

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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

In Re Liquidator Number:	<u>2007-HICIL-34</u>
Proof of Claim Number:	<u>INSU 701572-01</u>
Claimant Name:	<u>Swan Transportation Company</u>
Claimant Number:	<u>Class II</u>

**WRITTEN SUBMISSION IN SUPPORT OF
SWAN TRANSPORTATION COMPANY'S
OBJECTION TO THE NOTICE OF DECISION**

Swan Transportation Company ("Swan Transportation") f/b/o Swan Asbestos and Silica Settlement Trust (the "Trust") (collectively "Swan") by its undersigned attorneys, hereby submits its Written Submission In Support Of Swan Transportation Company's Objection To The Notice Of Decision pursuant to the Restated and Revised Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company in Liquidation dated January 19, 2005 (the "Home Proc. Order").

I. INTRODUCTION

Swan objects to the Liquidator's decision to approve only \$500,000 of Swan's \$30,000,000 proof of claim against Home Insurance Company in Liquidation ("Home") for the following reasons:

- The Liquidator's decision to approve \$500,000 relies solely upon a settlement agreement repudiated by the Liquidator more than four years ago;

- That settlement agreement does not reflect the value of Swan's proof of claim for \$30,000,000 under the Policies;
- The alleged settlement is not binding upon Swan because the Liquidator failed to properly assume the contract; and
- Even if the Liquidator could properly assume the settlement agreement, it is impossible for the Liquidator to perform its obligations specifically set forth in the terms of that agreement.

Therefore, as detailed further herein, the Liquidator's evaluation of Swan's claim is erroneous.

II. **FACTUAL BACKGROUND**

Swan faces claims for liquidated damages imposed upon it because of bodily injuries incurred by individual underlying claimants from exposure to asbestos, silica, and/or mixed dusts under the State of Texas' "Good Samaritan" tort liability law. In connection therewith, Swan sought insurance coverage for its tort liabilities under its general liability insurance policies, including two general liability policies sold by Home: (i) policy no. HXL-F 86 61 07 in the amount of \$15 million and (ii) policy no. HXL-C 11 17 16 in the amount of \$15 million (the "Home Policies").

As a result of the underlying claims and resulting litigation, in 2001 Swan sought protection under the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. The nature and circumstances of Swan Transportation's bankruptcy is detailed in Swan's Mandatory Disclosures.

During the course of Swan's bankruptcy, on October 30, 2001, Home executed a \$500,000 settlement agreement with Swan. See Settlement Agreement between Claimant and The Home Insurance Company with a "Signature Date" of

11/27/01 at CF020-34 (the "Settlement Agreement").¹ Swan executed a settlement agreement in such a low amount because of its severe financial distress and bankruptcy. As a result, Swan had limited resources to pursue a legitimate recovery of insurance proceeds from recalcitrant insurance companies. Ambiguity also existed with respect to Swan's overall liability to tort claimants. Since then, Swan has established as of October 30, 2007 that Swan's total liquidated liability for those underlying claims (excluding forecast liability future claims) was \$783,449,221. Thus, Swan's total liability under any applicable allocation methodology is sufficient to exhaust the Home Policies and justifies Swan's demand for \$30,000,000 in policy limits.

Among other things, the Settlement Agreement made Home's payment of the settlement amount contingent upon Swan's written notice to Home that certain conditions subsequent had been met, including the issuance of a Confirmation Order by the Bankruptcy Court. Settlement Agreement, Section 1 at CF023. Before the conditions subsequent could be met, however, the Order of Rehabilitation of Home was filed on October 5, 2003, followed by the filing of the Order of Liquidation on June 13, 2003.

An Amended Final Order confirming the Bankruptcy Plan was entered December 13, 2003 (the "Confirmation Order"). See Order Confirming the Plan of Reorganization at CF037-68; Order Correcting Scrivener's Error at CF069-073. In accordance with the Confirmation Order and the Bankruptcy Plan, the Trust was established to compensate all valid pending and future asbestos, silica and mixed dusts claims.

¹ "CF###" refers to the Case File in this matter.

Pursuant to Bankruptcy Code § 524(g), all claims against Swan are channeled into the Trust. See Amended Plan Of Organization Under Chapter 11 Of The United States Bankruptcy Code For Swan Transportation Company, attached as Exhibit B to the Mandatory Disclosures. Swan's liability insurance policies, including the Home Policies, constitute the main asset of the Trust.

A month thereafter, Swan provided written notice to Home that the conditions subsequent to the Settlement Agreement had been met and demanded payment within ten (10) business days of receipt of the notice as specifically provided for in the Settlement Agreement. See Swan letter dated 1/13/04 at CF035-36 ("01/13/04 Letter"). On January 19, 2004, counsel for Home confirmed that it could not comply with Swan's demand for payment under the Settlement Agreement. Home letter dated 1/19/04 at CF074-75. Swan has not received any payments from Home.

Swan, following discussions with representatives of the Liquidator, filed a Proof Claim on June 23, 2004, seeking \$30,000,000 under the Home Policies for Swan's underlying tort liabilities. See Claimant's Proof of Claim numbered INSU 701572 dated 6/9/04.

Swan has not filed any proof of claim for settlement amounts under the rescinded Settlement Agreement.

The Liquidator has not sought to assume the rescinded Settlement Agreement.

Rather than seek to assume the Settlement Agreement, the Liquidator appeared to be conducting an investigation of Swan's proof of claim for insurance coverage. By May 4, 2007, Swan sent updated underlying claimant information to the

Liquidator at the request of its representative Ron Barta. See Letter of May 4, 2007 from Robert Y. Chung of Anderson Kill & Olick, P.C. to Ron Barta of The Home Insurance Company in Liquidation attaching a "CD containing claimant information prepared by the Swan Asbestos & Silica Settlement Trust" without attachment but which updated CD will be provided upon request or as necessary, attached as Exhibit D to the Mandatory Disclosures. On June 8, 2007, general liability policies underlying the Home Policies also were provided to the Liquidator, again at the request of Mr. Barta. See Letter of June 8, 2007 from Robert Y. Chung of Anderson Kill & Olick, P.C. to Ron Barta of The Home Insurance Company in Liquidation enclosing "the National Union and Reliance insurance policies underlying the Home policies," attached as Exhibit G to the Mandatory Disclosures.

None of the information requested by the Liquidator and generated by the Trust is relevant to any obligations which long since were due under the Settlement Agreement.

On January 4, 2008, Home, in its Notice of Determination, first indicated that it believed that it could assume the settlement agreement without performance of its obligation to make timely payment of the settlement amount and without taking any steps to seek judicial approval pursuant to statute. See The Liquidator's Notice of Determination dated 1/4/08 at CF009-14 (the "Notice of Determination"). In the Notice of Determination from Home, the Liquidator approved \$500,000 based upon the prior repudiated Settlement Agreement inapplicable to Swan's proof of claim. Swan subsequently objected to the Liquidator's application of the repudiated Settlement Agreement to Swan's claim.

III. ARGUMENT

The Settlement Agreement is void due to the Liquidator's repudiation of the contract at the time payment of the settlement amount was due and failure to timely assume its obligations. Thus, the Liquidator's evaluation of Swan's proof of claim cannot rely upon any alleged settlement. Swan's proof of claim does not seek settlement proceeds, but rather payment for Swan's liability to asbestos claimants under the Home Policies.

If the Liquidator wanted to assume the Settlement Agreement, it should have done so by application to the Merrimack Superior Court. Even if the Liquidator was found not to have repudiated the alleged settlement and could therefore assume the Settlement Agreement, however, the Liquidator should have assumed the contract in whole and immediately met the full payment obligation rather than treat the settlement proceeds as a claim in the liquidation in an amount that Swan never set forth in its claim.

The Liquidator should not be permitted to assume a contract to receive the benefits of a release, but then unilaterally change the date and amount of payment for the benefit rendered. Nor should the Liquidator be allowed to combine an assumption of a repudiated contract with a valid proof of claim. In so doing, the Liquidator's determination arbitrarily renegotiates the terms of the repudiated Settlement Agreement and arbitrarily transforms Swan's proof of claim from one of insurance coverage for asbestos liabilities into a contract claim for settlement proceeds.

In any event, the explicit terms of the contract required the Liquidator to fulfill its obligations within a specific period of time. As that is now impossible, the Liquidator cannot in fact assume the Contract. Accordingly, Swan's proof of claim for

insurance proceeds cannot be affected by the release set forth in the Settlement Agreement.

A. The Liquidator's Attempted Allowance Of \$500,000 For Alleged Settlement Proceeds Erroneously Was Applied To Swan's \$30,000,000 Proof Of Claim For Insurance Proceeds.

Under New Hampshire law governing liquidations, the Liquidator is under an obligation to "review all claims duly filed in the Liquidation and shall make such further investigation as he or she deems necessary." Home Proc. Order, § 6(b) at 10. The Liquidator's evaluation of Swan's proof of claim required it to review the claim actually filed for \$30,000,000 under the Home Policies. To the extent the Liquidator viewed the proof of claim as anything other than a claim for insurance proceeds, such as a claim under the alleged settlement, the Liquidator's evaluation is erroneous.

In the Notice of Determination, the Liquidator arbitrarily chose to evaluate a proof of claim for \$500,000 in settlement proceeds. Swan, however, did not submit a proof of claim under the Settlement Agreement. Instead, Swan submitted a proof of claim for \$30,000,000 in general liability insurance policy limits under the Home Policies. Accordingly, the Liquidator was under an obligation to review the actual claim duly filed with it, specifically Swan's claim for insurance coverage under the Home Policies.

Initially, as detailed above, the Liquidator appeared to be conducting an evaluation of Swan's claim for insurance. At that time, Home never asserted that the Settlement Agreement was applicable to Swan's proof of claim. The Liquidator requested and received documentation in connection with Swan's liability, as well as documentation of insurance coverage underlying the Home Policies. None of the information requested by Home and generated at the expense of the Trust, however,

was relevant or necessary if the alleged settlement resulted in a release of Home's liability under the Home Policies.

Following its investigation, the Liquidator was under an obligation to "enter a determination, which shall either (1) allow the claim in whole or in part and classify the amount of the allowed claim or (2) disallow the claim in whole." Home Proc. Order, § 6(b) at 10. Rather than make a determination on the allowance of the actual claim submitted by Swan, Home essentially seeks to reclassify Swan's proof of claim from one for coverage under the Home Policies into a proof of claim for settlement proceeds. Thus, rather than allow or disallow the claim, the Liquidator neglected Swan's actual proof of claim altogether.

The Liquidator's decision to disallow \$29,500,000 of Swan's \$30,000,000 proof of claim did not state that it was based upon the validity of the Home Policies, it did not deny that Swan's liabilities were covered under the Home policies, nor did it allege even a single defense to coverage under the terms of the Home Policies. Instead, the sole justification of the Liquidator for disallowing Swan's claim is based upon the Settlement Agreement the Liquidator admitted it refused to fund when payment was due after failing to seek judicial approval required by statute. Notice of Determination at CF009.

In effect, the Liquidator's decision ignores Swan's actual proof of claim and instead interjects an alleged settlement agreement materially breached and repudiated by the Liquidator.

If the Liquidator believed the insurance policies no longer were in effect or exhausted through settlement, it could have attempted to deny Swan's proof of claim

altogether. It could not do so, however, because the Liquidator did not – and now cannot – comply with the terms of the Settlement Agreement. Therefore, the Liquidator's decision to allow only a fraction of Swan's \$30,000,000 claim is without merit.

B. Home's Allowance Of A Mere Fraction Of Swan's Claim Should Be Rejected Because The Settlement Agreement Cannot Be Assumed Through A Determination Of Swan's Proof Of Claim.

The issue of the validity or non-validity of the Settlement Agreement should not even be under consideration before the Referee. The only issue with respect to the Settlement Agreement should be whether, at the time Home made its Notice of Determination based upon the alleged settlement, Home was entitled to a release from Swan of its obligations under the Home Policies. As set forth herein, Home was not entitled to a release and therefore the reasoning underlying its Notice of Determination is without merit.

1. The Alleged Settlement Agreement Is Void Because The Liquidator Is In Material Breach Of Contract.

The Liquidator's failure to assume the alleged settlement agreement at the time payment was due is a material breach which voided the alleged settlement agreement. Failure to make timely payment under a settlement agreement with a fixed time of payment is well recognized as a material breach of contract:

If a compromise agreement fixes a time for the performance of a particular condition, or the making of a particular payment, the failure to perform or pay by the appointed time is a breach of the agreement.

15A C.J.S. Compromise & Settlement § 63 (updated June 2008) (citing Warner v. Rossignol, 513 F.2d 678 (1st Cir. 1975); Eastman v. McGowan, 86 Haw. 21, 946 P.2d 1317 (Haw. 1997)).

Furthermore, material breach of a settlement agreement entitles the non-breaching party to rescind the contract:

Where one party to a compromise agreement refuses to perform, the other party is entitled to rescind.

15A C.J.S. Compromise & Settlement § 51 (citing Warner v. Rossignol, 513 F.2d 678 (1st Cir. 1975); Poggi v. Kates, 115 Ariz. 157, 564 P.2d 380 (Ariz. 1977)).

Here, the alleged settlement agreement specifically requires that Home's payment of the settlement amount "shall be delivered within ten (10) business days of the date upon which Home is notified in writing by Swan Transportation or the Trustee, as appropriate..." Settlement Agreement, Section 2(a) at CF024. The Trustee notified Home consistent with the terms of the agreement by letter of January 13, 2004. 01/13/04 Letter at CF035. In the Notice of Determination, the Liquidator admits it has not yet paid any portion of the amount that was due on January 23, 2004 under the agreement. Indeed, Home's obligation is **over 4 ½ years late**. Thus, the Settlement Agreement is void and no settlement exists to justify the Notice of Determination's allowance of a mere fraction of Swan's Proof of Claim .

2. The Validity Of The Alleged Settlement Agreement Is Irrelevant.

If the Liquidator wanted to assume the contract, it should have done so by application to the Court. See N.H. Rev. Stat. § 402-C:25 IX. While Home itself is not permitted to dispose of assets (i.e., pay the settlement amount), the Liquidator has the discretion to do so "except that no transaction involving property the market value of which exceeds \$10,000 shall be concluded without express permission of the court." N.H. Rev. Stat. § 402-C:25 IX. Even then, however, the Liquidator should petition the Court to assume the contract in whole and immediately meet the full payment

obligation. Under New Hampshire law, the Liquidator can only assume a contract "upon such terms and conditions as are fair and reasonable." N.H. Rev. Stat. § 402-C:25 IX.

For example, the Liquidator should not be able to assume a contract to receive a stream of goods or services from a vendor, but then unilaterally change the date and amount of payment, yet continue receipt of the stream of goods or services. Similarly here, the Liquidator cannot disregard its obligations under the Home Policies based upon a release that was never paid for, yet use that very release to justify its refusal to meet its obligations under the Home Policies.

Over the past 4 ½ years since payment was due under the terms of the Settlement Agreement, the Liquidator neither sought approval of the alleged settlement from the Superior Court nor agreed to assume the entirety of its obligations under the Settlement Agreement. The Liquidator's sole reliance upon the rescinded Settlement Agreement in its Notice of Determination is misplaced. Accordingly, Swan's proof of claim should be considered without regard for the alleged settlement.

Swan's proof of claim itself does not seek settlement proceeds, but rather payment for Swan's liability to the underlying mixed dust claimants. The Liquidator should not be allowed to arbitrarily combine an assumption of contract requiring Court approval with a separate proof of claim and essentially renegotiate the rescinded settlement or change Swan's proof of claim for insurance coverage for tort liabilities into a claim for settlement proceeds.

C. Assumption By The Liquidator Of The Alleged Settlement Agreement Under Any Circumstances Is Impossible Because Home Cannot Perform Its Obligation Under The Contract.

Even if the Liquidator were legally permitted to do so here, assumption of the alleged settlement agreement is **impossible** because the material terms of that agreement can no longer be fulfilled. As set forth above, Home's expired payment obligation still has not been met over 4 ½ years (well over 1500 days) since the 10 day payment window explicitly set forth in the Settlement Agreement. Home's attempt to modify that former payment obligation into a claim distribution in which some fraction of the settlement payment might be paid on some unknown date simply compounds its material breach.

It is well established that a party to a settlement agreement cannot alter any of the material terms set forth therein:

The defendant's attempt to attach new conditions to the original contract of settlement and a refusal to deliver the plaintiff's property unless the plaintiff meet these new condition constitutes a refusal to perform according to the terms of the settlement.

15A C.J.S. Compromise & Settlement § 51 (citing Diehr v. Thompson Chemicals Corp., 281 S.W.2d 572 (Mo. Ct. App. 1955)).

By asserting that Home's obligations under the Settlement Agreement may be satisfied by allowing the settlement amount as a proof of claim determination, the Liquidator seeks to unilaterally rewrite the Settlement Agreement to:

- Exponentially delay the timing of the payment;
- Pay only a fraction of the settlement amount in the form of allowed distributions of claims;
- Create an arbitrary payment schedule determined by the Liquidator alone; and
- Deny the Trust over 4 ½ years of potential earnings based upon interest and investments for the benefit of mixed dust claimants.

Until receipt of the Notice of Determination, Home took no action to assume the alleged settlement agreement although it was able to do so by application to the Court. Home's attempt to do so now is not possible without materially altering the terms of that agreement. Therefore, whether or not Home can assume the Settlement Agreement and use it to justify its Notice of Determination is made irrelevant by its impossibility.

IV. **CONCLUSION**

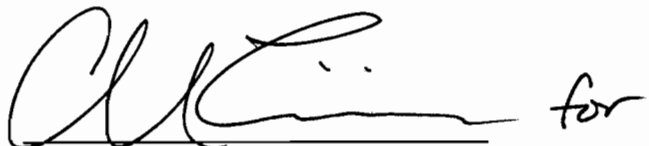
For the reasons set forth above, Swan respectfully requests that the Referee reject the Liquidator's basis for its Notice of Determination.

Dated: August 29, 2008

Respectfully submitted,
Swan Transportation Company f/b/o
Swan Asbestos and Silica Settlement Trust
By Its Attorneys

A handwritten signature in black ink, appearing to read "R. Horkovich", followed by the word "for" written in a cursive script.

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

CERTIFICATE OF SERVICE

I hereby certify that on this date, a true and correct copy of Written Submission In Support Of Swan Transportation Company's Objection To The Notice Of Decision was served by First Class Mail on the following:

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Dated: August 29, 2008

A handwritten signature in black ink, appearing to read "Eric A. Smith", written over a horizontal line.