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 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**

LIQUIDATOR'S SECTION 15 SUBMISSION

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), makes this submission in support of the Liquidator's determination of the claim of Swan Transportation Company ("Swan") pursuant to § 15 of the Revised and Restated Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company in Liquidation ("Claims Procedures Order").

Introduction

The claimant Swan objects to the Liquidator's determination to allow Swan's claim in the full $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. However, the effects of which Swan complains – delayed payment only on a 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 negotiated and resolved in 2001.

I. Issues to be determined:

Whether Home's inability to pay the settlement amount when due in 2004 because of Home's insolvency and liquidation warrants setting aside the settlement agreement and reopening Swan's underlying claim.

II. Exhibits:

The Liquidator relies upon the following exhibits:

1. The Settlement Agreement By And Among The "Swan Parties" (As Defined) And The Home Insurance Company executed November 27, 2001 (the "Settlement Agreement") (found at Case File – "CF" – 020);

2. Excerpts from the Disclosure Statement with respect to Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code for Swan Transportation Company ("Disclosure Statement") (from Swan's Mandatory Disclosures);

3. The Order Confirming the Plan of Reorganization for Swan Transportation Company executed by the Bankruptcy Court on May 30, 2003 and approved by the District Court on July 21, 2003 ("Confirmation Order") (CF037) and the subsequent Order Granting Motion to Correct Scrivener's Error in Order Confirming the Plan of Reorganization for Swan Transportation Company and to Make Non-Material Modifications to the Plan was executed by the Bankruptcy Court on November 17, 2003 and approved by the District Court on November 20, 2003 ("Correction Order") (CF069);

4. The Findings of Fact and Conclusions of Law Regarding the Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code for Swan Transportation Company executed by the Bankruptcy Court on May 30, 2003 and approved by the District Court on July 21, 2003 ("Findings") (from Bankruptcy Court on-line docket);

5. The Swan Asbestos & Silica Trust's January 13, 2004 written notice (CF035);

6. Home's January 19, 2004 letter response (CF074); and

7. The Liquidator's January 4, 2008 Notice of Determination (CF009).

III. Factual Background

a. The Coverage dispute and litigation. During the 1990s, Swan was faced with suits alleging injuries arising from exposure to asbestos, silica and/or mixed dusts. Disclosure Statement at 9. In 1999, Swan retained coverage counsel and filed coverage litigation against its insurers, including Home. Id. at 13. Swan sought coverage from primary and excess carriers from the 1970s through the 1990s. Insurers asserted numerous defenses to coverage. See id. at 13-14, 19. (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. Disclosure Statement at 20-23. As a result, Swan entered into settlement agreements with certain insurers as part of its planning for a voluntary bankruptcy. Id. at 25-26 (listing settlements).

b. The Home-Swan settlement. Home was among the settling insurers. Home executed the Settlement Agreement on October 30, 2001, and Swan executed it on November 27, 2001. Settlement Agreement at 15. The Settlement Agreement recites 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 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. Settlement Agreement, Recitals, at 3-4.

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." Settlement Agreement, Whereas Clauses, at 4. 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 specifies 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." Settlement Agreement § 1(a). The Swan Parties agree to use "commercially reasonable efforts" to ensure that the conditions subsequent are satisfied. Id. § 1(b). Under Section 2, Home is 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. Id. § 2(a). The Swan Parties provided broad releases of Home, effective upon the payment of the Settlement Amount. Id. § 3.

c. The Swan bankruptcy. On December 20, 2001, Swan filed its voluntary petition for relief under Chapter 11 of the bankruptcy code. Confirmation Order 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. These modifications "were made to

fully resolve all outstanding objections to the Plan." Findings ¶ 96. The confirmation hearing on the plan was held before the bankruptcy court on December 9, 2002. Confirmation Order at 1-2.

The bankruptcy court executed the Confirmation Order on May 30, 2003. Confirmation Order at 32. The Confirmation Order included a channeling injunction as to the Swan Parties and a channeling injunction as to settling insurers. Id. ¶¶ 31, 32. The district court approved the Confirmation Order on July 21, 2003. Id. at 32.

The Confirmation Order specifically approved the Settlement Agreement with Home as "fair, equitable, and reasonable." Confirmation Order ¶ 59. See also Findings ¶¶ 57, 58 (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").

The Correction Order was executed by the bankruptcy court on November 17, 2003 and approved by the district court on November 20, 2003. Correction Order at 5.

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 Correction Order, and requested payment of the Settlement Amount within ten business days. Swan 1/13/04 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. Home 1/19/04 letter.

ARGUMENT

Swan seeks to set aside the Settlement Agreement on the grounds that Home "repudiated" it by not making payment after the January 13, 2004 request, contending that the non-payment was a material breach. However, Swan overlooks the fact that the harms it complains of – delay in payment, fractional payment, an "arbitrary" payment schedule, and loss of potential earnings – are the consequence of Home's insolvency and its liquidation under the New Hampshire Insurers Rehabilitation and Liquidation Act ("Act"), 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. Notice of Determination at 1. Swan does not dispute that the Settlement Agreement addressed the same underlying claim as its proof of claim.

I. THE SETTLEMENT AGREEMENT IS EFFECTIVE BECAUSE THE NON-PAYMENT IS SIMPLY A RESULT OF HOME'S INSOLVENCY AND LIQUIDATION THAT AFFECTS ALL HOME POLICYHOLDER LEVEL 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. 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." 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 depending on its priority and the assets available for distribution. The timing of payment will be

determined by the liquidator and 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 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 are all the result of insolvency and liquidation of the insurer 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 Commissioners v. Security Trust Co., 70 N.H. 536, 541-42 (1900).

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 superior court addressed a similar issue in 2003, when a policyholder (Inspiration/Phelps Dodge) sought to require the Liquidator to pay a $2.5 million settlement that had not been consummated (or even fully executed) 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 their status as policyholder priority creditors. Order (September 18, 2003) (attached as Exhibit A).

The same result should apply here. Swan agreed to settle with Home for $500,000. That amount was not paid because of Home's liquidation, and it represents a claim against the estate, which has been allowed in full as a Class II claim.

II. THE SETTLEMENT AGREEMENT SHOULD NOT BE ELEVATED TO A CLASS I CLAIM OR REOPENED.

Swan now seeks to either elevate its claim to Class I by requiring the Liquidator to assume it or to reopen the settlement in an effort to renegotiate it at a higher amount. Swan's proffered equitable reasons, however, do not support this. More importantly, it would be improper to give Swan full payment in violation of statutory priorities or to assume or reject the Settlement Agreement.

A. The Settlement Agreement Is Reasonable.

As an initial matter, there is no equitable reason supporting reopening of the Settlement Agreement. Swan's suggestions that the Settlement Agreement is somehow inadequate or resulted from financial pressure should not be credited. Swan was represented and advised 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). 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. Most significantly, the settlement was reviewed by the Swan bankruptcy court as part of the plan confirmation process and approved 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." Confirmation Order ¶ 59.

B. The Liquidator Was Not Required To Assume Or Disavow The Settlement Agreement.

Swan contends that the Liquidator was required to assume or reject the Settlement Agreement. The provision of RSA 402-C:25 it cites, however, provides no support for this. The provision merely authorizes the Liquidator to deal with property of the insurer. "Subject to the court's control, [the liquidator] may: . . . IX. Acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon or otherwise dispose of or deal with any property of the insurer at its market value or upon such terms as are fair and reasonable . . . ." RSA 402-C:25, IX. This subsection concerns the disposition of the insurer's assets, not the resolution of claims.

Another provision is arguably more pertinent, as it is concerned with contracts during the liquidation period. "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. The first clause of this subsection makes clear that the Liquidator is authorized to make contracts to carry out the liquidation. The second specifies that where there are pre-existing contracts (most frequently leases or contracts for

goods or services) the Liquidator may affirm them, thus making them first priority administration costs, or disavow them, leaving the other contracting party with a claim for breach. The Liquidator cannot affirm the Settlement Agreement, however, as paying Swan in full for a pre-liquidation settlement would prefer Swan over other policyholder creditors. The Liquidator was not required to either affirm or disavow the settlement because it was not an executory contract. Accordingly, Swan properly has a claim for the settlement amount as a Class II claim.

1. The Liquidator cannot properly assume the Settlement Agreement.

The Settlement Agreement concerns only Swan's pre-liquidation claim for coverage under Home's policies. It therefor cannot be affirmed because giving it 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 and thus can warrant administration cost priority. See In the Matter of the Liquidation of The Home Insurance Co., 154 N.H. 472, 484 (2006) (payments under post-liquidation contract that would bring a net benefit to creditors is an administration cost); Standard Oil Co. of New York, Inc. v. Nashua Street Railway, 88 N.H. 342, 345 (1937) (equity receivership: expenses to be paid as "primary charge" against the estate "must be incurred for the care, preservation, and benefit of the estate"). Settlements of claims, however, 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 appellees claim from [the insurer's] estate and not administrative costs or expenses incurred."). See Liquidation of Home, 154 N.H. at 484-85 (discussing Oxendine); Inspiration/Phelps Dodge Order (Ex. A). 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").

Accordingly, it would have been improper for the Liquidator to assume the Settlement Agreement. Assuming the contract would improperly elevate the claim to an administration cost priority and offend the policy of equality of distribution among creditors of the same class. But this does not mean that the Liquidator was required to disavow it. The Settlement Agreement represents a liability of the Home estate, and the Liquidator has recognized that liability by allowing it in the Notice of Determination. As noted above, Swan will receive what it was entitled to, subject to the limitations imposed by Home's insolvency and liquidation that affect all of Home's creditors. Those limitations do not support disregarding the Settlement Agreement and renegotiating Swan's underlying claim.

2. The Liquidator was not required to affirm or disavow the Settlement Agreement because it was not executory.

There is no statutory requirement that the Liquidator must assume or reject 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 provision of RSA 402-C:25, XI 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 (3d ed. 1959); Fauci v. Mulready, 150 N.E.2d 286, 289-90 (Mass. 1958) (citing receivership cases); A. Resnick & H. Sommer, 3 Collier on Bankruptcy ¶ 365.LH at 365-103 (15th rev. ed. 2008) (historical analysis of 11 U.S.C. § 365); Central Trust Co. of Illinois v. Chicago Auditorium Ass'n, 240 U.S. 581, 592 (1916). Non-executory contracts do not present

the issue. 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 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 System Inc., 50 F.3d 233, 239 (3d Cir. 1995)) (emphasis added).[1] 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). Both parties did not have material unperformed obligations on May 8, 2003, when the petition to liquidate Home was filed.

On May 8, 2003, 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, however, was not a breach by Swan. There is a well-established distinction between failure of a condition and a breach of a duty. "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).

[1] This is the so-called "Countryman" definition articulated in V. Countryman, Executory Contracts in Bankruptcy, Part 1, 57 Minn. L. Rev. 439, 460 (1973).

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." In re Columbia Gas System, 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). There is no question but that as of May 8, 2003 Swan 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); and completed the confirmation hearing on December 9, 2002. While the conditions subsequent (issuance of the confirmation order and channeling injunctions) 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. 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.

3. Swan's remedy is allowance of the settlement amount.

Since the Settlement Agreement was not executory, the Liquidator was not obligated to either assume it or disavow it. But even if there were a rejection, it would not change the situation. It does not make the contract disappear. "Unassumed obligations . . . are merely claims, entitled to share in estate distributions with other claims of the same class." In re A.J. Lane & Co., Inc., 115 B.R. 738, 743, (Bkrtcy. D. Mass. 1990). In the event of a rejection, Swan would have just a claim for damages flowing from the breach of the settlement. See 4 Collier on Bankruptcy ¶ 502.08[2] at 502-71 "[T]o the extent the claim for rejection is allowable and not otherwise disallowable, the attendant claim is treated as a prepetition claim for the damages flowing from the rejection."); 2 Clark on Receivers § 423 at 710; Central Trust Co., 240 U.S. at 592. Swan, however, may not reopen the underlying claim because it will be made whole (so far as Home's assets and the statutory priorities permit).[2] Reopening the claim will only serve to frustrate the policy of encouraging settlements, potentially create new and unnecessary dispute resolution proceedings, and treat Swan differently from other policyholder claimants (such as Inspiration/Phelps Dodge) that settled with Home but were not paid before the liquidation.

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.

[2] Swan suggests that the delayed partial payment is itself a breach of the Settlement Agreement. However, under the cases cited above, it is Home's insolvency and liquidation that constitutes the asserted breach. The payment process under the liquidation statutes does not impair Swan's contractual rights, it only affects the remedy.

CONCLUSION

For the reasons set forth above, the Referee should sustain the Liquidator's Class II allowance of the Swan claim in the $500,000 amount provided by the Settlement Agreement.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER
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October 1, 2008

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Section 15 Submission and the Liquidator's Exhibits were sent via e-mail on October 1, 2008 to all persons on the following service list:

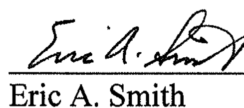

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Exhibit A

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.

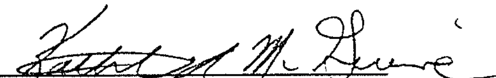
Accordingly, the Court does not find that the Commissioner acted in bad faith in not keeping Inspiration/Phelps Dodge informed regarding the Home's dire financial status.

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