

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SECURITY INSURANCE COMPANY OF	:
HARTFORD,	:
Plaintiff,	:
	:
-vs-	: Civ. No. 3:00cv1247 (PCD)
	:
TRUSTMARK INSURANCE COMPANY,	:
Defendant.	:
	:
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SECURITY INSURANCE COMPANY OF	:
HARTFORD,	:
Plaintiff,	:
	:
-vs-	: Civ. No. 3:01cv2198 (PCD)
	:
TRUSTMARK INSURANCE COMPANY,	:
Defendant.	:

**RULINGS ON PLAINTIFF’S APPLICATION FOR A PREJUDGMENT REMEDY AND
FOR PREJUDGMENT DISCLOSURE OF PROPERTY AND ASSETS**

Plaintiff moves for prejudgment remedies pursuant to FED. R. CIV. P. 64, CONN. GEN. STAT. §§ 52-278a *et seq.* and 52-515 *et seq.* and for prejudgment disclosure of property and assets pursuant to CONN. GEN. STAT. § 52-278n(c). For the reasons set forth herein, the motions are **granted** as to 3:01cv2198 and **denied** as to 3:00cv1247.

I. BACKGROUND

In early 1999, plaintiff agreed to reinsure TIG for certain workers’ compensation risks (“Reinsurance Agreement”). The TIG Agreement provided reinsurance for a twenty-four month period commencing January 1, 1999. The same year, defendant agreed to reinsure plaintiff for 100% of the

risk ceded to it by the TIG Agreement (“Retrocession Agreement”). The term of the Retrocession Agreement coincided with the term of the Reinsurance Agreement.

In the Fall of 1999, defendant notified plaintiff that it intended to cancel the agreement after twelve months on December 31, 1999. TIG insisted that plaintiff adhere to the twenty-four month period of the TIG Agreement. In an attempt to resolve the incompatible agreements, plaintiff negotiated with TIG to limit the TIG Agreement. Plaintiff was partially successful in limiting the term of the TIG Agreement to twelve months; however, the modified TIG Agreement required that plaintiff would cover losses on policies issued by TIG during the original twelve-month period for an additional twelve months (“runoff period”). Defendant refused to accept the terms of the modified TIG Agreement and insisted that it had no further obligation to cover plaintiff’s losses after the expiration of the original twelve-month period. Plaintiff thereafter filed its complaint in 3:00cv1247 (“First Action”) seeking a declaration that defendant could not cancel the agreement as of January 1, 2000.

Although defendant contested its liability during the runoff period, it covered losses ceded to plaintiff during 1999. Defendant later would deny liability for any losses and alleged that it had no obligation to cover losses ceded to it under the Retrocession Agreement as the Agreement was void *ab initio*. Plaintiff thereafter filed its complaint in 3:00cv2198 (“Second Action”) seeking a declaration that the Agreement could not be canceled and seeking an award of damages equivalent to coverage owed for 1999 losses and the present value of future obligations under the Agreement. After the hearing on the motion for prejudgment remedy, on stipulation of defendant plaintiff amended its complaint to

include a restitution claim seeking return of premiums paid if defendant's cancellation of the Retrocession Agreement is held to be valid.¹

Plaintiff and defendant have stipulated that plaintiff, through its agent WEB, entered into a reinsurance agreement with TIG Insurance Company ("TIG") whereby it agreed to reinsure certain workers' compensation risks during the twenty-four month period commencing January 1, 1999.

The parties further stipulate that defendant, through its agent WEB, entered into an agreement with plaintiff whereby defendant agreed to reinsure plaintiff for 100% of the risk for which plaintiff was reinsuring TIG for a period coterminous with the TIG Agreement. Third, the parties stipulate that defendant has received \$51,607,710.25 in premiums under its agreement with plaintiff.

II. MOTIONS FOR PREJUDGMENT REMEDY

Defendant argues that (1) plaintiff has not established that it has paid in excess of \$50 million in damages to TIG and it therefore has no obligation to indemnify plaintiff for amounts not paid; (2) plaintiff may not obtain a prejudgment remedy based on the failure of its claim that the Retrocession Agreement remains in effect as such would be contrary to the express requirement that it establish probable cause of success on the merits of the claim;² (3) CONN. GEN. STAT. § 52-278a *et seq.* does

¹ "[A]n amended complaint ordinarily supersedes the original, and renders it of no legal effect." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) (internal quotation marks omitted). The amended complaint is therefore the relevant complaint for purposes of this ruling.

² Defendant argues that "it cannot be seriously disputed that the main relief sought by [plaintiff] in its two complaints are declarations of specific performance," which is not an award of damages as required for a remedy granted pursuant to CONN. GEN. STAT. § 52-278a *et seq.* Defendant's interpretation of the claim is unduly narrow as the claim seeks a declaration that the terms of the Retrocession Agreement are binding on the defendant, specifically that plaintiff "is entitled to a declaration of this Court that [defendant] has no right to rescind the retrocession agreement and that [defendant] remains bound by that agreement." Although the remedy sought as a consequence of a declaratory judgment favorable to plaintiff may be characterized as specific performance in covering losses pursuant to the Agreement, the remedy may also be read as consequential damages for a breach of contract.

not authorize as a prejudgment remedy in the form of a bond; (4) granting a prejudgment remedy in this complex litigation would violate defendant's due process rights; and (5) CONN. GEN. STAT. § 38a-27 preempts the relief sought by plaintiff.

A. Standard

A prejudgment remedy sought pursuant to CONN. GEN. STAT. § 52-278a *et seq.* will only be granted after a determination that there is probable cause that plaintiff's claim is valid, *see* CONN. GEN. STAT. § 52-278d(a), or, stated another way, that there is probable cause that plaintiff will receive a judgment in its favor, *see* CONN. GEN. STAT. § 52-278c(a)(2). *Three S. Dev. Co. v. Santore*, 193 Conn. 174, 175, 474 A.2d 795 (1984). Probable cause is defined as "a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it." *Id.* The determination of probable success involves only a weighing of probabilities. *See id.*; *New England Land Co. v. De Markey*, 213 Conn. 612, 620, 569 A.2d 1098 (1990).

B. Plaintiff's Failure to Establish Payments to TIG

Plaintiff's failure to establish payments to TIG in excess of \$50 million is not necessarily dispositive. In contrast to the typical duty to indemnify, "[i]t is not necessary that the reinsured should first pay the loss to the party first insured before proceeding against the reinsurer upon his contract." *Macdonald v. Aetna Indem. Co.*, 88 Conn. 571, 581, 92 A. 154 (1914). Under Connecticut law, a reinsurance contract has been described as something more than a contract for indemnity agreement, "requiring payment by the reinsurer to the reinsured of the former's *pro rata* amount of losses as they

accrue, altogether regardless of payment by the reinsured or his ability to pay.” *Id.* Moreover, plaintiff’s alternative claim for unjust enrichment for premiums paid to defendant do not require additional proof in the form of payments to TIG.

C. Plaintiff’s Entitlement to Remedy Premised on Alternative Theories

There is no question that plaintiff is entitled to plead alternative theories of recovery, *see* FED. R. CIV. P. 8(e)(2), as in the present case with claims of breach of contract and unjust enrichment. Defendant argues that plaintiff should not be granted a prejudgment remedy on its alternative theory of unjust enrichment as such would be premised on plaintiff’s failure to establish defendant’s liability under the Retrocession Agreement. There is no basis in law for this proposition absent plaintiff’s original failure to plead the unjust enrichment claim. As plaintiff’s amended complaint cures this defect, the alternative claims are not an impermissible basis on which to seek a prejudgment remedy. Plaintiff need not establish probable cause to believe that it will succeed on all claims; it need only establish its probability for success on a single claim.

D. Availability of Bond as Prejudgment Remedy

There is no statutory basis for plaintiff’s requested remedy in the form of a bond. CONN. GEN. STAT. § 52-278a(d) defines prejudgment remedy as “any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant . . . of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment but shall not include a temporary restraining order.” The definition of prejudgment remedy is expressly limited to attachment, garnishment and replevin. *See R.I. Hosp. Trust Nat’l Bank*

v. Trust, 25 Conn. App. 28, 30-31, 592 A.2d 417 (1991). Furthermore, CONN. GEN. STAT. § 52-278e(d) provides that a defendant may “request that [it] be allowed to substitute a bond for the prejudgment remedy.” A bond is therefore available only when defendant elects to substitute it for a given prejudgment remedy, and this Court is not empowered to order defendant to post a bond. *See* CONN. GEN. STAT. § 52-278e(d).

E. CONN. GEN. STAT. § 38a-27

Defendant’s argument that § 38a-27³ precludes the prejudgment remedy sought by plaintiff is without merit. Section 38a-27, entitled “procedure where substituted service made against unauthorized insurer,” is expressly limited to “unauthorized” persons or insurers.⁴ *See* CONN. GEN. STAT. § 38a-27(a). It requires that an unauthorized insurer deposit cash, securities or bond sufficient

³ Section 38-27(a) provides that “[b]efore any unauthorized person or insurer files or causes to be filed any pleading in any court action or proceeding or in any administrative proceeding before the commissioner instituted against the person or insurer by service made in accordance with the provisions of section 38a-25, section 38a-26 or section 38a-273, the person or insurer shall either: (1) Deposit with the clerk of the court in which the action or proceeding is pending, or with the commissioner in administrative proceedings before the commissioner, cash or securities or a bond with good and sufficient sureties to be approved by the court or the commissioner, in an amount to be fixed by the court or the commissioner sufficient to secure the payment of any final judgment which may be rendered in the action or proceeding, provided the court or the commissioner in administrative proceedings may in its or his discretion make an order dispensing with the deposit or bond where the insurer shows to the satisfaction of the court or the commissioner that it maintains in this state funds or securities, in trust or otherwise, sufficient and available to satisfy any final judgment which may be entered in the action or proceeding; or (2) procure proper authorization to do an insurance business in this state.”

⁴ An “unauthorized insurer” is defined as “an insurer that has not been granted a certificate of authority by the commissioner to transact the business of insurance in this state or an insurer transacting business not authorized by a valid certificate.” CONN. GEN. STAT. § 38a-1(11)(E).

to secure payment of a final judgment rendered against it with the clerk of the court before it is permitted to file a responsive pleading. *See id.*

Defendant argues that § 38a-27 is a specific provision governing the provisions generally applicable to prejudgment remedies against insurers. *See Budkofsky v. Comm'r of Motor Vehicles*, 177 Conn. 588, 592, 419 A.2d 333 (1979) (holding that commercial registration provisions governed general registration provisions in determining truck owner's compliance with motor vehicle registration law). If such were the case, § 38a-27 could be interpreted as obviating the need to follow prejudgment remedy procedures of general application in cases against unauthorized insurers as § 38a-27 in effect requires defendant to provide security prior to filing responsive pleadings. Section 38a-27 cannot, however, be read reasonably as barring prejudgment remedies against insurers that are not unauthorized insurers.

Nor does defendant's rationale support this conclusion. That an authorized insurer becomes such "after a review of the finances of the insurance company" may explain why an unauthorized insurer is required to provide security, but licensing requirements alone do not guarantee continued economic vitality.

Section 38a-27 cannot be read, either by its express text or by implication, as barring plaintiff from seeking a prejudgment remedy against an insurer or reinsurer. *See Santini v. Deeb*, 2 Conn. App. 683, 483 A.2d 615 (1984) (reviewing merits of denial of motion for prejudgment remedy against insurer); *Republic Ins. Co. v. N. Am. Philips Corp.*, No. CV-90-0376040S, 1992 WL 175071, at *1 (Conn. Super. July 20, 1992). If the Connecticut legislature had intended to preclude all prejudgment remedies in actions against insurers, such a sweeping preclusion would be evident from a

reading of the text the various sections in Title 38a or in Title 52. There is no language supporting such a sweeping preclusion of prejudgment remedies in insurance cases.

F. Constitutional Sufficiency of Granting Prejudgment Remedy Sought

Defendant argues that a prejudgment remedy granted after only a single probable cause hearing would violate its due process rights. As the remedy is granted not on findings rendered from evidence presented at the hearing but rather on findings adopted from the stipulation of the parties, defendant's alleged due process violation is without merit.

G. Probable Success of Plaintiff's Claims

In the First and Second Actions, plaintiff has not established probable cause that it will prevail on its claim that defendant either improperly cancelled the agreement for the last twelve months or improperly canceled the agreement *ab initio*. As such, plaintiff will not be granted a prejudgment remedy on this basis and the motion is thus denied as to the First Action. Plaintiff similarly has not established a probability of success on the claim of improper cancellation in the Second Action.

Plaintiff has, however, established probable success on its claim of unjust enrichment. In order to prevail on its claim of unjust enrichment, plaintiff must establish (1) that defendants received a benefit, (2) that defendants unjustly did not pay for the benefit received and (3) that the failure to pay was to plaintiff's detriment. *Hartford Whalers Hockey Club v. The Uniroyal Goodrich Tire Co.*, 231 Conn. 276, 283 (1994). If the Retrocession Agreement is declared void *ab initio*, plaintiff is entitled to

a return of premiums paid.⁵ As such, plaintiff is entitled to attach the assets of defendant in an amount equal to \$51,607,710.25 based on its probability of success in the Second Action.⁶

H. Whether Plaintiff Must Post a Bond

Defendant requests that plaintiff be ordered to post a bond. *See* CONN. GEN. STAT. § 52-278d(a)(4) (“whether the plaintiff should be required to post a bond to secure the defendant against damages that may result from the prejudgment remedy”). The determination of whether plaintiff should be order to post a bond requires consideration of “the nature of the property subject to the prejudgment remedy, the methods of retention or storage of the property and the potential harm to the defendant’s interest in the property that the prejudgment remedy might cause.” CONN. GEN. STAT. § 52-278d(e). At present, no evidence has been provided as to the actual property that may be subject to attachment. The parties shall therefore brief this issue after defendant has responded to the order discussed hereafter requiring that it disclose, inter alia, the location of its assets.

III. PREJUDGMENT DISCLOSURE OF ASSETS

CONN. GEN. STAT. § 52-278n(c) provides that a “court may order disclosure at any time prior to final judgment after it has determined that the party filing the motion for disclosure has . . . probable cause sufficient for the granting of a prejudgment remedy.” As plaintiff has established probable cause

⁵ The amount of the benefit would necessarily be offset by losses covered by defendant. No evidence has been provided as to the amount of losses covered by defendant, only allegations as to amounts not covered by defendant.

⁶ Having concluded that this Court is not empowered to order defendant to post a bond, see *supra* Part II.D, there remains a question as to whether this Court has the authority to order the attachment of property outside of this jurisdiction. *See, e.g., Aschkar v. Curtis*, 327 F.2d 306, 310 (9th Cir. 1964); *In re Feit & Drexler, Inc.*, 42 B.R. 355, 359 (S.D.N.Y. 1984). This question is not yet ripe as no evidence has been presented as to the location of defendant’s assets.

sufficient for the granting of a prejudgment remedy in the Second Action, defendant is hereby ordered to provide plaintiff with the following information within thirty (30) days of the date this order issues:

1. A description of all bank accounts in which defendant has or has had an interest since January 1, 1999, which description shall include the name of the banking institution, account numbers(s), ownership, current balance and type of account (e.g., checking, savings, certificate of deposit or trust account).
2. A description of all real property in which defendant has or has had an interest since January 1, 1999, which description shall include the address, known liens or mortgages recorded against the property, the value of such liens or mortgages and the current value of the property. If property has been transferred, identify the transferee by name and current address and the amount paid for the transfer.
3. A description of all corporations, limited partnerships, general partnerships, limited liability partnerships, limited liability corporations or wholly owned entities in which defendant has or has had an interest since January 1, 1999, which description shall include the name of the entity, the interest held, the date the interest was acquired, the date the interest was sold or otherwise terminated, the name and address of transferees and the value of each interest.
4. A description of any and all interest defendant has had since January 1999, in any stock, bond, mutual fund, commercial paper, warrant or option, which description shall include the name, value, date acquired, date disposed, name of transferee and current location of any certificate or other indicia of ownership.
5. A description of all entities presently indebted to defendant, which description shall include the name and address of said entities.
6. A description of all customers, companies, businesses and insurers presently indebted to defendant, which description shall include the name and address of said entities.

IV. CONCLUSION

Plaintiff's motions for prejudgment remedy (3:01cv2198; Doc. 10) and for prejudgment disclosure of property and assets (3:01cv2198; Doc. 14) are **granted**. Plaintiff's motions for

prejudgment remedy (3:00cv1247; Doc. 74) and for prejudgment disclosure of property and assets (3:01cv2198; Doc. 72) are **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, August ____, 2002.

Peter C. Dorsey
United States District Judge