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Playing the waiting game: Self-insurance under R.I.G.L. § 42-14.1-2 after the Rhode Island Supreme Court's decision in Peloquin v. Haven Health Center of Greenville, LLC

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Peloquin v. Haven Health Center of Greenville, LLC., arose out of the mistaken administration of a lethal dose of morphine to an elderly resident at Haven Health Center in 2006. Haven Health was insured by Columbia Casualty with coverage for professional liability of $1 million per claim and $3 million in the aggregate. However, the policy also contained a self-insured retention endorsement requiring Haven Health to pay the first $2 million of all costs and damages. In 2007, Haven Health, and other related entities, filed for bankruptcy and the plaintiff substituted Columbia Casualty as a party. Ultimately the plaintiff sought partial summary judgment against Columbia arguing that the self-insured retention endorsement was void as a matter of public policy. Columbia also moved for summary judgment. The Superior Court denied the plaintiff's motion for summary judgment and granted Columbia's motion. The plaintiff appealed.

On appeal the plaintiff argued that the self-insured retention endorsement was void as a matter of public policy. Rather than addressing the plaintiff's public policy arguments the Supreme Court looked at the language of R.I. Gen. Laws § 42-14.1-2[1] to determine whether self-insured retentions [SIRs] are permitted un-

[1] R.I. Gen. Laws § 42-14.1-2 provides:

> The director of business regulation shall promulgate rules and regulations requiring all licensed medical and dental professional and all licensed health care providers to be covered by professional liability insurance insuring the practitioner for claims of bodily injury or death arising out of malpractice, professional error, or mistake. The director of the department of business regulation is hereby authorized to promulgate regulations establishing the minimum insurance coverage limits which shall be required, provided however that such limits shall not be less than one hundred thousand dollars ($100,000) for claims arising out of the same professional service and three hundred thousand dollars ($300,000) in the aggregate. The director of the department of business regulation is further authorized to establish rules and regulations allowing persons or entities with sufficient financial resources to be self-insurers.

der Rhode Island law. The Court concluded, based on its plain meaning that the statute merely authorized DBR to issue regulations allowing health care providers, with sufficient financial resources, to self-insure, but § 42-14.1-2 does not permit self-insurance in the absence of DBR regulations. The Supreme Court held that:

> unless and until the DBR promulgates regulations that expressly make provision for self-insurance by healthcare providers, by its plain language, the final sentence of § 42-14.1-2(a) does not permit the SIR endorsement that appears in the Columbia policy.

In light of this holding, the Court concluded that the plaintiff could recover from Columbia for the $100,000 minimum "per claim" coverage required under R.I. Gen. Laws § 42-14.1-2(a), plus interest and costs.

While the Supreme Court's decision has left healthcare self-insurers in limbo, DBR is currently developing regulations to permit self-insurance under R.I. Gen. Laws § 42-14.1-2(a) to rectify the situation. While the substance of the DBR regulations is not yet known, elements of the Supreme Court's decision in *Peloquin* in combination with other DBR regulations relating to self-insurance help provide some insight into what can be expected.

Even though the Supreme Court clearly stated that it did not need to address the public policy arguments against self-insurance, it made a number of comments on the issue in *Peloquin*. In particular, the Supreme Court noted, and implicitly agreed with, the statement by some authorities deeming self-insurance the "antithesis of insurance" (because the risk remains with the insured). The Supreme Court stated:

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> we agree with the general proposition that '[t]o meet the conceptual definition of self-insurance, an entity would have to engage in the same sorts of underwriting procedures that insurance companies employ.'

In light of these comments it is very likely that some form of internal risk assessment and analysis of potential losses will be required before permission to self-insure will be granted. This supposition is bolstered by an analysis of the DBR regulations relating to self-insurance in the Workers' Compensation arena. The DBR currently requires, as part of an application for a self-insurance certificate for Workers' Compensation, that the applicant complete a feasibility study or that a feasibility study be conducted at the applicant's expense if one is not submitted voluntarily with the original application. In addition, the DBR has reporting requirements that include "Historical Claims Reports" that outline the open litigation and other legal claims for the previous five years.

An additional concern raised by the Supreme Court in *Peloquin*, and possibly one of the key motivating factors behind its decision, was the financial ability of Haven Health to act as a self-insurer; Haven Health filed for bankruptcy within a year and a half of the issuance of the Columbia policy. The Court also noted that other statutes providing for self-insurance specifically include requirements that the self-insurer be found to have the financial wherewithal necessary to assume the risk of self-insurance. Indeed, the DBR's regulations for self-insurance in relation to Workers' Compensation require that self-insurers make regular reports on their financial status. In addition, DBR requires that self-insurers meet minimum asset thresholds, imposes requirements for excess insurance, and can require "aggregate

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(stop loss) insurance" in certain instances. The DBR regulations also require that self-insurers maintain security, in an acceptable form, in an amount that is calculated based on the amount of self-insurance involved. [2]

The decision in *Peloquin* has undoubtedly caused controversy by invalidating healthcare self-insurance in the absence of DBR regulations. While *Peloquin* leaves self-insuring healthcare providers and their excess carriers in an uncomfortable limbo, we expect that the DBR will issue regulations in the near future. Although these regulations may increase the burdens on self-insurers, they will provide protection against overreaching and ultimately protect healthcare providers.

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[2] The DBR regulations relating to Workers' Compensation provide for the following additional security:

Security Adjustment Based on Self Insured Retention (SIR) Level of Specific Excess Policy

SIR Range	Additional Security Required
Less than $500,000	None
$500,000 - $749,999	2 times (SIR - $350,000)
$750,000 - $1,000,000.00	3 times (SIR - $350,000)
$1,000,000.00 or more	4 times (SIR - $350,000)

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