies that prohibit such transfers. In LIMA's findings and purpose, the statute identifies that its goal is to target non-admitted insurance and reinsurance,<sup>101</sup> and its definition of "closed block" operates to restrict LIMA transfers to only non-admitted or reinsurance business.<sup>102</sup> LIMA allows objecting policyholders to essentially opt out of the plan (i.e., not be transferred) by simply identifying their policy and an objection to the plan.<sup>103</sup> The fact that policyholders can withdraw themselves from the plan means that any insurer considering such a transfer might need to affirmatively court each policyholder to ensure that the desired goals are accomplished. Additionally, the process is specifically limited to exclude policies that would violate a provision of the underlying insurance or reinsurance contract.<sup>104</sup>

Another concern with the statute is that the final sign-off approving the transfer is provided on a regulatory—and not a judicial—basis.<sup>105</sup> Having a regulatory and not a statutory approval process could limit the ability of the transferor to shield itself from future suits in other jurisdictions. Parties dissatisfied with the Commissioner's final order or the regulatory process are not without options, as they can go to the Vermont Supreme Court

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101. 2013 Vt. Acts & Resolves 93.

102. VT. STAT. ANN. tit. 8, § 7111(2).

103. *See id.* § 7112(j) (stating that in response to a timely objection "the assuming company shall, not later than 15 days after the end of the comment period, submit to the Commissioner either (1) an amended list of policies . . . excluding such policyholder . . . or (2) an express written notice from such policyholder . . . accepting the plan and consenting to the transfer having the full force and effect of a statutory novation . . . and withdrawing and rescinding its prior notice of objection"). Basically, under LIMA, the objector must either be satisfied or be cut out of the plan altogether.

104. *Id.* § 7112(l) explicitly limits the process if the contract or reinsurance agreement to be transferred has a provision prohibiting the transfer without the consent of the policyholder. While United Kingdom and Rhode Island regulators or courts might well intend to exclude such policies, they do so implicitly, rather than explicitly.

105. *Id.* § 7114(a).

to appeal the Commissioner's order.<sup>106</sup> Nonetheless, since the LIMA action concludes with a regulatory action, a question could arise on appeal of what level of judicial scrutiny would apply on appeal. One might argue that the Administrative Procedures Act of Vermont would apply, and that the court should defer to the agency approving the proposed transfer. Moreover, a Vermont Supreme Court decision, *State Department of Taxes v. Tri-State Industrial Laundries*, certainly implies that the review of the administrative case here would receive deferential review, in that "the actions of agencies are correct, valid and reasonable, absent a clear and convincing showing to the contrary."<sup>107</sup> Although, another concern arising from the regulatory order is how the courts of other states would treat such an administrative order. It is uncertain if a non-Vermont court would grant a similar level of deference, and further, if such a court might consider whether this level of decision could benefit from the full faith and credit of other states, or if it would be accepted by other states under the doctrine of comity.<sup>108</sup> Many courts and commenters have touched on

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106. *Id.* § 7115(b) (requiring that aggrieved parties appeal to the Vermont Supreme Court).

107. *State Dep't of Taxes v. Tri-State Indus. Laundries*, 415 A.2d 216, 218 (1980). *But see In re Agency of Admin., State Bldgs. Div.*, 444 A.2d 1349, 1350-51 (1982) (overturning a state agency decision as lacking sufficient basis, even as it articulated administrative case would receive deference on the factual matters and would only be overturned if they were to go beyond their enabling legislation or were clearly erroneous). Nevertheless, a dissenting Justice wrote that the court should follow the "construction of a statute by those charged with its execution . . . unless there are compelling indications that it is wrong." *Id.* at 1362 (Billings, J., dissenting).

108. In insurance transactions, there exists an underlying contract between two parties, where the issuer agreed to pay certain amounts if a specified or fortuitous event occurs. If a contract was novated pursuant to the LIMA process, would such a novation be respected by courts in other states? An example might help. Let us assume that an insured had moved and never received notice under the plan and submitted a claim the following year to the transferring company, well after the Final Order issued and appeal rights were extinguished. Presumably, the transferring insurer would deny the claim and point to the LIMA final administrative order, as they had believed their obligations under that contract were novated by the action. But a court in another state might add additional scrutiny later and might not rely on the Vermont administrative order, and it might not be as clear to the other court that the bargained for insurance had truly ceased. In what might be a closer call, look at the same example but assume that the administrative order had been challenged to the Vermont Superior Court, which upheld the administrative order, but did grant deference to the agency

whether administrative decisions are sufficient to satisfy the Full Faith and Credit or Comity clauses of the Constitution,<sup>109</sup> and it might be that the more akin to a court proceeding the Vermont process is, the more likely it is to be upheld.<sup>110</sup> It is possible that the state-based regulatory scheme in which insurers operate demand more cooperation and deference to other states' laws and regulatory orders, such as when insurance companies are no longer able to pay their claims and state insurance departments need to take action to rehabilitate or liquidate the companies.<sup>111</sup>

A method of voluntary restructuring in Rhode Island or elsewhere would not be very effective if it was not also recognized by the other states in the United States and beyond.<sup>112</sup> The notion that the courts of one state respect those of other states is deeply engrained in American culture. Court judgments and decisions receive such respect due to the inclusion of two similar clauses in Article IV of the U.S. Constitution: the Full Faith and Credit Clause<sup>113</sup> and the Privileges and Immunities Clause.<sup>114</sup> The United States Supreme Court has said “[n]o law has any

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during its review. Would that then receive the full respect during the other court's review?

109. See, e.g., *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966); see also William Daniel Benton, *Application of Res Judicata and Collateral Estoppel to EPA Overfiling*, 16 B.C. ENVTL. AFF. L. REV. 199, 244 (1988). But see *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914) (rejecting Missouri's application of Missouri law in its interpretation of its life insurance contract's loan agreement that was negotiated in New York between a New York insurer and a resident of New Mexico). The *Head* decision has been favorably cited for this limitation on extraterritorial application of state laws. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 n.16 (1996).

110. See *Utah Constr. & Mining Co.*, 384 U.S. at 421–22.

111. See *Ambassador Ins. Co. v. Allied Programs Corp.*, 564 N.Y.S. 2d 54, 55 (A.D. 1 Dept. 1990) (upholding a lower court's granting of full faith and credit to the administrative order of the Vermont insurance department). The court noted the granting of full faith and credit previously in New Jersey and that there was a model law created to provide a uniform system for the orderly and equitable administration of assets and liabilities of defunct multi-state insurers mandates such recognition. *Id.*

112. See HAROLD S. HORWICH, STATE OF CONN. INS. DEPT., FINAL REPORT OF THE SPECIAL TASK FORCE ON INSURANCE COMPANY RUN-OFF AND REORGANIZATION 11 (2006), <http://www.ct.gov/cid/lib/cid/rprtrunoff.pdf>.

113. U.S. CONST. art. IV, § 1.

114. U.S. CONST. art. IV, § 2, cl. 1.

effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.”<sup>115</sup> Thus, the Privileges and Immunities Clause or the Full Faith and Credit Clause are two methods emanating from the U.S. Constitution that courts use to recognize court orders in other states.

The Privileges and Immunities Clause, also referred to as the Doctrine of Comity, is based on mutual recognition of foreign proceedings.<sup>116</sup> More than one hundred years ago, in a matter regarding a New York merchant’s operations in Paris that led to a suit brought by a French consumer, the United States Supreme Court refused to grant comity to the judgement of a French court because the French court would not have recognized a U.S. judgement under similar circumstances.<sup>117</sup>

On the other hand, the Full Faith and Credit Clause is a means to prohibit multiple states from exercising jurisdiction over the same matter, case, or controversy with divergent results.<sup>118</sup> The Supreme Court has explained that

[o]urs is a union of States, each having its own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it. Given this structure, there is always a risk that two or more States will exercise their power over the same case or controversy, with the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue.<sup>119</sup>

The clause really is a method of applying *res judicata* and collateral estoppel to cases from other jurisdictions. In order for the Full Faith and Credit Clause to apply and for a decision be respected later by other jurisdictions, courts look to whether the initial court had jurisdiction over the matter.<sup>120</sup>

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115. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

116. *See id.* (“‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another.”).

117. *Id.* at 228–29.

118. *Id.* at 185.

119. *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 703–04 (1982).

120. *Id.* at 704.



IV. CONNECTICUT ADOPTED A LAW ALLOWING THE DIVISION OR MERGER  
OF INSURANCE COMPANIES, ADAPTING THE MORE EXPANSIVE  
PENNSYLVANIA AND ARIZONA LAWS FOR INSURANCE

In 2017, Connecticut adopted a new law that would allow domestic insurance companies to divide or merge through a regulatory process.<sup>121</sup> Effective October 1, 2017, the Connecticut law authorized the Connecticut Division of Insurance to approve either the division of an insurer or the combination of an insurer with a newly formed company.<sup>122</sup> This law allows domestic insurers to divide into two or more insurers pursuant to a plan of division that meets the requirements of nine sections of the law and gains the insurance commissioner's approval.<sup>123</sup>

Connecticut's law appears to be very similar to recent laws adopted in Pennsylvania<sup>124</sup> and Arizona<sup>125</sup> that allow for divisions of corporations.<sup>126</sup> The Pennsylvania and Arizona laws are broader and not only limited to insurance companies, as they

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121. H.B. 7025, 2017 Leg., Reg. Sess. (Conn. 2017).

122. Alexander R. Cochran et al., *Connecticut Adopts Act Authorizing Domestic Insurers to Divide*, DEBEVOISE & PLIMPTON (May 11, 2017), <https://www.debevoise.com/insights/publications/2017/05/connecticut-adopts-act>.

123. On December 4, 2017, The Hartford announced the sale of a subsidiary in run-off, Talcott Resolution, to a group of outside investors. *See The Hartford Announces Agreement to Sell Talcott Resolution*, THE HARTFORD NEWSROOM (Dec. 4, 2017), <https://newsroom.thehartford.com/press-release/hartford-announces-agreement-sell-talcott-resolution>. It is unclear that this sale involved Connecticut's newly authorized division statute or would subsequently involve a merger of certain business into a separate company not to be sold off with the rest of Talcott. But one could imagine insurers reorganizing certain assets under this law to prepare for a sale of a non-core legacy business and unlock capital by selling the assets off, as this sale did. *See An Act Authorizing Domestic Insurers to Divide: Hearing on CT H.B. 7025 (NS) Before the Comm. on Ins. & Real Estate*, Jan. Sess., 2017 No. 3549 (Conn. 2017) (statement of Cliff Leach, Vice President, Government Affairs of the Hartford). In that testimony, Leach identified roadblocks that insurance managers have in exiting insurance markets, such as Hartford's 2012 exit of certain life insurance markets. *Id.*

124. 15 PA. CONS. STAT. §§ 361–368 (2017).

125. S.B. 353, 51st Leg., Reg. Sess. (Ariz. 2013) amended many sections of law, including ARIZ. REV. STAT. ANN. § 10–22 (2017) and ARIZ. REV. STAT. ANN. §§ 29-2101 through 2703.

126. William D. Goddard, *Connecticut offers more options for insurers exiting lines of business*, BUS. INS., (Oct. 2, 2017, 12:00 AM), <http://www.businessinsurance.com/article/20171002/ISSUE0401/912316228/Business-Insurance-Perspectives-Connecticut-options-insurers-exit-lines>.

appear to allow the division of any corporate entity and are not codified under the insurance laws in either state. Connecticut's law creates a series of terms using the word "organic,"<sup>127</sup> in an attempt to clarify which rules the entity must follow and their derivation.<sup>128</sup> The terms seem intended to identify that the insurers operate across many states and are subject to state based regulation which could lead to multiple sets of rules for a book of business. They also reflect that many insurance company documents are proprietary and not subject to public scrutiny, even though the companies are regulated by a public entity who has access to such documents.<sup>129</sup> The use of such definitions may in fact help an entity going through a division in a public process to maintain confidentiality of such documents.

#### V. OKLAHOMA IS CONSIDERING ADOPTING A LAW TO ALLOW PART VII TRANSFERS

Oklahoma had proposed legislation in 2017 that would have created a commutation process within the Insurance Department.<sup>130</sup> The bill eventually was held, and a Joint Legislative Committee was created to consider the concept and possibly recommend a proposal.<sup>131</sup> On January 17, 2018, the Oklahoma Senate proposed a bill that would instead create an insurance business transfer process.<sup>132</sup> That bill proposes to

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127. "Organic rule," "organic law," and "public organic document." See H.B. 7025, 2017 Leg., Reg. Sess. §§ (13), (14), (17) (Conn. 2017).

128. *Id.* § (1). This section appears to be copied from § 102 and § 312 of the Corporations and Unincorporated Associations Section of the Pennsylvania General Laws. Compare *id.* with 15 PA. CONS. STAT. §§ 102, 312.

129. Compare the definition of public organic document to the internal entity controls that are not always known to the public—private organic rules. See Conn. H.B. 7025 §§ (15), (17).

130. S.B. 606, 56th Leg., 1st Sess. (Okla. 2017) was proposed and had considerable support, passing the senate on three occasions, and seemingly passing a majority house vote as well. See *Bill Information for SB 606*, OKLA. STATE LEGISLATURE, <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB606&Session=1700> (last visited Mar. 24, 2018).

131. The Joint Interim Study of Insurance Business Transfer Plans had its first and only meeting on October 26, 2017 to receive testimony, in person or via Skype, from a number individuals and groups, including the author of this Article.

132. S.B. 1101, 56th Leg., 2d Sess. (Okla. 2018). The new Oklahoma bill appears to have adopted many of the better aspects of the U.K. Part VII

create a legal process that would first involve the Oklahoma Insurance Department and their courts.<sup>133</sup>

The current proposed bill seems to have many of the advantages of Rhode Island's Insurance Business Transfers. It has a section that gives jurisdiction to the District Court in Oklahoma County to carry out provisions of the Act, including approval of the proposed insurance transfer.<sup>134</sup> The bill also proposes that the applicant provide notice to the appropriate regulators, guarantee associations, reinsurers, and known policyholders.<sup>135</sup> Section 6 of the proposal includes the submission of the business transfer plan to the Oklahoma Insurance Department for initial approval of the plan, the use of an independent expert to opine on the impact of the plan, including its impact on policyholders.<sup>136</sup> And section 6C gives the court the authority to receive comments and then, after a determination that the plan would not materially adversely affect the policyholders, the court has the authority to approve the transfer of the business, novating the original contracts.<sup>137</sup>

One of the only distinctions between the Rhode Island IBT process and Oklahoma's 2018 proposal is that the Rhode Island process is limited to mature blocks of certain kinds of business to be transferred, while Oklahoma's process is not so limited. The Oklahoma proposal has similar restrictions on the kinds of business that are limited, but does not have a maturation requirement in its current proposal. In theory, this could mean that a 2017 insurance policy could be transferred from the carrier that sold it to a new carrier, over the objection of the policyholder.<sup>138</sup>

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transfer and the Rhode Island Reg. 68, whereas the 2017 bill had "looked like the love child of the laws introduced by Vermont and Rhode Island." See Dan Ascher, *The Rhode Ahead*, INSIDER Q., Summer 2017, <https://www.insiderquarterly.com/the-rhode-ahead>.

133. See Okla. S.B. 1101 § 6, which proposes an approval process for the Department, followed by an approval process for their courts.

134. See *id.* § 4.

135. See *id.* § 5.

136. See *id.* § 6.

137. See *id.* § 6C.

138. But only if the Insurance Division had first approved the transaction, and the court later approves the proposal as well. See *id.* § 6.

## CONCLUSION AND SUMMARY CHARTS

Insurance companies have identified a need to unlock capital that is held in reserve from decades-old policies. Various jurisdictions have developed methods to help insurers unlock that value while also creating protections for policyholders in their processes. The United Kingdom has the longest history with Part VII transfers to move policies from one company to another and solvent schemes of arrangement to facilitate a faster winding down of an insurer's business. Modeled after those two laws, Rhode Island has created two methods of voluntary restructuring that achieve many of the goals that insurers seek. Several other states have adopted, or are proposing, laws authorizing something similar to the U.K.'s Part VII law, but currently only Rhode Island has a substantially similar law to the U.K. Part VII transfer.

One trend that appears on the rise is more aware and better represented policyholders who are able to articulate the reasons that the proposed voluntary restructuring may not be the best situation for themselves. Thus, the more and the better that policyholders are able to represent themselves in both the administrative and judicial processes, the better the system will have to become. Furthermore, several cases have pointed to a developing trend that not all future claims should be treated equally. Specifically, in *In re GTE Reinsurance*, the court approved a single class of creditors, and there, it was likely the most appropriate choice.<sup>139</sup> But future courts should look to cases from England, such as *In re Hawk Insurance* or *In re British Aviation*, for thoughtful guidance on whether to consider IBNR claims as a part of a combined creditor class or whether to treat them as a separate class of claims.<sup>140</sup>

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139. *In re GTE Reinsurance Co.*, No. PB 10-3777, 2011 WL 7144917 (R.I. Super. Ct. Apr. 25, 2011).

140. *In re British Aviation Ins. Co.*, [2005] EWHC 1621 (Ch.) [140]–[141] (Eng.); *In re Hawk Ins. Co.*, [2001] EWCA (Civ) 241 [11]–[12], [15]–[17].

SUMMARY OF VARIOUS VOLUNTARY RESTRUCTURING OPTIONS:  
BUSINESS TRANSFERS

	<b>Court Approval</b>	<b>Binding on Objectors</b>	<b>Independent Expert Opinion Required</b>	<b>Notice Required to Policyholders</b>	<b>Approval/Non-Objection from Transferor Regulator</b>	<b>Policies Subject to Transfer</b>
<b>U.K. Part VII Transfers</b>	Yes	Yes	Yes	Yes	No	Most allowed (Part VII, Sec. 105 has some exclusions)
<b>RI Insurance Business Transfers</b>	Yes	Yes	Yes	Yes	Yes	Mature (60 mo.+), closed book, no life, W.C. or personal lines
<b>Vermont</b>	No, regulatory	No	Yes	Yes	Yes	Closed block (60 mo.+) surplus lines or reinsurance
<b>Connecticut</b>	No, regulatory	Yes, but Sec. 8 gives right to appraisal	Not required, but available	Yes, and likely a public hearing too	N/A. To divide, must be domestic CT insurer	Seemingly any line or type
<b>Oklahoma 2018 SB 1101</b>	Yes, as proposed	Yes, as proposed	Yes, as proposed	Yes, as proposed	Yes, as proposed	No proposed restrictions

SUMMARY OF VARIOUS VOLUNTARY RESTRUCTURING OPTIONS:  
COMMUTATIONS

	<b>Initial Regulator Approval</b>	<b>Creditor Vote</b>	<b>Notice Required</b>	<b>Binding on Objectors</b>	<b>Court Approval</b>	<b>Limitations on Policies</b>
<b>U.K. Solvent Schemes of Arrangement</b>	No	Yes, more than 50% of creditors representing >75% of value	Yes	Yes	Yes	No
<b>RI Reg. 68 Commutations</b>	Yes	Yes, more than 50% of creditors representing >75% of value	Yes	Yes	Yes	Mature (60 mo.+), closed book, no life, W.C. or personal lines
<b>Oklahoma 2017 SB 606 (no longer proposed)</b>	N/A (only regulatory approval)	Yes, more than 50% of creditors representing >75% of value	Yes	Yes	No	No Life, W.C. or personal lines