

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company.

Docket No. 03-E-106

**LIQUIDATOR'S OBJECTION TO
INSPIRATION CONSOLIDATED COPPER COMPANY, ET AL.
REQUEST FOR EVIDENTIARY HEARING AND
LIQUIDATOR'S MOTION TO STAY DISCOVERY**

Roger A. Sevigny, Commissioner of the State of New Hampshire Department of Insurance, in his capacity as Liquidator of The Home Insurance Company (the "Liquidator"), pursuant to Orders dated June 11 and 13, 2003, by his attorneys, the Office of the Attorney General, respectfully objects to the Inspiration Consolidated Copper Company, Phelps Dodge Corporation and Phelps Dodge Miami, Incorporated's request for an evidentiary hearing dated August 13, 2003. The Liquidator objects because even if all of the assertions made by Inspiration/Phelps are proven true, all they would establish is a pre-liquidation claim having no entitlement to immediate payment, thus evidence is unnecessary because Inspiration/Phelps has no right to the relief requested. In addition, the Liquidator moves the Court to stay discovery in this matter because Inspiration/Phelps has sought discovery from the Liquidator that will be both futile and burdensome to the Liquidator and the estate. Discovery should not be available to Inspiration/Phelps at this stage in the proceeding where a pleading with the functional equivalence to a motion to dismiss for failure to state a claim is pending.

A. THE LIQUIDATOR OBJECTS TO THE REQUEST FOR AN EVIDENTIARY HEARING

Inspiration/Phelps states in its August 13th letter from counsel to Clerk McGraw that he believes that a "hearing should take a half day and involve the presentation of testimony from one or two witnesses from each side." Counsel presumes too much.¹ An evidentiary hearing would only be appropriate if there was some point to the presentation of evidence. And in this case, at this time, there is no such point because even if everything alleged by Inspiration/Phelps were to be proven true, they would not have any right to the relief they demand. As explained in the Liquidator's previous filings, the existence of a binding pre-liquidation debt based on a settlement of a policyholder's claim, even if bad faith negotiating were involved, does not give the policyholder claimant a right to immediate payment in full post-liquidation.

Inspiration/Phelps have presented a cast of grievances in search of a theory but fail to establish entitlement to relief. A hearing to prove the factual basis for Inspiration/Phelps' empty claim is unnecessary at this point where Inspiration/Phelps have not filed a proof of claim in the case and have not alleged entitlement to an administrative expense claim. If Inspiration/Phelps file a proof, and the Liquidator denies it, only then might a hearing on the underlying facts be appropriate. In addition, Inspiration/Phelps have set forth nothing that would entitle them to an administrative expense claim under RSA 402-C:44. Significantly, Inspiration/Phelps,

¹ See also Super. Ct. R. 13 (party may by motion request trial assignment but must represent that he knows of no reason why the opposing party is not ready for trial).

despite two pleadings already filed on their issue, have never even baldly asserted such a right. Thus, if the only way for payment in full now is through RSA 402-C:44 I, and Inspiration/Phelps have neither stated entitlement to payment under RSA 402-C:44, I, nor alleged any facts or even suggested that facts might exist leading to such an entitlement, there is no reason to waste the Court's time with an evidentiary hearing to prove a claim which will only, at best, share in distributions much later in the case.²

B. THE LIQUIDATOR MOVES THE COURT TO STAY DISCOVERY

Inspiration/Phelps have made two informal requests for discovery since filing their petition for intervention. Copies of these are attached hereto as Exhibit "A." The Liquidator asks the Court to stay discovery in this matter until such time as the objection to the Inspiration/Phelps position is decided. The objection filed by the Liquidator is in the manner of a motion to dismiss for failure to state a claim upon which relief may be granted. Consequently, the averments of the non-moving parties, for the purpose of the motion, are accepted as true. Inspiration/Phelps have pleaded detailed factual allegations that they believe support a claim that they should be paid in full for the policyholder claim they settled with The Home prior to The Home's liquidation. Inspiration/Phelps alleged eleven paragraphs of facts and

² The Liquidator acknowledges that certain payments on workers compensation claims are being advanced by the Liquidator (subject to an agreement with guaranty funds) until the various guaranty associations can pick these claims up in order to avoid disruption in payment to these claimants. These payments will be netted against the statutorily mandated Early Access Distributions otherwise payable to the guaranty funds.

submitted five exhibits in and with their petition. In their Intervenor's Reply, dated July 10, 2003, many additional allegations of fact are made. This is not a situation where the Liquidator is in a unique position of having hold of essential facts. Discovery, on the other hand, will create unnecessary burdens on the estate and the Liquidator at an early, critical stage in the process.

For good cause shown, for the convenience of the parties and in the interest of justice, the Court has the authority to stay discovery. N.H. Super. Ct. R. 35(c) & (d). The Court should stay discovery pending a determination by the Court—based on Inspiration/Phelps' petition, and the Liquidator's papers in opposition—that Inspiration/Phelps's "allegations are sufficient to allow them to conduct discovery in an attempt to prove allegations." Harris v. Iorio, 922 F. Supp. 588, 590 (M.D. Fla. 1996), *aff'd* 136 F.3d 139 (11th Cir. 1998); *see, e.g.*, Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U.S. 689, 694 (1933) (Cardozo, J.) (premature discovery "will be useless to decree . . . any earlier, and may even be oppressive . . ." and offensive of 'judicial parsimony' which condemns a useless remedy); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 597 (1st Cir. 1980) ("As a threshold matter, the court should be satisfied that a claim is not frivolous, a pretense for using discovery powers in a fishing expedition."); Downing v. Monitor Publishing Co., 120 N.H. 383, 387 (1980) (discovery should be safeguarded when plaintiffs claim is baseless).

While it is beyond doubt that discovery is to be liberally afforded, it is equally clear that it is within the discretion of the Court to allow or limit it. *See State v. DeLong*, 136 N.H. 707, 709-10 (1993)(court has discretion in matters relating to

discovery and error not reversible unless shown to harm substantive rights); N.H. Super. Ct. R. 35 (c) & (d); R. Wiebusch, 4 N.H. Prac. § 794 (1984). It is also clear that the Court can limit discovery pending the resolution of a dispositive issue. *See Vivid Tech., Inc. v. American Science & Eng., Inc.*, 200 F.3d 795, 804 (Fed. Cir. 1999) (“When a particular issue may be dispositive, the court may stay discovery concerning other issues until the critical issue is resolved.”); R. Wiebusch, 5 N.H. Prac. § 984 (1984) (“the Superior Court’s assistance may be needed at an early date to define the issues, to lay out a schedule for discovery, or to resolve a dispositive issue of law so that the parties may know how to prepare for trial” (emphasis added)). No harm will come to Inspiration/Phelps if discovery is stayed pending a decision on the Liquidator’s objection to the petition for intervention. If the Court determines that under some set of facts Inspiration/Phelps could recover its \$2.5 million settlement in full from the liquidation estate notwithstanding RSA 402-C:44, and the fact that it has yet to file a proof of claim, then discovery can be had to test facts supporting that claim for a trial on those facts. Such a trial would be held at a time consistent with the Court’s trial assignment calendar and the convenience of the parties —pursuant to a scheduling order— and with sufficient time for discovery. *See* Super. Ct. R. 13 & 62; R. Wiebusch, 5 N.H. Prac. § 984 (describing pretrial procedure).

C. CONCLUSION

As presently postured, Inspiration/Phelps wants a brief window of discovery and a mini-trial to determine a \$2.5 million question. Respectfully, the Liquidator submits that this would be asking too much in *any* litigated matter. *See* N.H. Super.

Ct. R. 62 (setting forth pretrial conference procedures); N.H. Dist & Mun. Ct. R. 4.2 (informal procedures limited to small claims not exceeding \$2,500). It is certainly asking too much to allow this kind of informal summary procedure at this stage of this case where the Liquidator has only just begun the process of collecting thousands of claims, is working with guaranty associations in every state, is establishing critical business systems, marshalling assets, and taking other early stage steps to liquidate a very large insurer with business in every state and three foreign countries. It is especially asking too much when the merits of Inspiration/Phelps claim have not been tested as a matter of law and appear quite tenuous.³

WHEREFORE, the Liquidator prays that this Court enter an order (i) denying Inspiration/Phelps' request for an evidentiary hearing; and (ii) staying discovery until no sooner than a final determination of the Liquidator's objection to the merits of Inspiration/Phelps' theory for recovery, and (iii) granting such other and further relief as may be just.

³ The Liquidator notes that Inspiration/Phelps have failed to refer to any judicial precedent in any jurisdiction supporting the demand that they make.


Respectfully submitted,

ROGER A. SEVIGNY,
COMMISSIONER
THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF INSURANCE

By her attorneys,

PETER W. HEED
ATTORNEY GENERAL

Dated: August 22, 2003


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CERTIFICATE OF SERVICE

I, Peter C.L. Roth, do hereby certify that on August 22, 2003 I served a true copy of the foregoing upon the attached Service List, by first class mail, postage prepaid.

Dated: August 22, 2003


Peter C.L. Roth

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