IN THE SUPREME COURT OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

BANK OF SAIPAN, as Executor of the Estate of LARRY LEE HILLBLOM,

Petitioner

v.

SUPERIOR COURT

OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,

Respondent

v.

ATTORNEYS' LIABILITY ASSURANCE SOCIETY, INC.,

Real Party in Interest.

Original Action No. 2000-002

Civil Action No. 98-0973

OPINION AND ORDER

Cite as: *Bank of Saipan v. Attorney's Liability Assurance Society, Inc.*, 2001 MP *5*

Submitted on the Briefs October 5, 2000

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BEFORE: DEMAPAN, Chief Justice, MANGLONA, Associate Justice and LAMORENA, Justice *Pro Tempore*

PER CURIAM:

¶1 We are asked to issue a writ of mandamus against the Commonwealth Superior Court pursuant to Com. R. App. P. 21 and 1 CMC § 3102. The Bank of Saipan has petitioned this Court for a Writ of Mandamus directing the Superior Court to vacate its order of July 6, 2000 dismissing Attorneys' Liability Assurance Society, Inc., A Risk Retention Group ("ALAS") as a defendant in the underlying action. *Bank of Saipan v. Carlsmith,* Civ. No. 98-0973 (N.M.I. Super. Ct. July 6, 2000) (Order Granting ALAS's Motion to Dismiss Pursuant to Rule 12(b)) ("Order"). Petitioner further asks this Court to direct the Superior Court to exercise subject matter jurisdiction and personal jurisdiction over ALAS by applying the CNMI Direct Action Statute. We have jurisdiction to issue extraordinary writs pursuant to our general supervisory powers. N.M.I. Const. art. IV, § 3 and 1 CMC § 3102(b). For the reasons discussed below, we **GRANT** the writ of mandamus.

ISSUES PRESENTED AND STANDARDS OF REVIEW

¶2 The issue is whether there are sufficient grounds to warrant writ relief. This issue turns on whether the CNMI courts may properly exercise both subject matter jurisdiction and personal jurisdiction over ALAS.

¶3 The standard of review for a Writ of Mandamus is discussed *infra.* The issue of jurisdiction is a question of law subject to *de novo* review. *Office of the Attorney Gen. v. Rivera,* 3 N.M.I. 436, 441 (1993).

FACTUAL AND PROCEDURAL BACKGROUND

¶4 In 1998, the Bank of Saipan, Executor of the Estate of Larry L. Hillblom ("Hillblom Estate") commenced a legal malpractice action against the Executor's prior counsel, Carlsmith Ball ("Carlsmith") for claims arising out of representation of the Hillblom Estate. ALAS is Carlsmith's professional liability insurer with offices in Chicago, Illinois.

¶5 On January 22, 1999, the Superior Court appointed Diego Mendiola as Special Administrator in the probate of the Hillblom Estate to act in the place of the Executor of the Hillblom Estate, for limited purposes.

¶6 In December 1999, the Special Administrator filed a First Amended Complaint for damages caused by defendants' alleged legal malpractice. On April 4, 2000, the Superior Court granted the motion which added ALAS as a defendant in place of fictitious Roe 1. On May 15, 2000, pursuant to Com. R. Civ. P. 12(b), ALAS timely filed and served a motion to dismiss asserting both lack of subject matter jurisdiction and personal jurisdiction. On June 7, 2000, the motion was heard by the Superior Court.

¶7 On July 6, 2000, the court issued its order dismissing ALAS for lack of subject matter jurisdiction. The Superior Court held that the arbitration clause found in the insurance policy issued to Carlsmith by ALAS divested the court of jurisdiction over ALAS, notwithstanding the application of 4 CMC § 7502(e), the CNMI Direct Action Statute. The Special Administrator timely brought this petition for writ of mandamus.

ANALYSIS

I. Writ Relief is Appropriate Because the CNMI Direct Action Statute Confers Jurisdiction Over ALAS in the Commonwealth

¶8 This Court has jurisdiction over extraordinary writs pursuant to its general supervisory powers. *Taimanao v. Superior Court,* 4 N.M.I. 94, 97 (1994); *Tenorio v. Superior Court,* 1 N.M.I. 1, 9-10 (1989).

¶9 This Court has adopted a five-part standard to govern the issuance of extraordinary writs. These guidelines are as follows:

(1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired.

(2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.

(3) The lower court's order is clearly erroneous as a matter of law.

(4) The lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules.

(5) The lower court's order raises new and important problems, or issues of law of first impression.

Tenorio v. Superior Court, 1 N.M.I. at 9-10.

¶10 In applying the guidelines to a particular case, there will not always be a bright-line distinction; and the guidelines themselves often raise questions as to degree. *Id.* at 10. Rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is applicable. *Mafnas v. Superior Court,* 1 N.M.I. 74, 78 (1990).[1] The decision whether to issue a writ "calls for a cumulative consideration of these factors." *Villacrusis v. Superior Court,* 3 N.M.I. 546, 550 (1993).

¶11 Petitioner states that the damage that will occur as a result of the dismissal order includes: extending the time the litigation continues, increasing costs, and creating potential loss of funds. Petitioner bears the burden of demonstrating that it lacks other adequate means for obtaining relief, and that it will be irreparably damaged or prejudiced on appeal. *Mafnas v. Superior Court,* 1 N.M.I. 74, 79 (1990). There is doubt as to whether petitioner has demonstrated the kind of injury that is necessary to justify mandamus relief in a traditional mandamus case.

¶12 While Petitioner might have an adequate remedy on appeal, whether taken as an interlocutory appeal or at the end of the case, the resulting delay will essentially deny Petitioner the remedies to which it is entitled.[2] A delay caused by appeal at the end of the case, or even a significant delay, will result in frustration of the Direct Action Statute in addition to the potential that Petitioner would proceed in two trials; one before the Superior Court and one before an arbitration tribunal in Illinois.

¶13 The third factor is whether the "lower court's order is clearly erroneous as a matter of law." *Tenorio,* 1 N.M.I. at 10. Where a Court is firmly convinced that the lower court has erred in deciding a question of law,

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[1] The final two factors, by definition do not coexist: "[T]he fourth contemplates a case presenting an oft-repeated error, and the fifth a case presenting a novel question. Where one of the two is present, the absence of the other is of little or no significance." *Nakatsukasa v. Superior Court,* Orig. No. 99-006 (N.M.I. Sup. Ct. Dec. 28, 1999) (Opinion at 3, n. 2).

[2] The Court finds it unusual that the Superior Court has limited discovery to only interrogatories and production of documents in a case of this magnitude. In light of the fact that this case has been ongoing since 1995, discovery should be completed and a trial date scheduled as expeditiously as possible.

the ruling may be held to be clearly erroneous as a matter of law. *In re Cement Antitrust Litig*., 688 F.2d 1297, 1307 (9th Cir. 1982). If a trial court were to adopt an interpretation of a statute that squarely contradicted the literal terms and clear intent of the statute, it could readily be said that the interpretation is clearly erroneous. But when a court is faced with two possible interpretations of a statute that has not been construed by an appellate court, it would be difficult in one sense to characterize either interpretation as "clearly erroneous." *Id.* at 1305. However, if the reviewing court were to review the lower court's interpretation and reject it, that particular interpretation could at that point be said to be "clearly" erroneous. *Id.* at 1305.

Under Rule 52(a) of the Federal Rules of Civil Procedure:

> [a] finding [of fact] is "clearly erroneous" when although there is evidence to support [the district court's finding], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948).

¶14 The "firm conviction" test provides an approach for determining when a court's interpretation of a statute falls under the third *Tenorio* criterion. *Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1997). In line with the "firm conviction" test for determining whether findings of fact are "clearly erroneous," the Ninth Circuit has concluded that when an appellate court is firmly convinced that a district court has erred in deciding a question of law the appellate court may hold that the district court's ruling is "clearly erroneous" as a matter of law as that term is used in mandamus analysis. *See In re Cement Antitrust Litig.,* 688 F. 2d at 1306-1307.

¶15 A lower court's order does not need to be "clearly" erroneous in supervisory mandamus cases where the writ petition raises an important question of law of first impression, the answer to which would have a substantial impact on the administration of the lower courts. *Nakatsukasa v. Superior Court*, Orig. No. 99-006 (N.M.I. Sup. Ct. Dec. 28, 1999) (Opinion at 3) (citing *In re Cement Antitrust Litig.*, 688 F.2d at 1307). In cases in which the U.S. Supreme Court has reviewed the exercise of supervisory authority by the appellate courts, it has not set forth any requirement that the order of the district court be "clearly erroneous" as a prerequisite to the granting of mandamus relief. *See In re Cement Antitrust Litig*., 688 F.2d at 1307. Because we find the lower court erred as a matter of law relying on the insurance policy arbitration clause to deny subject matter jurisdiction, we conclude that a writ must issue.

¶16 As for the fifth *Tenorio* factor, there has been little interpretation of the CNMI Direct Action Statute; resolution of the issue could have a substantial impact on the court as well as on the rights of the

Commonwealth residents. Thus the fifth *Tenorio* factor is satisfied in that this matter represents a question of first impression regarding the application of the Direct Action Statute and the relationship between it and arbitration and venue clauses in insurance contracts. This is a question of public policy of general importance to the Commonwealth.

A. Interpretation of the Statute

¶17 A basic principle of statutory construction is that language must be given its plain meaning. *Estate of Faisao v. Tenorio,* 4 N.M.I. 260, 265 (1995); *Commonwealth v. Hasinto,* 1 N.M.I. 377, 382 (1990). Statutory provisions are irreconcilable only where there is a positive repugnancy between them, or where they cannot mutually coexist. *Estate of Faisao,* 4 N.M.I. at 265.

¶18 Our Direct Action statute provides:

> On any policy of liability insurance the injured person or his or her heirs or representatives shall have a right of direct action against the insurer *within the terms and limits of the policy*, whether or not the policy of insured sued upon was written or delivered in the Commonwealth, and *whether or not the policy contains a provision forbidding direct action;* provided, that the cause of action arose in the Commonwealth. The action may be brought against the insurer alone, or against both the insured and the insurer.

4 CMC § 7502(e) (emphasis added).

¶19 The Superior Court emphasized the portion of the statute that states "within the terms and limits of the policy" to subject the Petitioner to arbitration. We disagree with the lower court's interpretation and find that the Direct Action Statute is clear. The insured person or a representative has a right of direct action against the insurer within the terms and limits of the policy, notwithstanding the language forbidding direct action. To give the Direct Action Statute force and effect, the phrase "whether or not the policy contains a provision forbidding the direct action" must be read broadly and supersede "terms and limits of the policy" where those terms have the effect, *directly or indirectly,* of precluding direct action. Any other result would render the statute a nullity since insurers would be free to word their way around the statute.

B. Public Policy Requires Upholding the Statute

¶20 A public policy may be based on either the constitution, statutes, rules or regulations, or "the need to protect some aspect of the public welfare." *Diamond Hotel, Co., Ltd. v. Matsunaga,* 4 N.M.I. 213, 224 (1995)(citations omitted). "Even where a contract provision does not by its terms squarely violate legislation, it may, nevertheless, be unenforceable if it contravenes a public policy behind such legislation."

Diamond Hotel, Co., Ltd., 4 N.M.I. at 224.

¶21 As for public policy, we need only look as far as the direct action statute itself. The Senate Report[3] specifically states that the Legislature wanted to regulate and control foreign insurers not registered in the CNMI. The Direct Action statute furthers the policy goals by attempting to provide convenient, direct relief for injured CNMI citizens. It is in the interest of the Commonwealth, and within the power of this Court, to uphold and interpret the legislative enactment to give force and effect to its underlying policy to protect the citizens of the Commonwealth. The Direct Action statute is the controlling law in the CNMI and confers more than a procedural right; it creates a right of action against the insurer in favor of any third party, not a party to the contract, for whose ultimate benefit the contract of insurance may be said to have been procured by the insured.

¶22 The statute plainly grants a right of direct action. It is the uniform custom and policy of the courts to give force and effect to every provision of an act where it is possible to do so. Thus, if either the terms of the statute as a whole or its legislative history disclose a clear intention on the part of the legislature, we must give effect to that intent, despite some ambiguity on the face of the particular subsection at issue. *Commonwealth v. Manglona*, Crim. No. 96-030 (N.M.I. Sup. Ct. Nov. 24, 1997) (Opinion).

¶23 "When interpreting a statute, a court's objective is to ascertain and give effect to the intent of the legislature." *See In re Estate of Rofag* 2 N.M.I. 18, 29 n. 10 (1991). In this case our duty is plain. The proper interpretation of the CNMI's Direct Action Statute and public policy requires reversal of the Superior Court on the issue of subject matter jurisdiction. The legislature clearly intends to grant and protect the rights of an injured party to recover from an insurer. We disagree with the lower court's and ALAS' contentions that any jurisdiction under the direct action statute may only be exercised within the "terms and limits of the policy." The insurer cannot insert language in a policy that would contravene the right of the injured party to bring a direct action as provided for in the act.

C. <u>The Lower Court's Order is Erroneous as a Matter of Law</u>

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[3] Standing Committee Report No. 3-260 (October 28, 1983) regarding Senate Bill 3-104 at page 2. S.B. No. 3-104 has become necessary due to the increasing number of insurance companies being established in the Commonwealth. Another matter of concern is the manner in which the Commonwealth might supervise outside insurance companies who have no established offices or agents in the Commonwealth, but continue to do insurance business with the Commonwealth. In the absence of any regulatory measures the Commonwealth is unable to benefit from such business activities or regulate them.

¶24 In finding no jurisdiction, the Superior Court relied on the Guam District Court's decision in *Heikkila v. Sphere Drake Ins. Underwriting Management, Ltd.*, 1997 A.M.C. 2975, 1997 WL 995625 (D. Guam 1997). As here, the same issue arose whether the Petitioner, a non party to the insurance policy, was bound by the policy's mandatory arbitration clause. The *Heikkila* court interprets Rule 12 (b)(1) as a procedural determination that if the arbitration clause was binding on the parties, then the court would be without jurisdiction. The court in *Heikkila* determined that a plaintiff proceeding under Guam's virtually identical direct action statute was bound by an arbitration provision contained in the underlying insurance policy.

¶25 As in *Heikkila*, the Superior Court concludes that the statutory language that parties "shall have a right of direct action against an insurer within the terms and limits of the policy," would bind the Petitioner, a third party to the policy, to the arbitration provision. However, *Heikkila* can be distinguished. The *Heikkila* case involves interpretation of a London Maritime Insurance Policy. The *Heikkila* court looked at an interstate choice of law analysis using the RESTATEMENT (SECOND) OF CONFLICT OF LAWS in addition to Federal Maritime Law [4] to determine what law applied to the policy. Such an analysis is of no use here. Although the decisions of another jurisdiction are helpful, this Court is not bound by a decision of the U.S. District Court in Guam in interpreting a CNMI statute.

¶26 *Heikkila* can be distinguished further as no citizen from Guam was a party to or beneficiary of the contract. Guam's interest in enforcing the obligations of the foreign corporation to the Plaintiff, a Missouri citizen, based on an insurance contract with a defunct CNMI corporation based on an accident far from Guam's territorial waters was remote unlike the factual situation here.

¶27 The court must decide if a plaintiff, a non-party to the insurance policy is bound by the policy's mandatory arbitration clause. In the absence of written or local customary law, we look to the common law as expressed in the Restatements. 7 CMC § 3401; *Ada v. Sadhwani's, Inc.*, 3 N.M.I. 305, 308 (1992). In interpreting the policy before this Court, we are employing the rules of analysis as determined by the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

¶28 The contract between ALAS and Carlsmith contains both a choice of a law clause and a binding arbitration agreement. The choice of law provision in the policy provides: "the validity,

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[4] *Heikkila* quoted *Aqua-Marine Constructors, Inc. v. Banks*, 110 F. 3d 663 (9th Cir. 1997) where the Ninth Circuit set out a three part choice of law standard to be applied where the laws of more than one jurisdiction vie for application in a maritime contract case. The first standard was to determine whether federal maritime law preempts the matter, another standard inapplicable here.

construction and enforceability of this Policy shall be governed in all respects by the law of the State of Illinois." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 provides that a court, subject to constitutional restrictions, will follow a statutory directive of its own state in determining the applicable law. Where there is no directive, as in the CNMI, some of the factors relevant to the choice of the applicable rule of law include the relevant policies of the forum, the protection of the justified expectations of the parties, and the relevant policies and interests of other interested states. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).[5]

¶29 The contracting parties chose Illinois as the governing law. Parties generally have the power to determine the terms of their contractual engagement. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). However, here the Petitioner, as a third party, did not explicitly agree to the contract's choice of law terms.

¶30 The state of Illinois has virtually no relationship to the parties. The CNMI has a greater interest than the State of Illinois, since the CNMI has a significant interest in and relation to the policy. The claims under the contract arise here, the policy is intended to compensate victims here, the witnesses are here, this is the situs of the Estate for whom Carlsmith was counsel, and the matter is already before the courts of the CNMI. Likewise, Vermont has little or no relationship to this proceeding, being merely the place of incorporation of the insurer. Hawaii has a lesser relationship since Carlsmith, located in Hawaii, selected Illinois as its choice of law in the insurance contract and did nothing in Hawaii with respect to the policy except accept it. ALAS has offices in Chicago, Illinois, but is a risk retention group incorporated in Vermont. The events complained of transpired in the CNMI and in part in Hawaii where Carlsmith is based. While ALAS has a Chicago office, it is no longer an Illinois corporation.

¶31 Petitioner also asserts that the Court has subject matter jurisdiction over ALAS pursuant to 4 CMC

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[5] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 provides:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
>
> > (A) the needs of the interstate and international systems,
> > (B) the relevant policies of the forum,
> > (C) the relevant policies of other interested states and the relative interests of those states in the determination of a particular issue,
> > (D) protection of justified expectations
> > (E) the basic policies underlying the particular field of law,
> > (F) certainty, predictability and uniformity of result, and
> > (G) ease in the determination and application of the law to be applied.

§ 7502(e), quoted above. ALAS contends that the policy divested the Court of subject matter jurisdiction. That section states, in part under the title "Arbitration":

> (a) All disputes which may arise between one or more ASSUREDS (including persons claiming benefits under this Policy regardless of whether the Company agrees they are ASSUREDS) and the Company (including its directors, officers, employees or agents) out of or in relation to this Policy (including disputes as to its validity, construction, or enforceability), or for its breach, shall be finally settled by arbitration held according to the Commercial Arbitration Rules of the American Arbitration Association, by which the ASSUREDS and the Company agree to be bound.
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> * * *
>
> (c) The arbitration proceedings shall take place in Chicago, Illinois, provided that the arbitration panel may, for the convenience of the parties and without changing the situs of the arbitration proceeding, take evidence outside of Chicago at any place or places within or without the State of Illinois.

¶32 A fundamental principle of contract law is that non parties are not bound to agreements to which they did not consent. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 (1979) (requiring that formation of contract consist of a bargain where there is manifestation of mutual assent and consideration). In the context of arbitration agreements, Illinois case law, the chosen state law found in the policy, recognizes that a nonparty to an arbitration agreement cannot be compelled to arbitrate. *See Yandell v. Church Mutual Ins. Co.,* 654 N.E.2d 188 (Ill. Ct. App. 1995) (ruling that a person who is not a signatory to an insurance policy is not a party to it and may not be bound to the arbitration clause provided in the policy); and *City of Peru v. Illinois Power Co.,* 630 N.E.2d 454 (Ill. Ct. App. 1994) (holding that third party beneficiaries are not parties to an arbitration agreement and cannot be compelled to arbitrate).

¶33 In applying either § 17 of the Restatement of Illinois law, it logically follows that the Hillblom Estate, a nonparty to the arbitration agreement, cannot be compelled to pursue its claim against ALAS through arbitration. In fact, the language of the policy delineates the limits of the arbitration requirement by providing a detailed definition of "ASSUREDS," which excludes any reference to an injured party by declaring that "[al]ll disputes which may arise between one or more ASSUREDS (including persons claiming benefits under this policy regardless of whether the company agrees they are ASSUREDS), and the Company" involving the policy would be settled by arbitration. The policy furnishes no basis upon which the arbitration may be enforced against the nonparty Hillblom Estate. It may very well be that such as expansive arbitration provision could not have been written into the policy given that Illinois disallows the enforcement of arbitration clauses against non-parties, including third party beneficiaries. *See Illinois*

Power, Co., 630 N.E.2d at 454.

¶34 But more important policy considerations are at stake. Under ALAS' and the trial court's logic, every person who seeks recovery from a tortfeasor and from the tortfeasor's insurance company could be forced into arbitration. Such a consequence would fly in the face of the Commonwealth's Direct Action Statute which confers a right of an injured party to name the insurance company of the tortfeasor in its action, even if the policy contains language forbidding direct actions. The trial court misidentified the scope of the arbitration agreement by erroneously concluding that the agreement deprives it of jurisdiction over the action in light of the Direct Action Statute.

¶35 Arbitration in other jurisdictions is largely governed by statute and the Commonwealth has no comparable statutory scheme. The Court then determines whether the application of Illinois' arbitration law would contravene a fundamental policy of the Commonwealth. Our review of the law[6] of Illinois and of the other potentially involved states causes us to conclude that under the applicable law of the contract, the arbitration provision is *not* enforceable to Petitioner. While the insured, Carlsmith, may be compelled to arbitrate disputes with its insurer in Illinois, an arbitration provision cannot be enforced against a third party to the contract who seeks to claim under it. This is in agreement with the common law. Therefore, the law of the CNMI does *not* recognize mandatory arbitration agreements as binding on third parties where, as here, the contract provision is neither fair nor reasonable and is void against Commonwealth public policy.

II Writ of Relief is Also Appropriate Because The Superior Court Has Personal Jurisdiction Over ALAS

¶36 There are two requirements for the exercise of personal jurisdiction over a defendant: there must be an applicable rule or statute conferring jurisdiction and, the assertion of jurisdiction must accord with constitutional principles of due process. *Data Disc., Inc. v. Systems Tech. Assoc., Inc.,* 557 F.2d 1280, 1286 (9th Cir. 1977).

A. There is a Statutory Basis for Jurisdiction.

¶37 The Commonwealth's long arm statute provides that any person, whether or not a citizen or resident

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[6] *Brooks v. Cigna Prop. & Cas. Co.,*700 N.E.2d 1052, 1054-1055 (Illinois 1998) (a third party beneficiary cannot be compelled to arbitrate); Title 12 § 5652 Vermont Stat. Ann. (no agreement to arbitrate enforceable unless signed by parties); *Brown v. KFC Nat'l Management Co.,* 921 P.2d 146, 165 (Haw. 1996) (party cannot be required to arbitrate any dispute he has not agreed to so submit).

of the Commonwealth, who in person or through an agent does any of the acts listed therein, submits such person to the jurisdiction of the courts of the Commonwealth as to any cause of action arising from any of the acts listed in the statute 7 CMC § 1102. The Commonwealth's long arm statute extends the court's jurisdiction to the extent permitted by the U.S. Constitution. *Id.* Included among the listed acts are: the transaction of any business within the Commonwealth, contracting to supply services within the Commonwealth, *contracting to insure any risk or person in the Commonwealth*, and performing any act within or without the Commonwealth from which a cause of action arises and for which it would not be unreasonable, unfair or unjust to hold the person doing the act legally responsible in a court of the Commonwealth.

¶38 Jurisdiction pursuant to that section is to be coextensive with the minimum standards of due process as determined in the federal courts. 7 CMC § 1102.[7] *See Greenspun v. Del E. Webb Corp.*, 634 F. 2d 1204, 1207 (9th Cir. 1980) (Even where the state statute purports to confer personal jurisdiction, such jurisdiction will not lie unless it is consistent with the demands of due process.)

B. Due Process Is Not Offended

¶39 Whether a forum may exercise jurisdiction depends on its long arm statute and on the Due Process Clause of the United States Constitution. The Commonwealth's long-arm statute, 7 CMC § 1101, *et seq.*, subjects both residents and nonresidents to the Court's jurisdiction to the fullest extent allowable under the due process standards of the U.S. Constitution. *Montecillo v. Di-All Chemical Co.*, App. No. 79-020 (N.M.I. Sup. Ct. Nov. 23, 1998) (Opinion at 3). The Due Process Clause of the Fourteenth Amendment to the United States Constitution imposes limitations on the power of a court to assert personal jurisdiction over a non-resident defendant. *Montecillo*, at 3.

¶40 Due process requirements are satisfied when in personam jurisdiction is asserted over the non-resident defendant who possesses minimum contacts with the forum such that the exercise of personal jurisdiction does not "offend traditional notions of fair play and substantial justice." *Montecillo*, at 3 (citing

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[7] In addition, the provisions of 4 CMC § 7305, the Uniform Unauthorized Insurers Act, at subpart (e)(1), provides that the transacting of business in the Commonwealth by a foreign insurer without a certificate of authority and the issuance or delivery of a policy to a citizen of the Commonwealth or a corporation authorized to do business therein is equivalent to appointment by the insurer of the Commissioner of Insurance as the insurer's true and lawful attorney upon whom process may be served and signifies the insurer's agreement that any such service of process is of the same legal force and validity as personal service of process in the Commonwealth. Therefore, personal service upon the corporation in the Commonwealth gives the Commonwealth courts personal jurisdiction.

International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L.Ed. 95, 100 (1945)). Whether a CNMI court has personal jurisdiction over ALAS thus depends on contacts between ALAS and the CNMI for purposes of general or specific jurisdiction.

1. General in Personam Jurisdiction Over ALAS

¶41 ALAS did not subject itself to the general jurisdiction of the Commonwealth courts. General in personam jurisdiction may be invoked by demonstrating that the defendant engaged in contacts with the forum state of a "continuous and systematic" nature. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16, 104 S. Ct.1868, 80 L. Ed.2d (1984). The standard for establishing general jurisdiction is "fairly high," *Brand v. Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986). If ALAS activities have been "systematic" or "continuous and systematic" then its relationship to the forum would have supported jurisdiction regardless of whether the cause of action was related to its activities in the CNMI. The Petitioner has not convinced the Court to find the continuous and systematic contacts necessary to support general in personam jurisdiction.

2. Petitioner Can Establish Specific Jurisdiction

¶42 Even though there is no general jurisdiction over ALAS, CNMI courts may still exercise personal jurisdiction if the case arises out of certain forum-related acts. Alternatively, specific in personam jurisdiction can be established by showing: (1) that the defendant has purposely established sufficient contacts with the forum, such that it can reasonably expect to be haled in to court in the forum; (2) the claim arises out of defendants' forum-related contacts; and (3) the exercise of jurisdiction is otherwise reasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-78, 105 S. Ct. 2174, 2183, 85 L. Ed.2d 528, 539 (1985).

In addition, the contacts must be based upon an act or acts of the defendant purposefully directed toward the forum jurisdiction. *Montecillo*, at 3 (citing *Burger King*, 471 U.S. at 474).

¶43 The due process requirement is met if a defendant has "fair warning that a particular activity may subject [them] to the jurisdiction of a sovereign," *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S. Ct. 2569, 2587, 53 L. Ed.2d 683 (1977) (Stephens, J., concurring); i.e., that it is foreseeable that the defendant may be haled into court in the forum. As noted, in *Burger King*, the "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S. Ct. 1473, 1478, 79 L. Ed. 2d 790 (1984); *Burger King*, 471 U.S. at 472, and the litigation results from alleged injuries that "arise out of or relate to" those activities.

Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. at 414.

¶44 While ALAS urges that it attempted to shield itself by limiting those jurisdictions in which it would be held accountable to Illinois, it was well aware of the possibility of being haled into court in a state that has a direct action statute. *First Guar. Bank of Hammond v. Attorneys Liab. Assurance Soc'y, Ltd.*, 515 So.2d 1080 (La. 1987). ALAS, having extended its insurance to risks in the CNMI, may not claim ignorance of the law.

¶45 ALAS has insured risks in the Commonwealth of the Northern Mariana Islands for twelve years. At present, it insures at least five attorneys domiciled in the Commonwealth. The policy of insurance which Carlsmith produced in discovery for the period of April 1, 1997 to March 31, 1998, reflects that it is a renewal and specifically lists the names of: David Olson, David Nevitt, John D. Osborne, Marcia Schultz, and John Biehl, all of whom (except Olson) are practicing in the CNMI.

¶46 ALAS has more than sufficient contact with the CNMI to justify jurisdiction over it in the CNMI. ALAS is not an admitted insurer and has not obtained a certificate of authority from the Commissioner of Insurance. 4 CMC § 7305(e)(1). Accordingly, ALAS has consented to suit and jurisdiction in the CNMI. It has delivered a policy to a foreign entity, Carlsmith, a licensed business resident in the CNMI, insuring risks and persons in the Commonwealth. ALAS has purposefully directed activities at residents of the forum.

¶47 The party who will stand the financial burden of much of any verdict in this matter is ALAS and the claim against ALAS arises out of its insurance activities and its connection to the Commonwealth.

¶48 Finally, ALAS has availed itself of the protection of the laws and courts of the Commonwealth. Not only has ALAS created a connection to the CNMI via its policy of insurance protecting lawyers practicing here, it has engaged in retaining lawyers and defending its insureds in the courts of the CNMI. Carlsmith was sued in this jurisdiction in 1998, conducted a vigorous statute of limitations defense before this Court and has defended the underlying action ever since. Pursuant to its policy, ALAS is paying or must pay all costs, charges and expenses including reasonable attorneys' fees incurred by Carlsmith in connection with its defense. ALAS has approved and is paying for the participation of counsel admitted to practice before the bar of the Commonwealth and located on Saipan to defend its insured. In short, ALAS has availed itself of the protection of the laws and the courts of the Commonwealth.

¶49 The claim against ALAS arises out of the defendant's forum-related activities.[8] ALAS's liability is passive pursuant to the CNMI Direct Action Statute. This action arises out of risks for which ALAS may be liable on the policy it has issued to cover lawyers in the Commonwealth for whom it is providing defense costs. The claim arises by reason of ALAS having insured a risk within the Commonwealth taken in conjunction with the application of Commonwealth law.

¶50 The third factor for specific jurisdiction is reasonableness. For jurisdiction to be reasonable the Court must consider the defendant's forum-related contacts "in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice." *Burger King Corp.*, 472 U.S. at 476. The relationship between the defendant and the forum must be such that it is reasonable to require the corporation to defend the particular suit which is brought there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). The burden of demonstrating unreasonableness and requires the defendant to put on a compelling case. *Burger King,* 472 U.S. at 476-477.

¶51 The Ninth Circuit has identified seven relevant factors to be considered in assessing the reasonableness of asserting jurisdiction over a non resident defendant: (1) the extent of purposeful interjection into the forum state; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state or country; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 840 (9th Cir. 1986).

¶52 An analysis of these factors demonstrates that asserting jurisdiction over ALAS is reasonable. Not only has ALAS conducted activities which have created a nexus with the Commonwealth and created "continuing obligations" between themselves and residents of the forum to whom it has, at a minimum, an indemnification obligation, but there is a strong public policy justification for the Direct Action Statute in the Commonwealth.

¶53 The burden on the defendant is a hardship, but the hardship on transferring this ongoing litigation

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[8] The Ninth Circuit has set a "but for" test to interpret whether a plaintiff's injuries "arise out of" the defendant's contacts. *Doe v. American Natl. Red Cross*, 112 F.3d 1048, 1051-52 (9th Cir. 1997). However, the court acknowledged uncertainty regarding the continued validity of the "but for" test. *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F. 3d 267, 271-272 (9th Cir. 1995). The Supreme Court has not reached the issue of whether the "but for" test is appropriate. *Carnival Cruise Lines Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991).

to another jurisdiction would be a foreseeable greater burden on the parties. Modern communications and transportation have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-223, 78 S. Ct. 199, 201, 2 L. Ed.2d 223 (1957). Suits based on alleged losses here can more conveniently be tried in the Commonwealth where the witnesses would most likely be located and where claims for losses would presumably be investigated. Petitioner also, has an interest in completing the litigation in a single forum where it has already commenced its action and where many of the key witnesses are located. As noted in *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647, 70 S. Ct. 927, 929, 94 L. Ed. 1154 (1950), such factors have been given great weight in applying the doctrine of *forum non conveniens.*

¶54 In addition, the U.S. Supreme Court stated in *Osborn v. Ozlin*, 310 U.S. 53, 62, 60 S. Ct. 758, 761, 84 L. Ed. 1074 (1940), that a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though that action may have repercussions beyond state lines. It is thus wholly reasonable that insurers who seek to capitalize economically by insuring risks from a great distance, be called upon on occasion to answer before the courts in the jurisdictions where they insure such risks.

¶55 The CNMI has a substantial interest both in protecting its citizens and in controlling the actions and responsibilities of foreign insurers. Judicial economy favors completing all of the proceedings in one location and the interests of the various states in furthering substantive social policies, such as state by state control of insurers and their answerability in local jurisdictions in furthered by continuing with the proceedings in the CNMI.

C. <u>ALAS Must Post Bond or Obtain a Certificate of Authority</u>

¶56 By its own admission, "ALAS has never sought or obtained a license to conduct business from any licensing authority in the CNMI." Thus, ALAS is an unauthorized insurer subject to 4 CMC § 7305, the Unauthorized Insurers Act, adopted by the Legislature.

The Act provides in part:

> (1) Before any unauthorized insurer may file or cause to be filed any pleading in any action, suit, or proceeding instituted against it, the unauthorized insurer shall either:
>
> > (A) File with the Clerk of the Court in which the action, suit or, proceeding is pending, a bond with good and sufficient sureties to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgement which may be rendered in the action; or

(B) Procure a certificate of authority to transact the business of insurance in the Commonwealth.

4 CMC § 7305(g)(1).

¶57 In this case, ALAS has failed to obtain a certificate of authority or post bond and cannot defend the action against it until it has either obtained a certificate of authority to transact insurance business in the CNMI or has posted an appropriate bond.

CONCLUSION

¶58 For the reasons set forth above, we hereby **GRANT** Petitioner's petition for a writ of mandamus against the Superior Court.

(1) Subject matter jurisdiction does exist as to ALAS;

(2) In personam jurisdiction exists over ALAS and that the exercise of such jurisdiction does not offend due process; and

(3) Defendant ALAS is instructed to post bond, and/or apply for admission as an authorized insurer in the Commonwealth and answer the underlying complaint.

ENTERED this _27th_ day of _April_____, 2001.

/s/ Miguel S. Demapan
MIGUEL S. DEMAPAN, Chief Justice

/s/ John A. Manglona
JOHN A. MANGLONA, Associate Justice

/s/ Alberto C. Lamorena III
ALBERTO C. LAMORENA III, Justice *ProTempore*