THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

LIQUIDATOR'S REPLY IN SUPPORT OF MOTION FOR APPROVAL OF NEW YORK TAX SETTLEMENT

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator of The Home Insurance Company ("Home"), by his attorneys, the Office of the Attorney General, hereby replies to the Opposition to Liquidator's Motion for Approval of New York Tax Settlement (the "Opposition") filed by 59 Maiden Lane Associates (the "Owner").[1] The Objection does not set forth sufficient grounds to warrant disapproval of a proposed settlement that clearly benefits the policyholders and other creditors of Home by bringing significant cash into the estate and avoiding continuation of tax litigation pending since 1997.

Introduction

1. The Owner contends that the Liquidator breached notice obligations under the 1997 O&Y Settlement and that its refusal to consent to the proposed settlement with New York City is reasonable because it is prejudiced by the settlement. The first claim is irrelevant, and both are wrong. The Liquidator did not breach the asserted contractual notice obligations because they were never triggered by the Owner. Although the Owner

[1] The Liquidator uses the terms defined in the Liquidator's Motion for Approval of New York Tax Settlement. A Joinder in the Opposition was filed by HSBC Bank USA as Indenture Trustee. The Joinder offers no additional grounds for opposition and warrants no response other than to note that it was submitted beyond the date for submitting opposition to the motion.

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was well aware that the tax litigation was proceeding, it never provided Home (or the Liquidator) with the written notice required to invoke the contractual provision concerning notice of meetings or hearings. The Owner's claims to prejudice from the settlement omit two critical facts: first, that any actual increase in taxes is minor (approximately $19,000), and second, that the Liquidator has previously offered to pay the Owner the amount of any such increase. The Owner's withholding of consent is thus unreasonable, and the Court should approve the settlement.

The Liquidator Did Not Have And
Did Not Breach Any Notice Obligation.

2. The Owner contends that the Liquidator breached a purported obligation to notify it of meetings with the City of New York or court hearings and thus deprived it of the opportunity to participate in settlement discussions. Opposition ¶¶ 5, 22. However, there was no such obligation. The O&Y Settlement did not require Home to provide notice to the Owner of meetings or hearings unless the Owner had first itself given written notice to Home. It provides that Home "shall coordinate fully and consult frequently with the Owner in connection with any action taken or proposed to be taken in any such Tax Proceedings. The Owner may retain independent counsel who, after having given written notice to Home of his or her retention by the Owner, shall be given notice of and be invited to attend all meetings with representatives of the City of New York relating to any Tax Proceedings, and any administrative or judicial hearings relating to any Tax Proceedings." O&Y Settlement § 7(a) (emphasis added). Neither Home (nor the Liquidator) ever received the written notice from Owner's counsel required by the underscored language, so Home was not obligated to give notice of and invite the Owner

to attend meetings with New York City or hearings concerning the tax proceedings. Affidavit of Joel Marcus ("Marcus Aff.") ¶ 3.

3. The Owner was well aware of the pending tax certiorari proceedings since they were pending when the O&Y Settlement was entered and when the Owner purchased the property. Further, in 1999 and 2000, Home's counsel, Joel Marcus, met with the Owner's representatives to obtain access to the property for Home's appraiser. During 1999, 2000 and 2001, Home requested information from the Owner concerning removal of asbestos from the property and the Owner's purchase of the property to assist in preparing the case. Marcus Aff. ¶ 4, Exhibits B and C. As information was not forthcoming, Home at one point requested a meeting with the Owner, and a meeting of Home and the Owner's representatives was held in October 1999 at Home's offices. At the meeting, Home's counsel described the status of the case and explained that Home sought the information to assist in preparing for trial. The Owner never provided the requested information. In addition, the Owner had initiated its own tax certiorari proceedings challenging the assessments on the property for 1996/97 and subsequent tax years to the present. The Home's tax cases and the Owner's tax cases have on occasion been calendared for conferences before the New York Supreme Court on the same days, and the Owner's counsel in its own cases has been present before or during the conferences in Home's proceedings on at least two occasions. Marcus Aff. ¶ 4. In these circumstances, the Owner's complaint that it has not been advised concerning the proceedings rings hollow.

4. Even if there had been some breach of notice obligations by Home prior to or during the liquidation proceedings, it would not be pertinent to this motion. The

Liquidator has requested the Court's approval for a settlement that is very advantageous to the policyholders and other creditors of The Home in that it will bring approximately $11 million into the estate and end already protracted litigation. Bengelsdorf Aff. ¶ 6. (To Home's knowledge, New York City has not yet retained an appraiser for the tax proceedings, and it is therefore likely that it would be more than a year before Home's tax proceedings go to trial in the event the settlement is not consummated. Marcus Aff. ¶ 7.) As described below, the Owner's refusal to consent to the settlement is unreasonable, and the Owner has not been harmed by any failure of notice.

The Owner Has Withheld Consent Unreasonably,
<u>And It Has No Valid Objection To The Settlement.</u>

5. The Owner's more substantive objection is that by contract it must consent to settlement of the tax certiorari proceedings, "which consent shall not be unreasonably withheld." O&Y Settlement § 7(a). Under New York law (which governs that agreement), a "standard of reason" applies to the withholding of consent under such a contractual provision. <u>Kruger v. Page Mgt. Co., Inc.</u>, 105 Misc. 2d 14, 432 N.Y.S.2d 295, 302-303 (1980) (Exhibit 1). "Objective" or "readily measured" criteria are necessary to meet this standard, not "subjective" factors such as a party's "supposed needs, dislikes, personal taste, sensibility or convenience." See <u>id</u>. at 302, 307. The burden rests on a person withholding consent to show that consent was reasonably withheld, and "[v]ague and conclusory reasons . . . do not suffice." <u>Cohn v. Cohn</u>, 102 A.D.2d 859, 477 N.Y.S.2d 48, 49 (2d Dept. 1984) (Exhibit 2). The Owner contends that it would be prejudiced by the proposed settlement, but its assertions are either incorrect or speculative, not objective.

6. The Owner first argues that the proposed settlement will increase its transitional assessments for the tax years 1997/98, 1998/99 and 1999/00. Opposition ¶¶ 12, 13, 16, 18. The most striking aspect of this argument is that the Owner only indirectly suggests that its actual taxes will increase. See Opposition ¶ 16; contrast ¶¶ 12, 18. There is good reason for its reticence. Under the proposed settlement, the Owner's taxable assessment for 1996/97 would decrease by $3,670,000. Opposition ¶ 11. This almost completely offsets the total increase in taxable assessments for 1997/98 and 1998/99 of $3,869,352. Id. (The increase in the transitional assessment for 1999/00 has no effect on the Owner's taxable assessment for that year as the actual assessment is lower than the transitional assessment. Id.) At the applicable tax rates, the actual increase in the Owner's taxes is approximately $19,000. Marcus Aff. ¶ 5. The Liquidator has already offered to reimburse the Owner for any additional tax due to the proposed settlement. See Marcus Aff. ¶ 5, Exhibit D at 2 (letter dated January 14, 2004). There is thus no actual burden created by the proposed settlement to support the withholding of consent. See Redwood Constr. Corp. v. Doornbosch, 248 A.D.2d 698, 670 N.Y.S.2d 560, 562 (2d Dept. 1998)(consent was unreasonably withheld where proposed use of property was "de minimis") (Exhibit 3).

7. The small size of the potential additional tax and the Liquidator's offer to reimburse the Owner also disposes of the Owner's claim that it will be prejudiced by the imposition of a tax lien and the possibility of foreclosure and default under its mortgage. Objection ¶ 16. The Owner's speculations concerning these draconian outcomes simply ignore the fact that it will face no additional tax burden.

8. The Owner also asserts that the proposed settlement prejudices its own tax certiorari proceedings for 1996/97 and later years because the New York Court "may consider the Liquidator's settlement of tax years 1994/95 and 1995/96 as a 'benchmark for value.'" Objection ¶ 15 (emphasis added). However, tax years stand alone.[2] The Owner's reliance on Bass v. Tax Comm'n of the City of New York, 179 A.D.2d 387, 578 N.Y.S.2d 158, 159 (1st Dept. 1992) (Opposition Exhibit B), is misplaced. That case involved evaluation of numerous hotly disputed issues. See id.; Bass v. Tax Comm'n of the City of New York, No. 56969/84, slip op. at 4-39 (N.Y. Sup. Ct. Jan. 18, 1991) (copy attached to Objection as Exhibit B). The trial court's use of the prior year assessment (a product of settlement) rested on the particular complex facts of the case, which led it to conclude that the prior year assessment represented a "consensus" between the parties to the tax proceeding as to the market value and tax value of the property. Slip Op. at 37. No such conclusion could reasonably be reached in the Owner's tax certiorari proceedings. *First*, the parties to the proposed settlement (the Liquidator and New York City) are different from the parties to those tax certiorari proceeding (the Owner and New York City). *Second*, it is indisputable—from the Owner's Opposition itself—that the Owner does not agree with the valuations in the proposed settlement. See Marcus Aff. ¶ 6. The claimed prejudice is merely speculative.

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[2] As noted in the Liquidator's motion, New York law requires *de novo* annual assessments, and even prior litigated decisions do not have preclusive effect. See New York Real Property Tax Law § 302; In the Matter of Phelps Dodge Industries, Inc. v. Kondzielaski, 131 A.D.2d 675, 516 N.Y.S.2d 754, 755-756 (1987) (notwithstanding the decision of a court on valuation for prior years, such a prior determination "could not conclusively bind [the court] in a review of the assessments for subsequent tax years, even those immediately following the years reviewed in the prior proceeding") (emphasis added); People ex rel. Hilton v. Fahrenkopf, 279 N.Y. 49, 17 N.E.2d 765, 766 (1938) ("the doctrine of *res judicata* can have no true application to the issues of value in recurring assessment proceedings") (Exhibits 4-6).

9. The Owner finally asserts that the settlement valuations for 1991/92 and 1992/93 have no regard to actual value. Opposition ¶ 17. This is irrelevant. The assessments used in the proposed settlement represent a compromise to reach an economic result, i.e., the approximately $16 million tax refund recommended by Justice Schoenfeld of the New York Supreme Court. Marcus Aff. ¶ 7. In the absence of actual prejudice to the Owner from the proposed settlement, the Owner's apparent dislike of the values used to produce the agreed result is a "subjective" consideration that does not support the Owner's refusal to consent.

10. There is no objective reason for the Owner to withhold its consent to the proposed settlement. Since the Owner has presented the reasonableness of its refusal for determination, the Court should rule that the Owner has unreasonably withheld its consent. In that event, the Owner has no valid objection and, as the settlement is clearly in the best interest of the policyholders and other creditors of Home, the Court should grant the Liquidator's motion and approve the settlement.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, SOLELY IN HIS CAPACITY AS LIQUIDATOR OF THE HOME INSURANCE COMPANY,

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STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

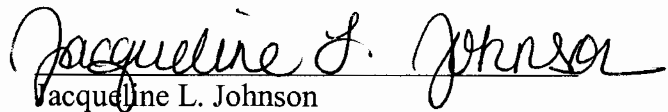
In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 03-E-0106

In the Matter of the Liquidation of
US International Reinsurance Company
Docket No. 03-E-0112

CERTIFICATE OF SERVICE

I, Jacqueline L. Johnson , do hereby certify that on March 8, 2004, I served a true copy of the foregoing upon the attached Service List, by first class mail, postage prepaid.

Dated: March 8, 2004



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