STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		**SUPERIOR COURT**
	(FILED April 25, 2011)	
IN RE: GTE REINSURANCE COMPANY LIMITED	: : :	**C.A. No. PB 10-3777**

DECISION

SILVERSTEIN, J. Before this Court is GTE Reinsurance Company Limited's (GTE RE) motion for an order confirming the vote at the November 30, 2010 Meeting of Creditors and implementing its proposed commutation plan, as well as Clearwater Insurance Company (f/k/a Odyssey Reinsurance Corporation and Skandia America Reinsurance Corporation) (Clearwater) and Hudson Insurance Company's (Hudson) (collectively, Odyssey Insureds) objections thereto. The Odyssey Insureds, as creditors of GTE RE, challenge the constitutionality of the Voluntary Restructuring of Solvent Insurers Act, G.L. 1956 § 27-14.5-1, et seq. (Restructuring Act) alleging violations of the Contract Clause and Due Process Clause of the United States and Rhode Island Constitutions. The Attorney General, Peter F. Kilmartin (Attorney General Kilmartin), participated in the instant proceedings as amicus curiae, and the Rhode Island Department of Business Regulation (DBR) joined the proceedings as an Intervenor.

I

The Restructuring Act[1]

On August 25, 1995, Governor Lincoln Almond (Governor Almond) created, by executive order (Executive Order), the Governor's Insurance Development Task Force (Task

[1] Capitalized terms, unless otherwise defined herein, have the meaning assigned to them in the Restructuring Act and Commutation Plan.

> economic developers, designed to position Rhode Island as the most competitive United States location for one or more target segments of the insurance industry." Id.

In 2002, in response to the Task Force's findings and recommendations, the Rhode Island Legislature enacted the Restructuring Act. The Restructuring Act became effective in 2004, following the promulgation of Insurance Regulation 68 (Reg. 68) by the Insurance Division of the DBR. The Restructuring Act, amended in 2007, sets forth a scheme by which a solvent insurance or reinsurance[3] company in run-off[4] may propose a commutation plan[5] extinguishing its liabilities for past and future claims of its creditors and then terminate its business.

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[3] "Reinsurance" is the pooling among secondary insurers of portions of risks previously underwritten by primary insurers in return for a reinsurance premium. See Delta Holdings, Inc. v. National Distillers & Chem. Corp., 945 F.2d 1226, 1229 (2d Cir. 1991); see also 1A Steven Plitt, et al., Couch on Insurance 3d § 9:1, at 9-3 (2009). In a typical reinsurance transaction: (1) a primary insurer underwrites risks in exchange for premiums from the insureds; and (2) the primary insurer then further spreads the risk by transferring or ceding a portion of it to reinsurers in exchange for premiums. See Delta Holdings, 945 F.2d at 1229; see also Horowitz Report § 2.2. Simply stated, reinsurance is "insurance for insurers." See Horowitz Report § 2.2; Couch on Insurance 3d § 9:1, at 9-5.

[4] "Run-off" occurs when an insurer or reinsurer ceases writing new business, but remains bound by its preexisting contractual commitments under the policies and/or reinsurance contracts into which it previously entered. See National Ass'n of Ins. Comm'rs, Alternative Mechanisms for Troubled Ins. Companies 1 (2009). As long as claims continue to be presented and the company remains solvent, the company must continue to pay claims in full. 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. Bankruptcy Law & Prac. 953, 954-55 (Dec. 2007). A company may attempt to expedite the

Reg. 68 "outline[s] the procedural requirements for insurance companies applying for the implementation of a Commutation Plan."[6] See Reg. 68 § 2. It specifies that before a commercial run-off insurer[7] may seek court approval and implementation of its proposed commutation plan, the Applicant must first submit the plan for DBR review.[8] Id. § 4. Thereafter, DBR has sixty days to review and comment on the proposed commutation plan. Id. Only after an Applicant has addressed DBR's comments, or the sixty day period has expired, may an Applicant apply to this Court for an order calling for a Meeting of Creditors and designating classes of creditors, if any, for the purposes of that meeting.[9] Id.

Within ninety days of the submission of an application to this Court, a Meeting of Creditors shall be held to consider the proposed commutation plan. Notice of the meeting shall be provided to all known creditors or representatives of creditors in accordance with § 27-14.5-

[6] Reg. 68 was issued in accordance with § 27-14.5-6 and G.L. 1956 § 42-14-17 which empower DBR's commissioner to "promulgate rules and regulations that may be necessary to effectuate [the Restructuring Act's purpose]."

[7] To qualify as a "run-off insurer" under the Restructuring Act, an Applicant must: (1) be domiciled in Rhode Island; (2) have liabilities under policies for property and casualty lines of business; (3) have ceased underwriting new business; and (4) only be renewing onv .0002 Tc 0.0902 Tw 13.915

3.[10] All creditors must be given an opportunity to vote on the proposed commutation plan and to object to this Court following a vote. See § 27-14.5-4(b). To obtain approval of the proposed commutation plan, an Applicant must obtain consent from (1) fifty percent of each class of creditors; and (2) seventy-five percent in value of the liabilities owed to each class of creditors. Id.

To determine whether the requisite statutory majority has been obtained, "votes will be calculated according to the aggregate amount of claims specified against the Applicant in respect of insurance and reinsurance contracts detailed in the voting form." See Reg. 68 § 4(c). Those creditors who fail to submit voting or proxy forms in accordance with the requirements of the commutation plan will not be considered to determine value of each creditor's vote at the Meeting of Creditors. Id. Further, the value attributed to each creditor's claim for voting purposes shall be determined on the basis of the information provided by the creditor in its

[10] In those instances when notice is required, the Applicant, within ten days, must cause

voting form or information available to the Applicant from its existing records. Id. Where an agreement cannot be reached as to the appropriate value of a creditor's claim, for voting purposes only, the Chairman of the Meeting of Creditors shall determine the fair and reasonable value.[11] Id. § 4(d).

Within thirty days of the approval of the proposed commutation plan, an Applicant must petition the Court to enter an order confirming the approval. Id. § 4(e). Before confirming the proposed plan and issuing an implementation order, the Court must determine that "implementation of the commutation plan would not materially adversely affect either the interests of the objecting creditors or the interests of assumption policyholders." Sec. 27-14.5-4(c). Upon such a determination, the Court must issue an implementation order which shall:

> "(i) Order implementation of the commutation plan;
>
> "(ii) Subject to any limitations in the commutation plan, enjoin all litigation in all jurisdictions between the Applicant and creditors other than with the leave of the court;
>
> "(iii) Require all creditors to submit information requested by the bar date specified in the plan;
>
> "(iv) Require that upon a noticed application, the Applicant obtain court approval before making any payments to creditors other than, to the extent permitted under the commutation plan, payments in the ordinary course of business, this approval to be based upon a showing that the Applicant's assets exceed the payments required under the terms of the commutation plan as determined based upon the information submitted by creditors under paragraph (iii) of this subdivision;

[11] A creditor may appeal the Chairman's decision to this Court. See Reg. 68 § 4(d). In those instances where "a Chairman's decision is reversed or altered on appeal and the vote is declared invalid, the Court may order a new Meeting of Creditors or such other relief as appropriate." Id. Additionally, all disputes between a creditor and the Applicant shall be resolved pursuant to the dispute resolution provisions specified by the commutation plan. See Reg. 68 § 4(f).

"(v) Release the Applicant of all obligations to its creditors upon payment of the amounts specified in the commutation plan;

"(vi) Require quarterly reports from the Applicant to the court and commissioner regarding progress in implementing the plan; and

"(vii) Be binding upon the Applicant and upon all creditors and owners of the Applicant, whether or not a particular creditor or

reasonable technology costs related to the examination process; and (3) all necessary and reasonable education and training costs incurred by the state to maintain the proficiency. Id.

II

Facts and Travel

GTE RE was incorporated in Bermuda on July 28, 1976 as a captive insurer and reinsurer of GTE Corporation. See Commutation Plan § 1.3. From 1978 through 1989, GTE RE also reinsured third-party property and casualty risks of U.S. and international insurance organizations, first as Telect Insurance Company Ltd., and then under its present name. Id. GTE RE "ceased underwriting in 1990, and . . . has been in [run-off] since that time." Id. In 1994, GTE RE moved its domicile to Vermont and on June 24, 2010, redomiciled in Rhode Island.

Between 1980 and 1986, GTE RE entered into several reinsurance contracts with the Odyssey Insureds.[12] See Wakin Affidavit ¶ 1. Specifically, on or about September 15, 1981, GTE RE's predecessor executed a continuous quota share reinsurance treaty with Hudson effective from December 31, 1980 through December 31, 1985 (Hudson Treaty).[13] Id. ¶ 2. Under Article II of the Hudson Treaty, GTE RE remained liable for its proportionate share of all losses that occurred during the period of its participation as a reinsurer on the Hudson Treaty. Id. GTE RE's share of the Hudson treaty was 4.5% for the years 1981 and 1982, 9% in 1983, 10% in 1984, and 15% in 1985. See Toothman Rebuttal Actuarial Report 13.

Similarly, on or about January 30, 1985, GTE RE's predecessor executed a continuous quota share reinsurance treaty with Clearwater effective from January 1, 1984 through January 1,

[12] Odyssey America Reinsurance Corporation (Odyssey) acts on behalf of and manages claims for its affiliates Clearwater and Hudson. See Wakin Affidavit ¶ 1.

[13] A reinsurance contract is referred to as a treaty or a reinsurance cover. See Toothman Rebuttal Actuarial Report 12 n.2. A quota share treaty reinsures a fixed percentage of each subject policy. Id.

1987 (Clearwater Treaty).[14] See Wakin Affidavit ¶ 4. Under the Clearwater Treaty, GTE RE also remained liable for all losses occurring prior to January 1, 1987. Id. GTE RE's share of the Clearwater Treaty was 2% in each year. See Toothman Rebuttal Actuarial Report 13.

The instant matter arises out of GTE RE's proposed commutation plan (Commutation Plan). Under its Commutation Plan, GTE RE would now make lump sum payments to each of its creditor-policyholders—rather than wait for claims to arise in the future—in exchange for which GTE RE would be released of all liabilities remaining under its contracts. Id. at 4.

Pursuant to Reg. 68 § 4, GTE RE submitted its Commutation Plan to DBR for review. DBR reviewed the plan for both procedural and substantive compliance with the requirements of the Restructuring Act and implementing regulations. See Dwyer Affidavit ¶¶ 5-6. As part of its review, DBR reviewed over half a dozen drafts of the Commutation Plan, focusing on the plan's effect on creditors, GTE RE's financial proposal, and the dispute resolution procedure. Id. ¶ 5. Additionally, DBR considered: (1) whether the drafting was clear and logical; (2) whether the interests of creditors were sufficiently close for there to be one class of creditors; (3) whether the notice to creditors was appropriate; (4) whether voting procedures methodologies were appropriate; (5) how the Meeting of Creditors and voting was going to be conducted; (6) whether the bar date was sufficiently long; and (7) whether the adjudication procedure was fair. Id. ¶ 6.

DBR also spent considerable time examining the fairness of the Commutation Plan's

(3) assess the reasonableness of the composite reserve calculation from which initial settlement values are calculated; (4) estimate the total expected costs that GTE RE would face as a result of the Commutation Plan; and (5) assess the reasonableness of the Commutation Plan as it relates to the amounts to be paid to individual creditors. Id. ¶ 7.

DBR's actuary determined: (1) the historical data used in GTE RE's actuarial report was consistent with the historical experience by treaty; (2) the estimated total reserves for the exposures subject to the Commutation Plan were reasonable and conservative; (3) the composite reserve formula was reasonable and conservative in the aggregate; and (4) there was a sufficient adjudicatory process for cedents who object to the composite reserve formula settlements to provide additional or different information to justify different payments under the Commutation Plan. Id. ¶ 8.

Following its investigation and analysis of the Commutation Plan, DBR submitted extensive questions and comments to GTE RE. Id. ¶ 12. GTE RE agreed to make revisions to the plan to address the substantial changes DBR believed to be in the creditors' best interests. Id. Thereafter, DBR concluded that, contingent upon the requested revisions, the Commutation Plan was fair and did not materially adversely affect any creditor. Id. ¶¶ 9, 13. DBR gave its final approval to the Commutation Plan on June 25, 2010. Id. ¶ 13.

On June 28, 2010, in accordance with the Restructuring Act and Reg. 68, GTE RE initiated the instant action by filing a petition for implementation of the Commutation Plan with this Court. On July 21, 2010, following a properly noticed hearing, this Court determined that a single class of creditors was appropriate and granted GTE RE's motion for leave to convene a Meeting of Creditors and for a scheduling order. The Court's Order provided:

pass constitutional muster under contract clause analysis so long as it is reasonable and necessary to carry out a legitimate public purpose." Brennan, 529 A.2d at 638 (citing United States Trust Co. v. New Jersey, 431 U.S. 1, 25-26, 97 S. Ct. 1505, 1519 (1977)).

Over time, Rhode Island courts have espoused the test devised by the United States Supreme Court when scrutinizing alleged Contract Clause violations. See, e.g., Nonnenmacher v. City of Warwick, 722 A.2d 1199, 1202 (R.I. 1999); see also In re Advisory Opinion to Governor (DEPCO), 593 A.2d 943, 948-49 (R.I. 1991). Under this three-part test, a court must first determine whether "the state law [has] in fact substantially impaired a contractual relationship." See Energy Reserves Grp., Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-12, 103 S. Ct. 697, 704-05 (1983). If so, a court must then examine whether the state can "show a legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." Id. Lastly, a court must decide whether the "legitimate purpose [is] sufficient to justify the impairment of the contractual rights." Id.

1

Substantial Impairment

Similarly, our Supreme Court has adopted the United States Supreme Court's three-part test to determine whether a contractual relationship has been substantially impaired. See Retired Adjunct Professors of R.I. v. Almond, 690 A.2d 1342, 1345 n.2 (citing Brown, 659 A.2d at 106); see also General Motors Corp. v. Romein, 503 U.S. 181, 186, 112 S. Ct. 1105, 1109 (1992) (detailing the United States Supreme Court's substantial impairment analysis). Indeed, our Supreme Court has explained:

> "Generally we look to see whether the change in law operates as a substantial impairment of a contractual relationship. This inquiry has three elements: whether there is a contract, whether the law in

question impairs an obligation or right under that contract, and whether the impairment is substantial. But even if the new law constitutes a substantial impairment, it still will not be deemed unconstitutional as a violation of the applicable contract clauses, if

incurred in defending those claims, up to the treaties' monetary cap.[17] See Couch on Insurance 3d § 1:6, at 1-17 (stating that another common definition of insurance is "a contract to pay a sum of money upon the happening of a particular event or contingency"). Put simply, the Odyssey Insureds contracted for the payment of money, and under the Commutation Plan, that is exactly the benefit they will receive. See Mar. 16, 2011 Hearing Tr. 84; see also Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 511, 62 S. Ct. 1129, 1134 (1942) (clarifying that under Contract Clause analysis, it is significant that a state statute is designed to permit performance of contractual obligations, even if it entails some modification, because "[i]mpairment of an obligation means refusal to pay an honest debt; it does not mean contriving ways and means for paying it"); City of El Paso v. Simmons, 379 U.S. 497, 509, 85 S. Ct. 577, 584-85 (1965) (finding it critical in upholding a statute that even though the law clearly eliminated some contract rights on paper, it had been designed to preserve the substantial and practical rights that gave value to the purchasers' contracts). For that reason, the Court does not believe that an actuarial-based estimated payout of the Odyssey Insureds' present and future claims substantially impairs their contractual rights or their reasonable contractual expectations.

This is particularly true where, as here, the Odyssey Insureds have failed to establish beyond a reasonable doubt that the actuarial-based payout will, as a matter of fact, be less than

[17] Notably, under the Odyssey Treaties, Hudson's maximum coverage was capped at $4,000,000 and Clearwater's was capped at $1,500,000, of which GTE RE was responsible for only a portion. See Toothman Rebuttal Actuarial Report at 13. Hence, the Odyssey Insureds could not have had a reasonable expectation of unlimited indemnification. Furthermore, even if there was no policy cap, insurance or reinsurance policies provide no absolute guarantee of indemnification. See P.T. O'Neill & J.W. Woloniecki, The Law of Reinsurance in England and Bermuda 979 (3d. ed. 2010) ("The insurer who believes that by purchasing reinsurance he has transferred part of the risk he has assumed is wrong. He has merely substituted the original risk which he underwrote for the credit risk of his insurer failing to meet his obligations."). For these reasons, it is simply a misrepresentation for the Odyssey Insureds to assert a reasonable expectation of unlimited indemnification.

payouts. Id. Likewise, the survival ratio[18] factor used in the composite reserve methodology is not only conservative, but significantly greater than the ratio used by the Odyssey Insureds. Id. Under the Commutation Plan,

> "the survival ratio of 25.7 years used to calculate the Composite Reserve is much greater than the survival ratio for asbestos and environmental-related liabilities used by [the Odyssey Insureds]. The survival ratio used by [the Odyssey Insureds] is seven years for asbestos and environmental liabilities combined, eight years for the asbestos-related liabilities and three years for the environmental-related liabilities. [However], a reserve based on survival ratio in excess of 25 will provide a much higher Commutation Payment than would be the case if a survival ratio of seven has been used." Id.

Moreover, this Court is bound by the well-established precedent of our Supreme Court. On several occasions, our Supreme Court has declined to find a substantial impairment of contractual rights where the party raising a Contract Clause challenge failed to provide evidence of definite or actual impairment. See, e.g., Retired Adjunct Professors, 690 A.2d at 1347; Nonnenmacher, 722 A.2d at 1203; DEPCO, 593 A.2d at 949. Indeed, in Retired Adjunct Professors, our Supreme Court upheld a 1995 legislative enactment which capped the gross part-time salary retired former state employees could earn and still remain eligible for their pensions. See 690 A.2d at 1348. There, the Court held that it was not clear "as a factual matter" that the statutory enactment would "actually

related injury to 66 2/3% of their highest salary, and limiting recovery in those instances where a firefighter earned additional income from other employment. See 722 A.2d at 1201. After the pension board sought a refund of benefits from plaintiffs because oh mo the19.ght4 Tc

impairment, the Court finds the Odyssey Insureds' reliance thereon to be unwarranted. See 336

In connection with the arbitration and choice of law provisions, the Restructuring Act, Reg. 68, and the Commutation Plan: (1) prevent any legal or arbitration proceedings from being commenced or continued in order to obtain payment or establish the existence or amount of a claim; (2) provide that the Commutation Plan's dispute resolution procedures trump any dispute resolution procedures in the Odyssey Treaties; (3) require that the Commutation Plan be governed by, and construed in accordance with, the laws of Rhode Island; and (4) grant this Court with the exclusive jurisdiction to hear and determine any suit, action, or proceeding, and to settle any dispute which may arise in connection with the Commutation Plan. Despite these alterations, the Court finds the Supreme Court's analysis in City of El Paso to be instructive. In City of El Paso, the Supreme Court held that a statute eliminating an unlimited right to cure defaults in certain contracts did not substantially impair rights because the particular clause at issue was "not the central undertaking" of the contracts, and the Court did not believe that "the buyer was substantially induced to enter into these contracts on the basis" of that particular clause. See 379 U.S. at 514, 85 S. Ct. 586-87. Here, the Odyssey Insureds attempt to establish substantial impairment by arguing that the choice of law and arbitration provisions are material terms of the Odyssey Treaties. See USA Cable v. World Wrestling Fed'n Entm't, Inc., 766 A.2d 462, 470 (Del. 2000). However, simply because those provisions may be deemed "material" to a contract, it does not follow that they were a "central undertaking" or a "substantial inducement." Accordingly, despite the Odyssey Insureds best efforts, the Court finds that they have failed to establish that these provisions were a central undertaking or substantial inducement to the parties to the Odyssey Treaties, and therefore, their alteration by the Commutation Plan is insufficient to rise to the level of substantial impairment.

Even if the Court were to assume that th

Likewise, although the Commutation Plan alters the Odyssey Insureds' choice of law by designating Rhode Island law as the governing law, the Court is of the opinion that, under the circumstances, such an impairment is insufficient to amount to a substantial impairment. Here, although the Commutation Plan provides that Rhode Island law shall govern any dispute in connection with the Commutation Plan, nothing in the plan

> "shall affect the validity of any other provisions determining governing law and jurisdiction as between the GTE RE and any of its [creditors] whether contained in any contract or otherwise and not relating to any dispute arising out of the Explanatory Statement or any provisions of the Commutation Plan or any action or omission thereunder or in connection with the administration of the Commutation Plan." See Commutation Plan § 10.4.

Accordingly, even if the Court were to assume that the choice of law provision was a substantial inducement for the contracting parties, the alteration of the choice of law provision is only directed at disputes arising out of the Commutation Plan, and New York law still governs the interpretation and application of the Odyssey Treaties. Therefore, the Court finds that the parties' choice of law has not been negated, and the alteration is not a substantial impairment.

The Odyssey Insureds also argue that the Restructuring Act and Commutation Plan impair their contractual rights by fundamentally changing the Odyssey Treaties from bilateral agreements to multilateral agreements. The Court, however, is not persuaded that by allowing a class of creditors to vote on whether or not to approve the Commutation Plan, the Restructuring Act and Commutation Plan convert the Odyssey Treaties from bilateral to multilateral contracts. lat870007.0t780r2.79 0 nef0]TJ05(.)1sey Insurw 8t

GTE RE. Consequently, the Court finds that the creditor vote does not change the nature of, or substantially impair, the rights of the parties under the Odyssey Treaties.

b

The Impairment was Foreseeable

It is long settled that "one whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." Energy Reserves, 459 U.S. at 411, 103 S. Ct. at 704. It follows, therefore, that the second step in analyzing the extent of the impairment on the Odyssey Treaties is a determination of whether previous regulation made the impairment foreseeable and affected the parties' reasonable expectations. See Janklow, 300 F.3d at 857. A key factor in determining the parties' expectations is "'whether the industry, into which the complaining party has entered, has been regulated in the past.'" Id. at 854 (quoting Energy Reserves, 459 U.S. at 411, 103 S. Ct. at 704 (explaining that if contractual rights are already subjected to regulation, or the parties are operating in a heavily regulated industry, then further regulation is foreseeable)). Indeed, a party's expectation of future regulation is important in determining whether contractual rights are substantially impaired because parties bargain for contractual terms based on those expectations; if those expectations are fulfilled, the Court will not relieve parties of their obligations. See, e.g., Energy Reserves, 459 U.S. at 411, 103 S. Ct. at 704; Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 435, 54 S. Ct. 231, 239 (1934) (affirming that a party's expectations are necessarily limited by "existing laws," which are "read into contracts in order to fix obligations as between the parties").

Here, Bermuda law provides a point of reference to determine the parties' expectations because, at the time the Odyssey Treaties were negotiated and finalized, GTE RE was domiciled

in Bermuda and had all the powers granted to a Bermuda corporation under the Bermuda Companies Act. See Blaisdell, 290 U.S. at 429-430, 54 S. Ct. at 237 (noting that it is "the laws which subsist at the time and place of the making of a contract, and where it is to be performed," that "enter into and form a part of it," for purposes of assessing expectations); see also Romein, 503 U.S. at 189, 112 S. Ct. at 1111 (explaining that Contract Clause analysis requires an assessment of the "laws in existence when [the contract] was made"). Accordingly, looking to Bermuda law, § 2 of the Bermuda Companies (Arrangements and Reconstructions) Act 1975 (1975 Act)[19] provides:

> "(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them, the Court may, on the application in a summary way

extinguishment, and it follows therefore, that the Odyssey Insureds' "individual expectations of immunity from future statutory change" are similarly unwarranted under Rhode Island. See Retired Adjunct Professors, 690 A.2d at 1347.

Moreover, the fact that Rhode Island's pre-existing regulations do not directly address the particular subject matter of the Restructuring Act is of no moment to the Court. It is well settled that to be within a party's reasonable expectations, the new regulation need not be precisely the same as previous regulations. See Energy Reserves, 459 U.S. at 413-14, 103 S. Ct. at 706. Rather, the Supreme Court has found it sufficient that the state's supervision of the industry "was extensive and intrusive."[23] Id.; see also Liberty Mut. Ins. Co. v. Whitehouse, 868 F. Supp. 425, 432 (D.R.I. 1994) (rejecting challenger's objection to a legislative amendment—that lack of precedent made changes unforeseeable—where state regulation of the field was pervasive and periodic).

Consequently, in light of Bermuda's legal and legislative framework, the Court finds that the actions taken by the State under the Restructuring Act were reasonably foreseeable. Moreover, given the highly regulated nature of the commercial insurance industry, the Court finds that the contractual alterations and modifications authorized by the Restructuring Act and Commutation Plan should have been within the reasonable expectations of the parties. For all of the reasons set forth herein, the Court finds that the Restructuring Act and Commutation Plan do not substantially impair the Odyssey Insureds' contractual rights.

[23] In Blue Cross/Blue Shield v. State of R.I. Dep't of Bus. Regulation, No. 04-5769, 2005 WL 1530449, at *8 (R.I. Super. Ct. June 23, 2005), this Court similarly held that the lack of existing specific regulations did not preclude a finding that the industry as a whole was heavily regulated.

2

Legitimate Public Purpose

Assuming, arguendo, that the Court was to find that the Restructuring Act and Commutation Plan substantially impair the parties' contract rights, that alone may be insufficient to amount to a Contract Clause violation. See Retired Adjunct Professors, 690 A.2d at 1345 n.2 (affirming that a finding of substantial impairment does not necessarily amount to Contract Clause violation). Rather, a statute will be deemed constitutional, despite any substantial

legitimate police power"). Indeed, "[t]he requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." Energy Reserves, 459 U.S. at 412, 103 S. Ct. at 705.

It is against this background that the Court recognizes the importance of allowing states the freedom to legislate on social and economic matters of importance to their citizens and to modify the law to meet changing needs and conditions. See Lefrancois v. State of R.I.

already highly regulated insurance industry, resulting in timely payments to creditors, allowing businesses to change their business model when they deem necessary, and to do so in an expeditious and fair way." See Attorney General Mem. 2-3.

Likewise, the DBR asserts that the Restructuring Act: (1) provides certainty of payment to creditors; (2) avoids a lengthy run-off and limits ongoing administrative costs, adverse claim development, and deteriorating reinsurance collections; (3) promotes fairness in result and prevents unfair preferences amongst creditors; (4) reduces the risk of loss of information interfering with claim processing; (5) allows for more efficient deployment of capital to non-run-off operations; and (6) enhances regulatory oversight over the run-off process.[24] See DBR Mem. 10-12. In turn, the DBR contends that the Restructuring Act not only protects creditors domiciled in Rhode Island from the harms of insurance companies in run-off, but also achieves Governor Almond's original objective of making Rhode Island an attractive location for insurance companies—whether or not they are in run-off—and encouraging economic growth and increased investment in industry and jobs. Id.

Moreover, despite the Odyssey Insureds' best efforts, the Court is not persuaded that the Restructuring Act was intended to advance only one party's private interests. See Blue Cross/Blue Shield, 2005 WL 1530449, at *8 (stating that the function of the public-purpose analysis is to ensure that the State is not merely advancing one contractual party's private interests). Rather, it is clear to the Court that the Restructuring Act is generally directed at

[24] Notably, the Restructuring Act protects several of GTE RE's current creditors, domiciled in Rhode Island, from the risks and harmful effects of run-off. The record indicates that Constellation Reinsurance Co., Factory Mutual Insurance Company, Metropolitan Group Property and Casualty Insurance Company, and Stonewall Insurance Company are all located in Rhode Island.

and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's adoption].'" Energy Reserves, 459 U.S. at 412, 103 S. Ct. at 705 (quoting United States Trust, 431 U.S. at 22, 97 S. Ct. at 1518). In other words, even if the Restructuring Act was found to substantially impair a contractual relationship, this Court may nevertheless uphold it, upon concluding that the statute was reasonable and necessary in light of the legislature's legitimate public purpose. See United States Trust, 431 U.S. at 25, 97 S. Ct. at 1519.

Generally, where the affected contract is a private one, "[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."[25] Id. at 22-23, 97 S. Ct. at 1518; see also Mercado-Boneta, 125 F.3d at 16 (stating that "[i]f the state has . . . altered none of its own financial obligations, then the legislative decisions deserve significant deference because the state is essentially acting not according to its economic interests, but pursuant to its police powers"). Therefore, the Court's role when reviewing whether a statute is necessary, is simply to ensure that the State has not "impose[d] a drastic impairment" despite evidence of a more moderate and equally as effective alternative. United States Trust, 431 U.S. at 31, 97 S. Ct. at 1522. Similarly, when reviewing a statute for reasonableness, this Court is directed to ensure that the statute is "reasonable in light of the surrounding circumstances." Id.

[25] Despite the Odyssey Insureds' assertions that the Restructuring Act should be subject to more rigorous judicial review because the fees owed to the State provide it with a direct pecuniary interest, the Court does not believe the collection of those fees is analogous to instances in which a state has enacted legislation in order to alter its own contractual obligations. Rather, the Court finds that the $125,000 fee is necessary to assist the State in administering the provisions of the Restructuring Act, and is insufficient to trigger heightened scrutiny by this Court. See § 27-14.5-5(a) (providing that "the Applicant shall pay a fee to the department in the amount of . . . $125,000 or any lesser amount that the commissioner shall deem adequate for appropriate and thorough review of the application") (emphasis added).

Moreover, the Restructuring Act is not a drastic measure, as it provides sufficient safeguards to protect the parties' rights and interests.[26] As explained by the DBR and GTE RE's experts: (1) the DBR must review and approve any proposed commutation plan before it can be submitted to the Court; (2) the commutation process is governed by a dispute resolution provision which incorporates the review standards of the Federal Arbitration Act and protects against instances of partiality; (3) the Restructuring Act requires that majorities of voting creditors and supermajorities of voting creditors by value approve a proposed commutation plan;

statute does not prescribe a rule limited in effect to contractual obligations or remedies, but instead imposes a generally applicable rule of conduct designed to advance a broad societal interest). There is simply no evidence before this Court of either a less drastic, but equally as effective alternative, or that the Restructuring Act is unreasonable in light the State's economic condition and the issues plaguing the commercial insurance industry. Therefore, for the reasons set forth herein, the Court finds that the Restructuring Act is a reasonable and necessary means by which to address a legitimate public purpose.

B

Due Process

In addition to violating the Contract Clause, the Odyssey Insureds also allege that the Restructuring Act violates the Due Process Clause of the United States and Rhode Island Constitutions.[27] Specifically, the Odyssey Insureds allege that the Restructuring Act amounts to an unconstitutional retroactive legislation for which there is no rational basis or legitimate government purpose.

Due process prohibits legislation that retroactively and unreasonably impairs substantive rights.

(emphasizing that retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions). To comport with the requirements of due process, a statute may not retroactively abrogate a property interest unless that action is, at a minimum, justified by a legitimate legislative purpose furthered by rational means. See Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730, 104 S. Ct. 2709, 2718 (1984).

It is well settled, however, that "[e]conomic or social welfare legislation carries a presumption of validity and will be upheld against substantive due process challenges so long as the law bears rational relation to legitimate governmental objectives." Hargreaves v. Reis, 977 F. Supp. 123, 129 (D.R.I. 1997) (citing U.S. v. Carolene Prods. Co., 304 U.S. 144, 58 S. Ct. 778 (1938)); see also Metropolitan Prop. & Cas. Ins. Co. v. Rhode Island Insurer's Insolvency Fund, 811 F. Supp. 54, 57 (D.R.I. 1993) (explaining that economic legislation that does not implicate a party's fundamental rights is unconstitutional under due process clause only if it is arbitrary, discriminatory, or demonstrably irrelevant to a policy the legislature is free to adopt). Therefore, a party challenging a legislative enactment has a heavy burden to rebut the presumption that a statute is constitutional and to establish that the legislature has acted in an arbitrary and irrational manner. See Liberty Mut., 868 F. Supp. at 434 (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15, 96 S. Ct. 2882, 2892 (1976)).

Moreover, our Supreme Court has explained that "[a]lthough a statute has retroactive effect that implicates property rights, it does not necessarily follow that the statute is unconstitutional." Brown, 659 A.2d at 103; see also Brennan 529 A.2d at 640-41. Rather, the court must next examine whether the purpose of a retroactive statute is such that, on balance, it

outweighs the unfairness of retroactivity. See Lawrence v. Anheuser-Busch, Inc., 523 A.2d 864, 870 (R.I. 1987); see also Raymond v. Jenard, 120 R.I. 634, 639, 390 A.2d 358, 360 (1978).

Accordingly, the Court must first determine whether the Restructuring Act is indeed retroactive in nature. A statute is unconstitutionally retroactive "[o]nly when the adverse effects of the statute are activated by events that occurred before the effective date of its enactment." Rhode Island Insurers' Insolvency Fund v. Leviton Mfg. Co., Inc., 716 A.2d 730, 735 (R.I. 1998) (citing Brown, 659 A.2d at 102). In other words, the Court must determine whether the conduct that triggers the Restructuring Act's application to the Odyssey Treaties occurred before or after the law's effective date. See id.; see also Landgraf, 511 U.S. at 269-70, 114 S. Ct. at 1499 (stating that when determining whether a statute is retroactive, the Court must consider "whether the [statute] attaches new legal consequences to events completed before its enactment"). In this case, the provisions of the Restructuring Act were triggered in June 2010, eight years after its enactment. As a result, the statute's application is prospective even though it alters the provisions of a previously existing contract. See McAndrews v. Fleet Bank of Mass., N.A., 989 F.2d 13, 16 (1st Cir. 1993) (holding that a statute was not retroactive, despite modifying the parties' contractual rights under preexisting contracts, where the conduct triggering the statute's application occurred after the law's effective date).

Even if the Restructuring Act were interpreted as being a retroactive legislation, having already passed constitutional muster under the Contract Clause,[28] the statute would unquestionably survive a due process challenge. See Liberty Mut., 868 F. Supp. at 434 (D.R.I. 1994) (explaining that the standard applicable to a court's review of an economic legislation under due process is less exacting than under the Contract Clause); see also Mercado-Boneta,

[28] See supra Part IV.A.2-3.

125 F.3d at 13 (noting that the Contract Clause inquiry is more searching than the rational basis review employed in a due process challenge). Indeed, when determining whether there is a rational relationship between an economic statute

Clause, will the court examine whether the existing procedures are adequate. See Lee v. State,

during the commutation process, but also protects against an adjudicator's partiality. See §§ 3.6.8 & 3.6.11.

Lastly, the Odyssey Insureds seem to allege that applying the Restructuring Act to them would violate due process because they lack a sufficient connection to the State. The Odyssey Insureds rely on Phillips Petroleum Co. v. Shutts, to establish that due process prohibits a state from "abrogat[ing] the rights of parties beyond its borders having no relation to anything done or to be done within them." See 472 U.S. 797, 821-23, 105 S. Ct. 2965, 2979-80 (1985). Their reliance, however, is clearly misplaced. In Shutts, the Supreme Court held that Kansas courts could not apply Kansas law to disputes about natural gas royalty contracts because neither the parties nor the disputes had any connection to the State. Id. at 814-17. The Supreme Court stated, "for a State's substantive law to be selected in a constitutionally permissible manner, the State must have a significant contact or significant aggregation of contacts . . . such that choice of its law is neither arbitrary nor fundamentally unfair." Id. at 818. Here, however, the Court finds there to be sufficient connection with Rhode Island such that application of the Restructuring Act is not unfair. Although GTE RE was not domiciled in Rhode Island at the time the Odyssey Treaties were executed, GTE RE is now redomiciled in Rhode Island and entitled to invoke the laws and protections of this State. Further, as previously indicated, given the highly regulated nature of the commercial insurance industry, a legislative enactment, such as the Restructuring Act, should have been within the parties' reasonable expectations. Consequently, the Court is of the opinion that the application of the Restructuring Act—already determined to be a reasonable and necessary means of serving a legitimate public purpose—to the Odyssey Treaties is fair and would not amount to a due process violation.