THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

LIQUIDATOR'S OBJECTION TO SWAN TRANSPORTATION COMPANY'S MOTION TO RECOMMIT

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby objects to the motion to recommit filed by Swan Transportation Company ("Swan Transportation") f/b/o Swan Asbestos and Silica Settlement Trust (collectively "Swan").

Introduction

The claimant Swan moves to recommit the Referee's June 18, 2009 Order on the Merits ("Order") (attached as Exhibit A). In the Order, the Referee sustained the Liquidator's determination to allow Swan's claim in the $500,000 amount of a settlement reached by Swan and Home during the negotiations among claimants, Swan and Swan's insurers that led to Swan's voluntary bankruptcy proceeding. The 2001 settlement was approved as fair in the Swan bankruptcy proceeding. Swan seeks to set aside the settlement because Home did not pay the settlement amount when due in 2004, seven months after Home was declared insolvent and ordered liquidated in the Court's June 13, 2003 Order of Liquidation. However, the effects of which Swan complains – that it will receive payment on its claim as liquidated in the settlement only on a delayed, percentage basis – are the consequences of Home's insolvency that affect all policyholder claimants equally. They do not support reopening Swan's claim which was resolved by agreement in 2001.

STATEMENT OF THE CASE

1. Factual Background

The background to this matter is contained in the exhibits submitted to the Referee. Those exhibits are included in the Appendix of Exhibits ("App.") submitted with this objection.[1]

a. The coverage disputes and litigation. During the 1990s, Swan was faced with suits alleging injuries arising from exposure to asbestos, silica and/or mixed dusts. App. 20 (Swan Disclosure Statement). In 1999, Swan retained coverage counsel and filed coverage litigation against its insurers, including Home. App. 24. Swan sought coverage from primary and excess carriers from the 1970s through the 1990s. Insurers asserted numerous defenses to coverage. See App. 24-25, 30. (Home had issued two excess policies, one in 1994 and one in 1995, which was cancelled in February 1995.)

During 2001, Swan engaged in global negotiations and mediations with the underlying claimants and the insurers. App. 31-34. As a result, Swan entered into settlement agreements with certain insurers as part of its planning for a voluntary bankruptcy. App. 37 (listing insurer settlements).

b. The Home-Swan settlement. Home was among the settling insurers. Home and Swan entered the Settlement Agreement by and among the "Swan Parties" (As Defined) and The Home Insurance Company ("Settlement Agreement") in November 2001. App. 1.[2] The Settlement Agreement recited that certain of the "Swan Parties" (a defined term including Swan) had been sued for "Foundry-Related Claims" (defined as including claims for alleged asbestos-related and silica-related claims). It further recited that Home had issued two liability insurance

[1] The Appendix includes the exhibits to the Liquidator's written submission and the few additional items referred to in Swan's written submission.

[2] Home executed the Settlement Agreement on October 30, 2001, and Swan executed it on November 27, 2001. App. 15.

policies, and that the Swan Parties and Home disagreed with respect to certain issues regarding the insurance coverage, if any, for lawsuits alleging Foundry-Related Claims. It added that certain of the Swan Parties had initiated coverage litigation against insurers, including Home. Finally, it recited that Swan intended to file a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. App. 3-4 (Settlement Agreement, Recitals).

The Settlement Agreement stated that the Swan Parties and Home "wish[ed] now to resolve fully and finally any and all disputed issues between them regarding all past, present, and future insurance claims under the Home Policies for the Underlying Lawsuits and all Foundry-Related Claims on the conditions set forth in this Agreement." App. 4 (Settlement Agreement, Whereas Clauses). They accordingly agreed to settle for the "Settlement Amount" ($500,000), recognizing that "the distribution of the Settlement Amount by Home to the Trust pursuant to this Agreement, and the effectiveness of the releases provided by this Agreement, are contingent upon satisfaction of certain conditions subsequent specified herein." Id.

Section 1 of the Settlement Agreement specified the conditions subsequent: "(i) The Issuance of the Channeling Injunction (Settling Insurers); (ii) The issuance of the Channeling Injunction (Swan Parties); and (iii) The issuance of the Confirmation Order by the Bankruptcy Court." App. 4 (Settlement Agreement § 1(a)). The Swan Parties agreed to use "commercially reasonable efforts" to ensure that the conditions subsequent are satisfied. Id. § 1(b). Under Section 2, Home agreed to pay the Settlement Amount to the Trust within ten business days of the date on which Home is notified by Swan or the Trustee that all of the conditions subsequent have been satisfied. App. 5 (§ 2(a)). The Swan Parties provided broad releases of Home, effective upon the payment of the Settlement Amount. App. 6-7 (§ 3).

c. The Swan bankruptcy. On December 20, 2001, Swan filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code. App. 45 (the Confirmation Order entered in the Swan bankruptcy proceeding at 1). Swan filed its plan of reorganization on September 17, 2002 and transmitted it to holders of impaired claims and interests on or about September 30 – October 1, 2002. Id. Swan submitted technical modifications to the plan on December 5 and 9, 2002. Id. According to the findings made as part of the Confirmation Order, these modifications "were made to fully resolve all outstanding objections to the Plan." App. 101 (Findings ¶ 96). The confirmation hearing on the plan was held before the bankruptcy court on December 9, 2002. App. 45.

The bankruptcy court executed the Confirmation Order on May 30, 2003. App. 76. The Confirmation Order included a channeling injunction as to the Swan Parties and a channeling injunction as to settling insurers. App. 55-59 (¶¶ 31, 32). The district court approved the Confirmation Order on July 21, 2003. App. 76.[3]

The Confirmation Order specifically approved the Settlement Agreement with Home as "fair, equitable, and reasonable." App. 67-68 (Confirmation Order ¶ 59). The Findings of Fact entered as part of the Confirmation Order include findings that the terms and conditions of the agreements contemplated by the plan are "fair, reasonable, equitable, and in the best interests of the Debtor's creditors and its Estate." App. 94 (Findings ¶¶ 57, 58).

d. Swan's request for payment and Home's response. On January 13, 2004, the Swan Asbestos & Silica Trust gave written notice to Home that the provisions of Section 1(a) of the Settlement Agreement had been satisfied, enclosed copies of the Confirmation Order and the

[3] The Confirmation Order was corrected in non-material ways in a Correction Order executed by the bankruptcy court on November 17, 2003 and approved by the district court on November 20, 2003. App. 81.

Correction Order, and requested payment of the Settlement Amount within ten business days. App. 114 (Swan January 13, 2004 letter).

Counsel for Home responded by letter on January 19, 2004 advising that Home had been placed in liquidation on or about June 13, 2003 and that, pursuant to orders of the New Hampshire Court, Home could not comply with the request for payment. Counsel directed Swan to the New Hampshire liquidation and enclosed a copy of the Order Establishing Procedures in that proceeding. App. 116 (Home January 19, 2004 letter).

e. Swan's proof of claim and the Liquidator's determination. Swan filed a proof of claim ("POC") in June 2004. App. 124. The POC asserted a claim for $30 million (the total limits of the two Home policies). Id. The attached supplement briefly described the history of Swan's bankruptcy. At the end of a paragraph regarding coverage litigation, the supplement noted that Home entered the Settlement Agreement and stated that Home "failed to pay the amount of the settlements [sic] when due in January 2004." App. 127. After making preliminary inquiries regarding Swan's claim, the Liquidator issued a Notice of Determination ("NOD") on January 4, 2008. App. 118. In the NOD, the Liquidator allowed Swan's claim in the full amount of the Settlement Agreement: $500,000. Id.

f. The disputed claim proceeding. Swan filed an objection to the Liquidator's determination on March 6, 2008, which was docketed as disputed claim proceeding 2008-HICIL-34. The Referee entered a briefing schedule after a telephonic structuring conference. Exhibit B. The parties then filed written submissions pursuant to Section 15 of the January 19, 2005 Restated and Revised Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company in Liquidation ("Claims Procedures Order"). After oral argument, the Referee issued the Order affirming the Liquidator's determination on June 18, 2009. Exhibit A.

2. The Home Liquidation and the Act

On June 13, 2003, the Court entered the Order of Liquidation declaring that Home was insolvent, appointing the Insurance Commissioner as its Liquidator and finding sufficient cause for an order to liquidate Home. Order of Liquidation ¶¶ (b) - (d). Home is accordingly being liquidated pursuant to the provisions of the New Hampshire Insurers Rehabilitation and Liquidation Act ("Act"), RSA 402-C. In the Matter of the Liquidation of The Home Ins. Co., 154 N.H. 472, 475 (2006) ("Home I").

There are several provisions of the Act that are significant here. First, all pre-liquidation claims against Home must be presented through the proof of claim process. Claimants must file proofs of claim before the filing deadline. RSA 402-C:37, 38. The deadline in the Home liquidation was June 13, 2004. See Order of Liquidation ¶ (bb). All other methods of asserting claims are enjoined. Id. ¶ (n). The Liquidator then investigates claims "as he deems necessary" and determines the amounts for which they will be recommended to the Court. RSA 402-C:45. See RSA 402-C:38, II. The Liquidator is to give notice of determinations to the Claimants, who may object. See RSA 402-C:41. The Claims Procedures Order provides additional direction regarding how claims against Home are to be handled and provides for review of disputed claims by the Referee.

Second, claims can only be paid in accordance with the priorities provided by RSA 402-C:44. That statute establishes ten successive priority classes and provides that "every claim in each class shall be paid in full or adequate funds retained for the payment before the members of the next class receive any payment." Class I is the costs of administration, Class II is policy related claims, Class V is the residual classification, and Class VII is interest on claims already paid. Id. The statute represents a legislative determination to prefer certain creditors, in

particular policyholders and claimants against policyholders, over others. See Home I, 154 N.H. at 488. Insolvent insurers cannot pay all of their creditors, so even preferred creditors may receive only partial payment and lower classes no payment at all. In the case of Home, it is not anticipated that there will be any distribution to creditors in classes below Class II. In the Matter of the Liquidation of The Home Ins. Co., 158 N.H. 396, 397 (2009) ("Home III") (citing Home I, 154 N.H. at 477).

Third, payments may be made on allowed claims (in accordance with the priorities) only when approved by the Court and consistent with being able to make equivalent distributions to creditors whose claims have not yet been determined. RSA 402-C:46 ("Under the direction of the court, the liquidator shall pay dividends in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third-party claims.").

Fourth, the Liquidator has broad powers "subject to the court's control" set forth in RSA 402-C:25. These powers include the authority to "[e]nter into such contracts as are necessary to carry out the order to liquidate, and affirm or disavow any contracts to which the insurer is a party." RSA 402-C:25, XI.

ARGUMENT

Prior to the 2001 Settlement Agreement, Swan had a disputed claim for coverage under the Home insurance policies and was litigating the claim with Home. The claim was liquidated and made absolute by the pre-liquidation Settlement Agreement, which provided for payment of $500,000 upon satisfaction of certain conditions subsequent. The conditions were satisfied in January 2004, after Home had been ordered liquidated. Swan accordingly only has a claim for $500,000 in the Home liquidation.

To avoid this result, Swan seeks to set aside the Settlement Agreement. First, Swan asserts that Home "repudiated" the settlement by not making payment when due in January 2004. Swan's assertion simply disregards the fact of Home's insolvency and liquidation. Once Home was in liquidation, it was precluded from paying the settlement amount, and the settlement became a claim against the estate to be paid in accordance with the Act. All the harms of which Swan complains – delay in payment, fractional payment, an "arbitrary" payment schedule, and loss of potential earnings – are the consequence of Home's liquidation under RSA 402-C. They apply equally to all policyholder claimants. The liquidation of Home does not entitle Swan to reopen its claim but only to a distribution on the agreed settlement amount, which the Liquidator has allowed in full as a Class II claim.

Second, Swan contends that the Settlement Agreement is not binding because the Liquidator did not assume it. However, the Liquidator is not required to affirm or disavow the Settlement Agreement. The provision of the Act concerning affirmation and disavowal of contracts only applies to executory contracts – contracts that neither side has performed. Contracts such as the Settlement Agreement that have been performed by one side are already binding and need not be affirmed to become a claim against the estate, subject to the provisions of the Act.

Finally, Swan advances equitable contentions. Swan suggests that the Settlement Agreement should not be binding because the settlement was unfair. This argument lacks any legal basis, and it ignores both the representations that Swan made in the Settlement Agreement and the fact that the Bankruptcy Court in Swan's bankruptcy proceeding approved the agreement as fair. Swan also contends that the Liquidator erred by not reviewing the merits of its claim for coverage. However, the Liquidator is not obligated to consider anew the merits of a complex,

disputed claim when that claim had been settled before the liquidation. Swan's suggestion that the Liquidator should not be able to rely on the Settlement Agreement because liquidation staff asked for information regarding the underlying claims is groundless. Swan offers no cognizable basis to hold that a request for information bars the Liquidator from considering all issues relating to the claim.

I. THE NON-PAYMENT IS NOT A "REPUDIATION" BUT SIMPLY THE RESULT OF HOME'S INSOLVENCY AND LIQUIDATION THAT AFFECTS ALL HOME POLICYHOLDER CLAIMANTS EQUALLY.

Home would have paid the $500,000 settlement amount in accordance with the Settlement Agreement but for the fact that Home was in liquidation when the payment became due. As the Referee held, the Act is binding on the Liquidator and prevented payment under the Settlement Agreement when due. Order at 3. This does not repudiate the contract but only provides Swan with a claim under the contract in the liquidation.[4]

The liquidation of an insolvent insurer under the Act imposes certain limitations on creditors intended to further the purpose of the Act: "the protection of the interests of insureds, creditors, and the public generally." RSA 402-C:1. IV. Under the Act, when an insurer is liquidated, all claims against the insurer must be filed with the liquidator. RSA 402-C:37 and 38. Allowed claims are prioritized into classes, and "every claim in each class shall be paid in full or adequate funds retained for the payment before members of the next class receive any payment." RSA 402-C:44. Thus, a claim may be paid in full, receive a percentage distribution, or not be paid at all depending on its priority and the assets available for distribution. The timing of payment will be determined by the liquidator and the court depending upon the progress of the liquidation. "Under the direction of the court, the liquidator shall pay dividends in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious

[4] None of the cases or the treatise cited at pages 12-13 of Swan's motion concern a liquidation.

completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims." RSA 402-C:46, I.

The harms which Swan contends warrant setting aside the Settlement Agreement all follow as a matter of law from the Order of Liquidation directing Home's liquidation under the Act. The "fractional" payment results from the legislative determination of priority classes in RSA 402-C:44 and the fact of Home's insolvency. The "delay" in payment and the "arbitrary" payment schedule result from the need to determine Home's liabilities before the Liquidator can seek approval of distributions from the court under RSA 402-C:46. Finally, the "denial" of earnings is a side effect of the delay in payment suffered by all creditors, and it is recognized by the provision for post-liquidation interest if assets are sufficient to pay it. See RSA 402-C:44, VII (Class VII priority for interest from the date of the liquidation petition or whenever payment is due, whichever is later, until date dividend is declared). As the New Hampshire Supreme Court said long ago in a bank insolvency:

> In all insolvency proceedings the rights of creditors are necessarily impaired more or less. Upon the commencement of the proceedings a creditor's right to bring actions at law against the debtor to enforce his claims terminates. . . . His claims may cease to bear interest, although by the terms of the contract he is entitled to interest. He may be compelled to accept part, for full, payment.

Bank Comm'rs v. Security Trust Co., 70 N.H. 536, 541-42 (1900).

The absence of payment in January 2004 therefore is not a repudiation of the Settlement Agreement but merely a consequence of Home's liquidation, which prevents payments to any policyholder claimants except in accordance with the Act. By allowing the claim in the full $500,000 settlement amount, the Liquidator is not "renegotiating" the Settlement Agreement but properly recognizing it as a liability of the estate, subject to the limitations imposed by the liquidation statutes. Swan essentially contends that it should be permitted to reopen (that is,

"renegotiate") its claim because the settlement was not paid, but the non-payment is merely a consequence of liquidation.

The Court addressed a similar issue in 2003, when a policyholder (Inspiration/Phelps Dodge) sought to require the Liquidator to immediately pay a $2.5 million settlement that had not been consummated when Home was ordered liquidated. The court ruled that Home was not required to pay the $2.5 million but that Inspiration/Phelps Dodge must await payment under the liquidation distribution scheme according to its status as a policyholder priority creditor. Order (September 18, 2003) (attached as Exhibit C). So here, Swan must await payment. Home did not repudiate the Settlement Agreement. Instead, the Act dictates the manner and extent to which that acknowledged liability may be paid. "[T]o allow Swan to set aside the Agreement would contravene the statute." Order at 4.

II. THE LIQUIDATOR WAS NOT REQUIRED TO ASSUME OR DISAVOW THE SETTLEMENT AGREEMENT BECAUSE IT WAS NOT AN EXECUTORY CONTRACT.

Swan now appears to accept that the Settlement Agreement cannot properly be assumed (or, in the language of the Act, RSA 402-C:25, XI, "affirmed") or treated as a Class I administration cost entitled to full payment. Motion at 7.[5] However, it continues to suggest that the contract has somehow been nullified because it was not assumed. As explained below, the

[5] The Settlement Agreement cannot be assumed because it is a pre-liquidation agreement resolving Swan's pre-liquidation claim for coverage. As the Referee held (Order at 3), giving it Class I administration cost priority would violate the priority statute. RSA 402-C:44. The principal question in deciding to assume a contract is whether it provides a benefit to the liquidation. See Home I, 154 N.H. at 484 (payments under post-liquidation contract that would bring a net benefit to creditors is an administration cost). Claim settlements are not administration costs because they do not bring a benefit (additional assets) into the estate but merely resolve an asserted liability. Oxendine v. Commissioner of Ins. of North Carolina, 494 S.E.2d 545, 546-48 (Ga. Ct. App. 1997) (settlements reached with rehabilitator are not administration costs in liquidation: "These claims are for money which [policyholders] claim from [the insurer's] estate and not administrative costs or expenses incurred."); Home I, 154 N.H. at 484-85 (discussing Oxendine); Inspiration/Phelps Dodge Order (Ex. C). Full payment of Swan's settlement amount would violate the equality of treatment mandated by RSA 402-C:44 and, as it would give Swan more than other creditors in the class, be a preference. See RSA 402-C:32 (preference is a transfer "the effect of which transfer may be to enable the creditor to obtain a greater percentage of his debt than another creditor of the same class would receive").

Liquidator does not need to affirm or disavow the Settlement Agreement because it was not executory. It merely remains a claim against the estate for the settlement amount. See Stewart Foods, Inc., 64 F.3d 141, 143 (4th Cir. 1995) ("[T]he debtor's obligation under a non-executory contract created a claim to be handled as part of the bankruptcy proceedings.").[6]

A. The Liquidator Was Not Required To Affirm Or Disavow The Settlement Agreement Because It Is Not Executory.

As the Referee held (Order at 2), the Liquidator was not required to assume or disavow the Settlement Agreement. The Act provides: "Subject to the court's control, [the liquidator] may: . . . XI. Enter into such contracts as are necessary to carry out the order to liquidate, and affirm or disavow any contracts to which the insurer is a party." RSA 402-C:25, XI.[7] The provision regarding affirmance or disavowal of contracts is based on the longstanding powers of equity receivers and bankruptcy trustees to elect whether to assume or reject executory contracts. See R.E. Clark, 2 Clark on Receivers § 428 at 720-22 (3d ed. 1959); Fauci v. Mulready, 150 N.E.2d 286, 289-90 (Mass. 1958) (citing cases); Central Trust Co. of Illinois v. Chicago Auditorium Ass'n, 240 U.S. 581, 592-93 (1916). Non-executory contracts do not present the issue, and there is no requirement that the Liquidator affirm or disavow them. If the contract has been performed by the insurer, it is an asset of the estate. If it has been performed by the other party, it is a liability of the estate and is merely a claim against the estate.

The Settlement Agreement here was not executory because it was not materially unperformed by both Swan and Home. An executory contract is "a contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that

[6] Contrary to Swan's contention (Motion at 8-9), the Liquidator is not construing the insurance policies through the Settlement Agreement. The Settlement Agreement resolves the disputed claim for coverage and thus replaces the policies with respect to asbestos/silica matters.

[7] It is noteworthy that the statute does not provide that the Liquidator must affirm or disavow contracts, much less do so in any particular time. A liquidator does not need to even consider the issue unless the contract is executory.

the failure of either to complete performance would constitute a material breach excusing performance of the other." Gallivan v. Springfield Post Road Corp., 110 F.3d 848, 851 (1st Cir. 1997) (quoting In re Columbia Gas Sys. Inc., 50 F.3d 233, 239 (3d Cir. 1995)) (emphasis added).[8] The question is thus whether both parties had unperformed obligations that would each constitute a material breach excusing performance of the other. The relevant time is the date the petition for liquidation was filed. See 402-C:21, II (rights fixed on date petition for liquidation filed).

On May 8, 2003, when the petition to liquidate Home was filed, the parties were waiting for the conditions subsequent to occur, which would trigger Home's obligation to make payment. Home's performance had not yet become due, and there was no material non-performance on Swan's part that would excuse Home's performance. What remained to happen was the issuance of the confirmation order containing the channeling injunctions. The potential non-occurrence of the conditions subsequent was not a breach by Swan. "Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur." Restatement (Second) of Contracts § 225(3) (1981). Thus, "if the remaining obligations in the contract are mere conditions, not duties, then the contract cannot be executory . . . because no material breach could occur." Columbia Gas, 50 F.3d at 241. Matter of KMMCO, Inc., 40 B.R. 976, 979 (E.D. Mich. 1984) ("failure to fulfill a condition cannot amount to breach").

The Settlement Agreement here does not impose a duty on Swan that conditions subsequent actually occur. It only provides that "[t]he Swan Parties agree to use commercially reasonable efforts to ensure that the conditions subsequent specified above are satisfied." Settlement Agreement § 1(b) (App. 4). There is no question but that as of May 8, 2003 Swan

[8] This is the so-called "Countryman" definition articulated in V. Countryman, Executory Contracts in Bankruptcy: Part 1, 57 Minn. L. Rev. 439, 460 (1973). See Stevens v. CSA, Inc., 271 B.R. 410, 413 (D. Mass. 2001).

had used "commercially reasonable efforts" to see that the confirmation order and channeling injunctions would issue. Swan had filed its petition for voluntary bankruptcy on December 20, 2001; proposed and filed a plan of reorganization that provided for the two channeling injunctions on September 17, 2002; modified that plan to "resolve all outstanding objections to the Plan" at or before the confirmation hearing (Findings ¶ 96 (App. 101)); and completed the confirmation hearing on December 9, 2002. See App. 45. While the conditions subsequent had not yet been satisfied, Swan had substantially performed its "commercially reasonable efforts" obligation under the Settlement Agreement.

This is analogous to the situation where a broker filled its obligations by bringing a buyer to the table, but the commission was not due unless the sale closed. Because the broker had fulfilled its obligation, the commission contract was not executory even though the condition to payment (closing) had not occurred. See Gallivan, 110 F.3d at 851 (citing In re Munple, Ltd., 868 F.2d 1129, 1130-31 (9th Cir. 1989)). At the time the petition to liquidate Home was filed, Home could not have contended that Swan was in material breach of the Settlement Agreement. Accordingly, the Settlement Agreement was not executory.

B. A Non-Executory Contract Only Creates A Claim.

Since the Settlement Agreement was not executory, the Liquidator was not obligated to either affirm it or disavow it. It merely represents a claim against the estate. This case is quite similar to Stewart Foods. In that matter, a former executive had received 19 of 120 monthly payments when the company was placed in bankruptcy and stopped making payments. The executive sought to require the company to continue making payments. The bankruptcy court held that the contract was not a pre-petition claim and directed payment; the district court

affirmed on the ground that the company was trying to treat the claim as rejected even though it was non-executory. 64 F.3d at 143-44.

The Fourth Circuit reversed. It held that rejection or assumption of a contract does not determine whether a claim exists, only whether a claim is treated as a pre-petition obligation or an administrative expense. 64 F.3d at 144. Since non-executory contracts cannot be assumed or rejected, the debtor remains bound by those contracts. Id. at 145. However, they are treated as pre-petition claims against the estate. Id. Where a payment is due after bankruptcy, it still constitutes a pre-petition debt; that is, while the contract continues in effect the debtor does not have an obligation to make payment other than as provided under bankruptcy law. Id. at 146. The obligations under such a contract continue to run both ways. The bankrupt must make payment as permitted under bankruptcy law, and the other party has to honor its obligations. See Beloit Liquidating Trust v. United Ins. Co., 287 B.R. 904, 905-906 (N.D. Ill. 2002) (holding that bankrupt insured's obligation to pay retrospective premiums was governed by Bankruptcy Code provisions regarding pre-petition claims, but that since the insurance policies were non-executory pre-petition contracts the insurer was obligated to pay covered claims under the policies). Thus, Home is obligated to pay the settlement amount as provided under the Act (i.e., as a Class II claim for $500,000), and Swan is obligated to abide by its release of Home.[9]

In this situation, Swan may not reopen the underlying claim because the Settlement Agreement is an acknowledged liability to be paid so far as the Act and Home's assets permit. Reopening the claim will only serve to frustrate the policy of encouraging settlements and potentially create new and unnecessary dispute resolution proceedings. Most significantly, it

[9] As Stewart Foods held, a rejection of an executory contract would not entail a different result. It does not make the contract disappear. 64 F.3d at 144-45. See First Sec. Bank v. Gillman, 158 B.R. 498, 503 (D. Utah 1993) ("[T]he result is the same: the non-debtor party to the contract holds only a general unsecured claim against the estate."); In re A.J. Lane & Co., Inc., 115 B.R. 738, 743, (Bkrtcy. D. Mass. 1990) ("Unassumed obligations . . . are merely claims, entitled to share in estate distributions with other claims of the same class.").

would be inequitable by treating Swan differently from other policyholder claimants (such as Inspiration/Phelps Dodge) that settled with Home but were not paid before the liquidation. See Order at 3, 4.

In sum, Home's contractual obligation to pay $500,000 represents the liability of the estate, and it was properly addressed by the allowance of the full $500,000 settlement amount as a Class II claim.

III. SWAN'S EQUITABLE ARGUMENTS LACK MERIT.

Swan also advances several equitable considerations at various points in its motion, but none provide any ground for reversing the Referee. Swan suggests that the Settlement Agreement is somehow inadequate or resulted from financial pressure. Motion at 4. Swan offers no legal basis for reopening the Settlement Agreement on this ground, and the argument should not be credited in any event. As the Referee noted (Order at 3), Swan was represented by counsel in negotiating the Settlement Agreement, see Settlement Agreement § 11(a), and it specifically acknowledged that it was not "unduly pressured" to accept the settlement. Id. § 11(b). App. 12. Contrary to Swan's present intimations, there were (and are) significant coverage issues. As noted in Swan's Disclosure Statement at 12, the policies of post-1986 insurers (including Home) contain asbestos and pollution exclusions and "non-cumulation" and "anti-stacking" provisions. App. 23. Most significantly, the settlement was reviewed by the Swan bankruptcy court as part of the confirmation process for Swan's own proposed plan. The court approved the Settlement Agreement as "fair, equitable, and reasonable" after consideration of "the probability of success of the claims that Swan has brought against The Home, the complexity of the litigation, expense, inconvenience, and delay attending to the litigation; the

interests of creditors; and whether the settlement was as [sic] product of arm's length negotiations and was entered into in good faith." App. 67-68 (Confirmation Order ¶ 59).

Swan also contends that the Liquidator could only act on its POC as presented, as a claim for coverage of asbestos and silica claims under the Home policies without regard to the Settlement Agreement, and that the Liquidator was obligated to address the coverage issues either first or not at all. Motion at 15-17. This position is contrary to the legislative purpose of having an efficient liquidation, denies the Liquidator discretion granted by the Act and misconstrues the Referee's Order.

The Act seeks to provide for an efficient and expeditious liquidation. See RSA 402-C:1, IV ("The purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally . . . through . . . (c) Enhanced efficiency and economy of liquidation. . . ."). It specifically authorizes the Liquidator to request claimants to provide information to supplement their proofs of claim, RSA 402-C:38, II, and it provides that he shall review claims and "shall make such further investigation as he deems necessary." RSA 402-C:45, I. It would contrary to evident legislative purpose of having efficient proceedings in which the Liquidator investigates claims "as he deems necessary" to hold either that (a) inquiries made of the claimant about one issue bar the Liquidator from raising other available defenses or (b) the Liquidator must investigate and take a position on every issue in making his determination at the peril of losing the ability to investigate other issues if an initial defense were rejected by the Court or Referee.

First, nothing in the Act requires the Liquidator to accept a claim as a claimant may chose to frame it. The Act authorizes him to investigate the claim and, as the Referee recognized, this necessarily includes evaluating any defenses that may be available. Order at 3. In this case, the Liquidator's investigation revealed that Swan's disputed claim for coverage had been previously

liquidated for an agreed amount of $500,000 in the Settlement Agreement. The fact that Swan choose to ignore the settlement in presenting the claim does not foreclose the Liquidator from relying on it.

Second, nothing in the Act prevents the Liquidator from conducting an initial evaluation of the claim before determining it based on a single dispositive issue. The Liquidator properly may look at the entire situation and determine what potentially dispositive issues to consider and assert first. Here, the Liquidator reviewed the Swan claim and identified the Settlement Agreement as an initial dispositive issue. He is not barred from asserting that defense merely because he started by gathering information about the claim generally. Just as a litigant does not forego the chance to file a summary judgment motion on one issue by initially conducting discovery on other issues, the Liquidator did not lose the chance to raise the settlement by asking about the underlying claims, especially when Swan chose to focus its POC on those claims.

Third, nothing in the Act requires the Liquidator to evaluate every issue and assert all defenses to a claim at once. This would be wasteful of the time and resources of the liquidation staff. Where there are thousands of claims to determine, the Liquidator may properly chose to rely on a dispositive issue and determine the claim without addressing every other issue that might become relevant if the fist issue is ultimately not dispositive. A litigant does not lose other defenses by filing a summary judgment motion on one issue, and the Liquidator did not lose the ability to review coverage issues by first asserting that the claim is barred by a prior settlement. The Referee's Order is not to the contrary. In the language on which Swan relies, the Referee was saying no more than that the Liquidator's obligation to investigate a claim encompasses consideration of any issue that may resolve it, even if the claimant chose to present the claim in a way that seeks to avoid a dispositive issue. Order at 3.

CONCLUSION

For the reasons set forth above, the Court should sustain the Referee's affirmance of the Liquidator's determination allowing Swan's claim in the amount of $500,000 at priority Class II.

Respectfully submitted,

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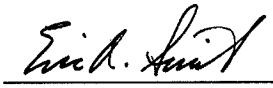

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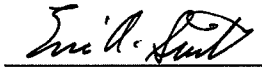
July 27, 2009

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Objection to Swan Transportation Company's Motion to Recommit was sent by first class mail to all persons on the service list on July 27, 2009. The Appendix to Liquidator's Objection was served only on counsel for Swan.



Eric A. Smith

THE 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

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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE
IN RE THE HOME INSURANCE COMPANY IN LIQUIDATION
DISPUTED CLAIMS DOCKET

In Re Liquidation Number:	2008-HICIL-34
Proof of Claim Number:	INSU 701572-01
	INSU 701573
Claimant Name:	Swan Transportation Co.
Claimant Number:	
Policy or Contract Number:	
Insured or Reinsured Name:	Swan Transportation Co.
Date of Loss:	

ORDER ON THE MERITS

Swan Transportation Company ("Swan Transportation") f/b/o Swan Asbestos and Silica Settlement Trust ("the Trust")(collectively "Swan") seeks an order: (1) that its proof of claim is allowed; (2) that the Liquidator has no affirmative defenses to payment of the claim in the amount of $30 million, to total of the limits of liability of the two Home policies at issue; and (3) denying the amount for which the claim was allowed.

RELEVANT FACTS

Home issued two general liability insurance policies to Swan, policies HXL-F 86 61 07 and HXL-C 11 17 16. Both policies had limits of liability of $15 million. Swan faces claims for liquidated damages because of bodily injuries sustained by individual underlying claimants from exposure to asbestos, silica, and/or mixed dusts under the State of Texas' "Good Samaritan" tort liability law. Because the value of the claims against Swan exceeds its assets, it sought protection under the bankruptcy code. Swan also entered into settlements with its liability insurers.

Swan and Home entered into a settlement agreement ("the Agreement") on or about October 31, 2001. The Agreement made clear that Swan and Home disagreed with respect to certain issues regarding the insurance coverage available under the Home policies for the claims against Swan. The Agreement further noted Swan's intent to file for bankruptcy and the wish of Swan and Home to resolve any and all disputed issues between them regarding past, present and future insurance claims under the two Home policies. The Agreement indicated that Home agreed to pay $500,000 to Swan. The Agreement made Home's payment contingent upon Swan providing written notice to Home that certain conditions had been met. Those conditions included the issuance of a Confirmation Order by the Bankruptcy Court. Swan made reasonable commercial efforts to perform under the contract. However, before performance was complete, the Order of Rehabilitation of Home was filed on October 5, 2003, followed by the Order of Liquidation filed on June 13, 2003.

An Amended Final Order confirming the Bankruptcy Plan for Swan was entered December 13, 2003. At that time, the Trust was established to compensate the valid pending and future asbestos, silica and mixed

dust claims. The assets from Swan's liability insurers, paid based on the settlements with those insurers, comprised the basis of the Trust. It is the Trust which has the ability to pursue claims against Home. Thereafter, by letter dated January 13, 2004, Swan provided written notice to Home that the conditions subsequent to the Agreement had been met, and demanded payment pursuant to the Agreement. Home responded by letter dated January 19, 2004 that it could not comply with Swan's demand for payment and directed Swan to the liquidation proceedings.

Swan filed a proof of claim with the Liquidator on June 23, 2004, seeking the full limits of liability under the Home policies listed above, a total of $30 million. The proof of claim did not seek to enforce the Agreement.

LEGAL ANALYSIS

Swan asserts that the Liquidator's decision to approve only $500,000 of Swan's $30 million proof of claim was inappropriate for these reasons:

- The Agreement is not binding on Swan because the Liquidator did not properly assume the contract
- The decision relies solely on the Agreement, which the Liquidator repudiated
- The Liquidator can't perform the obligations set forth in the Agreement
- The Agreement does not accurately reflect the value of Swan's claims under the Home policies

The Liquidator argues that it must act according to the New Hampshire Statute, RSA Chapter 402-C Insurers Rehabilitation and Liquidation. The Liquidator further argues that it was unable to assume the Agreement and was not required to disavow the Agreement. The Liquidator also asserts that in the liquidation Swan is entitled to the same treatment as other claimants, in other words, for a Class II claim in the amount of $500,000.

RSA 402-C controls the rights and duties of the Liquidator. Once a liquidation order is entered, the Liquidator is bound to take only actions allowed and/or required by the statute. It is to RSA 402-C the Referee must look to determine the requirements imposed upon and actions allowed to the Liquidator.

Swan first argues the Agreement is not binding on Swan because the Liquidator did not assume the contract. The Liquidator argues that it could not do so. Nothing in RSA 402-C requires the Liquidator to assume or disavow any contract. Under RSA 402-C:25, IX, the Liquidator has the ability to take certain actions regarding assets of the insurer. RSA402-C:25, XI allows the Liquidator to affirm or disavow any contracts to which Home is a party, but does not require the Liquidator to do so. Therefore, the Referee finds that the Liquidator was not required to assume or disavow the Agreement.

The Liquidator argues that it could not assume the Agreement, because to do so would make Swan's claims administrative claims, falling within Class I. RSA 402-C:44 sets forth the order of distribution of assets. Class I is administrative costs, defined to include: costs of reserving or recovering assets of the insurer; compensation for services rendered in the liquidation; necessary filing fees; fees and mileage payable to witnesses; and reasonable attorney's fees. Class II is policy related claims, which includes all

claims by policyholders and insureds arising from and within the coverage of the applicable limits of insurance policies.

The Agreement relates to Swan's pre-liquidation claim for coverage under policies issued by Home. Pursuant to RSA 402-C, the Liquidator may affirm or disavow any contracts to which Home is a party, but by doing so, those contracts become first priority administrative costs. The New Hampshire Supreme Court has addressed the issue of assumption of a contract and indicated that the Liquidator must consider whether the contract provides a benefit to the liquidation and should be considered an administrative cost. In the Matter of the Liquidation of The Home Insurance Co., 154 N.H. 472 (2006). Because the Agreement does not provide benefit to the liquidation, it can't be considered an administrative cost and therefore can't be treated as a Class I contract. To do so would be inequitable to other claimants and against the requirements of the statute. The Liquidator has properly designated Swan's claim as a Class II claim.

Swan next argues that the Liquidator can't rely on the Agreement because it failed to perform the Agreement and because it can't now perform the Agreement. The Liquidator asserts that Home would have complied with the Agreement but for the fact that Home was in liquidation when the payment was due, and under RSA 402-C, the Liquidator was unable to do so. Therefore, the Liquidator alleges that any harm which Swan suffered by the failure of Home to fulfill its obligations under the Agreement are all the result of the insolvency and liquidation.

Once the liquidation order was entered, the Liquidator was bound to adhere to the provisions of RSA 402-C and follow the order of distribution set forth in Section 44. Swan's claims must be treated as Class II claims, pursuant to the statute. See also In the Matter of Rehabilitation/Liquidation of the Home Insurance Company, Merrimack County Superior Court Order, September 13, 2003, regarding claims by Inspiration and Phelps Dodge.

Swan also insists that its choice to submit a proof of claim not for $500,000 but for $30 million is dispositive. Swan asserts that its claim must be reviewed based on the claim submitted, for $30 million, and not on the Agreement. Swan's argument that it had the right to frame the claim being made, and the Liquidator must review the claim as filed is compelling. However, the Liquidator is under an obligation to review all information related to the claim, including in this case, the Agreement. To require the Liquidator to ignore the Agreement would be to ignore the requirements imposed on the Liquidator by RSA 402-C and allow Swan a benefit to which it is not entitled, in comparison to others with claims against the estate.

Swan also argues that because the Liquidator did not perform under the Agreement it is void, and therefore Swan is entitled to make a claim for the full value of amounts due under its policies. Swan also argues the Liquidator can't assert policy defenses or other defenses. In addition, Swan asserts that it entered into the Agreement under pressure because of financial concerns. With these arguments, Swan asks the Referee to ignore a deal it was willing to accept in 2001 and at the same time refuse to allow the Liquidator to offer defenses to a new and different deal. Swan can't have both. Swan was represented by counsel and understood the parameters of the Agreement when signed.

The Referee is cognizant of the fact that Swan relied on portions of the Agreement with which the Liquidator did not and could not comply. However, given the parameters of RSA 402-C, under which the Liquidator is required to act, the Referee finds that the Liquidator acted within the statue and to allow Swan to set aside the Agreement would contravene the statute. In addition, allowing Swan to set aside the Agreement would be inequitable to the other claimants in the Liquidation.

CONCLUSION

For the reasons set forth above, the Referee affirms the Liquidator's basis for its Notice of Determination.

So Ordered.

June 18, 2009
Date

Referee, Melinda S. Gehris

BEFORE THE COURT-APPOINTED REFEREE
IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY
DISPUTED CLAIMS DOCKET

In Re Liquidator Number: 2008-HICIL-34
Proof of Claim Number: INSU 701572-01
INSU 701573
Claimant Name: Swan Transportation Company
Insured or Reinsured Name: Swan Transportation Company

ORDER

At the request of counsel a telephonic conference was held in this matter on July 30, 2008.

A potentially dispositive matter to be addressed is whether the Liquidator properly relied upon a settlement between The Home Insurance Company ("Home") and Swan Transportation Company ("Swan") when placing a $500,000 value on the determination of Swan's pending proof of claim. The apparent basis for the determination is a $500,000 settlement between Home and Swan negotiated in 2001, a settlement which became effective upon confirmation of Swan's bankruptcy reorganization plan on December 13, 2003, six (6) months after Home's liquidation order.

Swan contends that the Liquidator may not rely upon the 2001 settlement amount because the Liquidator has neither performed under the terms of the settlement agreement, nor taken any appropriate affirmative action to formally assume the obligation. Instead contends Swan, the Liquidator should determine its pending proof of claim "afresh", without regard to the 2001 settlement terms.

Parties agree that this issue is best addressed through written submissions under Sec. 15 of the Procedures. The Claimant's submission shall be due on September 1, 2008 and the Liquidator's response on October 1, 2008.

So ordered.

Date: August 1, 2008

Referee, Paula T. Rogers

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

In the Matter of Rehabilitation/Liquidation of the Home Insurance Company

No. 03-E-106

ORDER

This proceeding arises out of a Petition to Intervene in the Home Insurance Company ("the Home") rehabilitation/liquidation proceeding, filed by Inspiration Consolidated Copper Company ("Inspiration"), Phelps Dodge Corporation, and Phelps Dodge Miami, Incorporated (together "Phelps Dodge") (collectively "Inspiration/Phelps Dodge"), creditors of the Home. In an Order dated June 11, 2003, the Court (McGuire, J.) granted prayers A and B of the Inspiration/Phelps Dodge Petition to Intervene allowing them to intervene. The issue currently before the Court is Prayer C of Inspiration/Phelps Dodge's motion to intervene, which requests that the Insurance Commissioner, the administrator responsible for managing the Home's rehabilitation/liquidation, pay the $2.5 million settlement debt in full before any liquidation of the Home. For the reason stated below, prayer C is **DENIED.**

I. FACTUAL BACKGROUND

Inspiration/Phelps Dodge asserted property damage claims against the Home under four Excess Umbrella Liability Insurance Policies based on environmental contamination of Pinal Creek in Globe, Arizona. These claims were the subject of a civil suit in Arizona Sate Court in 1998 entitled Inspiration Consolidated Copper Company et al. v. The American Ins. Co., et al. (Maricopa County, Arizona, No. CV 98-000530). The

parties settled the suit after trial began but prior to going to the jury. The settlement, subject to approval by the New Hampshire Insurance Department, required the payment of $2.5 million by the Home to Inspiration/Phelps Dodge.

Five months following the settlement agreement, on March 4, 2003, pursuant to RSA 402-C:15, Paula T. Rogers, Commissioner of Insurance for the State of New Hampshire (the "Commissioner"), filed the Verified Petition for Rehabilitation of the Home. The Commissioner filed the petition for the purposes of seeking appointment as receiver of the Home and commencing the rehabilitation process. On March 5, 2003, this Court (McGuire, J.) entered an order, in which the Commissioner was appointed as Rehabilitator for the Home.

Following the Commissioner's determination that the Home was insolvent within the meaning of RSA 402-C:3 and RSA 402-C:20, II and that under RSA 402-C:19 further attempts to rehabilitate the Home would be futile, the Commissioner filed a Verified Petition for Order of Liquidation pursuant to RSA 402-C:5, RSA 402-C:19 and RSA 402-C:20. On June 13, 2003, this Court (McGuire, J.), issued an order of liquidation for the Home, and established the deadline for filing claims pursuant to RSA 402-C:26, II, RSA 402-C:37, I and RSA 402-C:40, II as one year from the date of the order.

As noted above, and consistent with the orders of this Court, Inspiration/Phelps Dodge were granted the right to intervene as creditors of the Home under the liquidation process. In their position as creditors, Inspiration/Phelps Dodge contend that their $2.5 million settlement claim against the Home supersedes other claims held by other creditors of the Home and should be paid in full before any liquidation of the assets of the Home.

Inspiration/Phelps Dodge argue that the Home should be required to pay the full amount of their claim, prior to the liquidation process, because representatives of the Home and Risk Enterprise Management, Ltd. ("REM"), the third party administrator that manages the Home's business on behalf of the Commissioner, approved the settlement agreement which brought an end to the Arizona dispute.

Representatives of the Home signed the agreement, documented in a "Settlement Termsheet" dated November 27 and 29, 2002, five months prior to the Commissioner placing the Home into Rehabilitation. Inspiration/Phelps Dodge note that although the "Settlement Termsheet" was not the final settlement agreement, it did represent the basic requirement that the Home pay Inspiration/Phelps Dodge $2.5 million.

In accordance with the "Settlement Termsheet" and the obligations bestowed upon the Home therein, Inspiration/Phelps Dodge maintain that they are in a unique position as policy holders, because representatives of the Home substantially approved the settlement which became final prior to the Rehabilitation and current Liquidation status of the Home.

The Commissioner in her capacity as Liquidator of the Home counters that granting the Inspiration/Phelps Dodge request would violate the claims process and distribution scheme set forth in RSA chapter 402-C and would be inequitable to other similarly situated policy claims holders. Thus, the Commissioner maintains that the Inspiration/Phelps Dodge claim should be treated like other policy claims in its class.

II. DISCUSSION

Inspiration/Phelps Dodge argue that their $2.5 million settlement claim should be paid out to them prior to the Home liquidation because (1) they are in a unique position

amongst the creditors, having concluded a settlement agreement in which the Home was a participant, five months prior to the Commissioner's submission of the Liquidation Petition of the Home; and (2) the Liquidator has exercised bad faith in not awarding Inspiration/Phelps Dodge their settlement claim. The Court does not agree.

RSA chapter 402-C governs the rehabilitation and liquidation of insurers. The purpose of RSA chapter 402-C is to protect the interests of insureds, creditors, and the public generally. RSA 402-C:1, IV. RSA chapter 402-C "shall be liberally construed to effect the purposes stated in [RSA 402-C:1, IV]." RSA 402-C:1, III. To that end, RSA 402-C:5 grants the Court the power to issue "restraining orders, temporary and permanent injunctions, and other orders as are deemed necessary and proper to prevent", among other things, "[w]aste of the insurer's assets", "[t]he obtaining of preferences, judgments, attachments, garnishments or liens against the insurer or its assets" and "any other threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders . . . ."

As noted above, the settlement award at issue here stems from property damage claims for which the Home is responsible under four excess umbrella liability insurance policies held by Inspiration/Phelps Dodge. Thus, under RSA 402-C:44, III, the Inspiration/Phelps Dodge claim qualifies as a policy-related claim.

Like other policy claim holders who have not been paid, Inspiration/Phelps Dodge is subject to the order of distribution articulated in RSA 402-C:44, III. Policy claims rank third in priority following administrative costs and wage claims. RSA 402-C:44, III. Ordering the Home to pay Inspiration/Phelps Dodge prior to the liquidation process

would elevate the Inspiration/Phelps Dodge claim to a priority status inconsistent with their policy claim position and would be unfair to other similarly situated claims holders.

In making distributions pursuant to the liquidation process, RSA 402-C:46 instructs the Commissioner to "pay dividends in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of the unliquidated and undetermined claims." Granting Inspiration/Phelps Dodge request would be contrary to the intent of the statute and disrupt the "recognition of priorities" outlined therein.

Moreover, an early disbursement to Inspiration/Phelps Dodge, at a time when the Home is insolvent, would constitute a voidable preference under RSA 402-C:32, I(a) & (b) which provides in pertinent part that:

> [i]f a liquidation order is entered while the insurer is already subject to rehabilitation, transfers otherwise qualifying shall be deemed preferences if made or suffered within one year before the filing of the successful petition for rehabilitation or within 2 years before the filing of the successful petition for liquidation, whichever time is shorter.
>
> (b) the insurer was insolvent at the time of the transfer or (2) the transfer was made within four months before filing the petition, or (3) the creditor receiving it would or to be benefited therby or his agent acting with reference thereto had reasonable cause to believe at the time when the transfer was made that the insurer was insolvent or was about to become insolvent . . . .

Thus, even if the Commissioner of the Home had paid Inspiration/Phelps Dodge the $2.5 million pursuant to the settlement agreement, the payment would have been subject to retrieval under the applicable preference statute above.

As to Inspiration/Phelps Dodge's assertion of bad faith on behalf of the Commissioner, the Court finds that there was no evidence of bad faith presented.

Accordingly, the Court does not find that the Commissioner acted in bad faith in not keeping Inspiration/Phelps Dodge informed regarding the Home's dire financial status.

III. Conclusion

For the reason stated above, the Court rules the Home is not required to pay Inspiration/Phelps Dodge their $2.5 million policy claim, prior to liquidation of the Home. Such a payment would be inequitable under the statutorily defined distribution scheme of the liquidation process. Accordingly, Inspiration/Phelps Dodge, must await payment from the Commissioner according to their status as a policy claims holders.

So Ordered.

Dated: 9/18/03

Kathleen A. McGuire,
Presiding Justice