Thus, he could not sue directly, but could sue State Farm on the underinsured portion of the policy and recover.

Insolvency Filing Period Extended by Failure to Receive Notice

In re Transit Casualty Co., Case No. 236 (N.Y. Ct. App. 1992) (Lexis, N.Y. lib., N.Y. file).

The state liquidator's failure to notify an insured party of impending cancellation may result in extending the period in which the insured can file claims against the insolvent insurer's estate. In this case, Missouri declared Transit Casualty insolvent and began liquidations proceedings. As part of the proceedings, the liquidator notified policyholders that policies would be cancelled. A policyholder, Digirol, did not receive the notice even though the liquidator had the proper address. After the date the liquidator designated for cancellation, fire destroyed the Digirol's property. Digirol learned of the cancellation after he filed a claim with the ancillary receiver appointed in New York. He appealed the decision, arguing that his policy required actual notice before cancellation. The lower courts rejected his argument, but the state's highest court agreed and reversed the prior adverse decision.

The court concluded that the cancellation notice did not disrupt the policyholder's existing right to notice. The right to notice was a right that existed as a claim against the insured at the time of the insolvency. That right or claim matured at the time of the insolvency. The state, therefore, had a duty to inform Digirol of the cancellation to make it effective.

The court then rejected the state's argument that a vested right to notice was inconsistent with the liquidation process. The state argued that the liquidation process needed to fix and value claims that were timely filed. In response, the court found that the liquidation process should be more flexible than that suggested by the state. Moreover, the court felt that delay did not present a danger to the liquidation process if the state's failure to notify caused the late claim.

Finally, the court concluded that its decision did not upset the policies of the Uniform Insurer's Liquidation Act. The act was designed to protect policyholders from the dissipation of insurance company assets. The court's requirement of adequate notification would not disrupt that policy goal.

Court Concludes Excess Insurance Policy Did Not Drop Down

Ambassador Assocs. v. Corcoran, Case No. 9 (N.Y. Ct. App. 1992), *affirming*, 143 Misc. 2d 706, 541 N.Y.S.2d 715 (1989).

In a one paragraph opinion, New York's highest court affirmed a trial court decision that an excess coverage policy did not require the insurer to drop down. In the underlying suit, the facts were relatively simple. Fire destroyed an insured building. The primary layer of insurance provided for one million dollars of coverage. Mission Insurance provided the first layer of excess coverage for $10 million. Home Insurance provided a second layer of excess coverage up to $15 million. When Mission became insolvent, the

state insurance fund offered to pay up to $3 million in excess coverage. Home then sought a declaratory order that it would not have to provide coverage for the remaining $7 million that Mission was supposed to cover but could not. The trial court found that Home's policy did not require Home to fill the void created by the Mission insolvency. Both appellate courts reviewing the decision agreed.

In the appeal, the building owner argued that the excess coverage policy contained an ambiguity concerning the scope of coverage that should be construed against Home. The policy provided that Home would pay for ultimate net loss exceeding the amount of the underlying insurance but not exceeding its policy limit of $15 million. The policy defined ultimate net loss as "the amount payable in settlement of the liability of the Insured after making deductions for all recoveries and other valid and collectible insurance, excepting however policy(ies) of the Underlying Insurer(s)." The building owner argued the definition of net loss was ambiguous because the terms "recoveries" and "other valid and collectible insurance" could have contradictory meanings.

The court found there was no ambiguity. The controlling provision of the policy provided for coverage in excess of the listed underlying insurance. The Home policy listed Mission as an underlying insurer. The court concluded that the amounts Home agreed to pay for were in excess of those provided by the Mission policy.

The fact that the full amount of the Mission policy was not collectible did not change the result. The court concluded that the clause did not apply to underlying policies because the specific language in the clause concerning valid and collectible insurance excluded the underlying policies.

The court went on to note several other reasons for its conclusion. First, the cost of the Home policy was substantially lower than the primary and first layer of excess coverage. This discount indicated that the parties recognized the lower level of potential coverage and reflected the lower level of risk in the price of the policy. Second, requiring drop down would result in the second insurer's guaranteeing the solvency of the prior insurers. Finally, the court noted that the state had a security fund that indicated the state's intention for parties to look to the fund rather than the excess insurers to cover losses due to an insurer's insolvency.