

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

DOCKET NO. 03-E-0106

In The Matter Of The Liquidation Of  
The Home Insurance Company

**SWAN TRANSPORTATION COMPANY'S MOTION TO RECOMMIT AND REVIEW  
THE REFEREE'S ORDER ON THE MERITS FILED JUNE 18, 2009**

Swan Transportation Company ("Swan Transportation") f/b/o Swan Asbestos and Silica Settlement Trust (the "Trust") (collectively "Swan") hereby moves this Court to recommit this matter and review the Order On The Merits filed by the Referee on June 18, 2009. Furthermore, Swan respectfully requests oral argument on this matter.

**I. INTRODUCTION**

In its written submission and oral argument before the Referee, Swan objected 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 the validity of an unperformed 2001 settlement agreement.<sup>1</sup> repudiated by the Liquidator more than five years ago;
- The Liquidator failed in its obligation to take into account the substantial evidence of a \$30 million covered loss provided to the Liquidator by the Trust at the Liquidator's express request as part of the Home's proof of claim;
- The 2001 Settlement Agreement does not reflect the value of Swan's proof of claim for \$30,000,000 under the Policies;

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<sup>1</sup> Settlement Agreement between Claimant and The Home Insurance Company with a "Signature Date" of 11/27/01 at CF020-34 (the "Settlement Agreement")

- This unperformed 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.

In the Order on the Merits, the Referee erred in affirming the Liquidator's

basis for its Notice of Determination for the following reasons:

1. While the Liquidator does not have to assume an unperformed settlement agreement, it cannot rely upon an unassumed and unperformed settlement agreement exclusively to justify its determination of the value of a policyholder's insurance policies;
2. If the Liquidator cannot assume an unperformed settlement agreement under statute as the Referee found, the settlement agreement's mere existence does not justify disregarding the terms of a still valid insurance policy by arbitrarily limiting a policyholder's insurance proceeds to the voided settlement amount;
3. Without a valid settlement agreement superceding or controlling an insurance policy, the terms of the insurance policy itself must determine the policyholder's right to insurance coverage;
4. The Liquidator's Notice of Determination is deficient if the Liquidator fails to meet its obligation to review all information related to the claim, including materials relating to underlying claimants and underlying insurance coverage requested from and provided by the claimant; and
5. While the Liquidator is free to assert any policy defenses it wants to in making its Notice of Determination, once made, the Liquidator should not be permitted a second bite at the apple to assert additional defenses not previously asserted.

Therefore, as detailed further herein, the Order on the Merits should be reversed and Swan's proof of claim should be approved in its entirety or, in the alternative, at least evaluated on its merits under the terms of the subject insurance policies and in accordance with the voluminous claim information requested by and provided to the Liquidator from the Trust.

## II. STANDARD OF REVIEW

The standard of review in determining whether the referee committed errors of law is *de novo*. In re Reiner's Case, 152 N.H. 594, 597, 883 A.2d 315, 318 (N.H. 2005). Here, the evidence is undisputed among the parties, at least with respect to those facts relevant to the Referee's decision. Accordingly, Swan seeks a *de novo* review of the rulings and determinations by the Referee as set forth in the Order on the Merits.

## III. STATEMENT OF THE FACTS

Although none of the relevant facts are disputed by the parties, for this Court's convenience, Swan sets forth the following background regarding the underlying facts and the proceedings in this matter.

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 dated June 13, 2008.

During the course of Swan's bankruptcy, on October 30, 2001, Home executed a \$500,000 settlement agreement with Swan. See 2001 Settlement Agreement at CF020-34.<sup>2</sup> 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. Uncertainty 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 upon Home for an approved claim for Home's full \$30,000,000 policy limits.

The 2001 Settlement Agreement made Home's payment of the settlement amount contingent upon, among other things, Swan's written notice to Home that certain conditions subsequent had been met, including the issuance of a Confirmation Order by the Bankruptcy Court. See 2001 Settlement Agreement, Section 1 at CF023. Before the conditions subsequent could be met, however, on March 5, 2003, this Court entered an Order Appointing Rehabilitator, 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

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<sup>2</sup> "CF###" refers to the Case File in this matter.

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.

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.

On January 13, 2004, Swan provided written notice to Home that the conditions subsequent to the 2001 Settlement Agreement had been met and demanded payment within ten (10) business days of receipt of the notice as specifically provided for in the 2001 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 Home could not comply with Swan's demand for payment under the 2001 Settlement Agreement. See 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 9, 2004, seeking \$30,000,000 under the Home Policies for Swan's underlying tort liabilities based upon the portion of Swan's \$783 million loss allocable to the Home policy periods. See Claimant's Proof of Claim numbered INSU 701572 dated 06/09/04 at CF015-16.

Swan never filed any proof of claim with Home for the amount under the unperformed and rescinded 2001 Settlement Agreement.

The Liquidator has not sought to assume the rescinded 2001 Settlement Agreement.

Rather than seek to assume the 2001 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 past due under the 2001 Settlement Agreement and remain unperformed. Instead, the information requested by the Liquidator only would be relevant to an evaluation of Swan's proof of claim without regard to the unperformed 2001 Settlement Agreement.

On January 4, 2008, Home, in its Notice of Determination, first indicated that it believed that it could assume the 2001 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 rescinded 2001 Settlement Agreement inapplicable to Swan's proof of claim. Swan subsequently objected to the Liquidator's application of the rescinded 2001 Settlement Agreement to Swan's claim.

Swan filed its Written Submission on August 29, 2008. Oral argument before the Referee was conducted on April 28, 2009. The Referee filed the Order on the Merits which is the subject of the instant motion on June 18, 2009

#### IV. **ARGUMENT**

##### A. **The Referee Erred In Allowing An Unassumed And Unperformed 2001 Settlement Agreement To Control The Terms Of Unreleased And Still Valid Insurance Policies.**

In the Order on the Merits, the Referee found that "the Liquidator was not required to assume or disavow the Agreement." See Order on the Merits at 2. Swan does not disagree.

The Referee further found that "[b]ecause the Agreement does not provide benefit to this liquidation, it can't be considered an administrative cost and therefore can't be treated as a Class I contract." See Order on the Merits at 3. In so finding, essentially, the Referee determined that the 2001 Settlement Agreement cannot be assumed because assumed contracts should be treated as Class I claims. For the

purposes of this motion, Swan does not dispute that the 2001 Settlement Agreement cannot be assumed by the Liquidator.

The Liquidator also notes 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 or liquidation.” Assuming that were the case, RSA 402-C does not make the 2001 Settlement Agreement controlling. Instead, the statute merely (a) allows the Liquidator to assume the contract – which it has not, and according to the Referee, cannot do – or (b) allow the claimant to bring a claim under the unperformed 2001 Settlement Agreement. Here, however, neither happened, so the unperformed 2001 Settlement Agreement remains rescinded and coverage under the insurance policies remain unreleased.

Where the Referee critically erred, despite finding that the 2001 Settlement Agreement need not and could not be assumed, was in concluding as a matter of law that the Liquidator was allowed to rely upon an unassumed and unperformed settlement agreement to contravene the terms of the still valid insurance policies which were the subject of Swan’s proof of claim. This leap of faith is not justified by New Hampshire law and apparently was not justified by the Referee other than concluding that “the Liquidator is under an obligation to review all information related to the claim, including in this case, the Agreement.” See Order on the Merits at 3.

The Liquidator’s ability to review the unperformed 2001 Settlement Agreement, however, is not at issue. While the Liquidator may be able to review and consider anything the Liquidator finds relevant, the one thing the Liquidator cannot do is



rely upon an unconsummated settlement agreement to rewrite the terms of a valid insurance policy which requires the payment of policy limits based upon claims. See Tech-Built 153, Inc. v. Virginia Sur. Co., Inc., 153 N.H. 371, 375, 898 A.2d 1007, 1010 (N.H. 2006) (“In general, we do not look beyond the four corners of the insurance contract to discern the intent of the contracting parties regarding the scope and extent of insurance coverage.”); see also Catholic Med. Ctr. v. Executive Risk Indem., Inc., 151 N.H. 699, 702, 867 A.2d 453, 457 (N.H. 2005) (“while we have ‘the duty to construe an insurance contract in a reasonable manner, [we are] not free to rewrite its terms....’”) (citation omitted).

Here, as detailed below, the 2001 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 Home's contractual obligations. The Referee found that “Swan was represented by counsel and understood the parameters of the Agreement when signed.” See Order on the Merits at 3. Home likewise was represented by counsel and should be held to those same parameters. Thus, the Liquidator's evaluation of Swan's proof of claim cannot completely disregard the plain language of the Home Policies based upon a settlement agreement where the requirements for release of the subject insurance policies were not met.

**B. The Referee Erred In Finding The Unassumed And Unperformed 2001 Settlement Agreement Constitutes A Controlling Contract Between The Parties.**

Contrary to the Referee's finding that the 2001 Settlement Agreement was not and could not be performed, the Order on the Merits states that “the Referee finds that the Liquidator acted within the statute [sic] and to allow Swan to set aside the Agreement would contravene the statute.” See Order on the Merits at 4. Here, the

Referee is assuming that a valid agreement exists to be, or not to be, set aside. The 2001 Settlement Agreement, however, never became a valid agreement and remains an invalid agreement due to the Liquidator's material breach of contract.

1. **The 2001 Settlement Agreement Cannot Be Performed Absent Assumption Of The Contract.**

If the Liquidator wants to assume a contract, it should do so by application to the Court. See N.H. Rev. Stat. § 402-C:25 IX; see also In re Home Ins. Co., 154 N.H. 472, 482, 913 A.2d 712, 720 (N.H. 2006) ("any agreement negotiated by the liquidator requires court approval"). 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. See N.H. Rev Stat. § 420-C:25 XI ("[s]ubject to the court's control, [the Liquidator] may: ... 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."). Under New Hampshire law, the Liquidator only can 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 same 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.

Furthermore, even if the Liquidator was found not to have repudiated the alleged settlement and could therefore assume the 2001 Settlement Agreement, the Liquidator should have assumed the contract in whole and immediately meet the full payment obligation rather than treat the settlement proceeds as a claim in the liquidation for a recovery that Swan never included in its proof of 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 arbitrarily combine a quasi-assumption of a repudiated contract with a valid proof of claim. In so doing, the Liquidator's determination renegotiates the terms of the repudiated 2001 Settlement Agreement and transforms Swan's proof of claim from one of insurance coverage for asbestos liabilities into a contract claim for settlement proceeds.

Over the past 5 plus years since payment was due under the terms of the 2001 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 2001 Settlement Agreement. The Liquidator's sole reliance upon the rescinded 2001 Settlement Agreement in its Notice of Determination is misplaced. The contractual terms set forth in the unreleased Home Policies must control the valuation of Swan's proof of claim without regard for the 2001 Settlement Agreement.

**2. The Liquidator's Failure To Assume The 2001 Settlement Agreement Constituted A 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...." See 2001 Settlement Agreement, Section 2(a) at CF024. The Trustee notified Home consistent with the terms of the 2001 Settlement Agreement by letter of January 13, 2004. See 01/13/04 Letter at CF035. In the Notice of Determination, the Liquidator admits it had not yet paid any portion of the amount that

was due on January 23, 2004 under the agreement. Indeed, Home's obligation is **over 5 years late**. Thus, the 2001 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 .

Under these circumstances, if the Liquidator wanted to assume the 2001 Settlement Agreement, it should have done so by application to this Court. As the Referee acknowledged, however, it is impossible for the Liquidator to do so.

Furthermore, 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 no longer can be fulfilled. As set forth above, Home's expired payment obligation still has not been met over 5 years (approximately 2000 days) since the 10 day payment window explicitly set forth in the 2001 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 2001 Settlement Agreement may be satisfied by allowing the settlement amount as a proof of claim determination, the Liquidator sought to unilaterally rewrite the 2001 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 5 years of potential earnings based upon interest and investments for the benefit of mixed dust claimants.

Until receipt of the Notice of Determination, the Liquidator took no action to validate the alleged settlement agreement although it could have attempted to do so by application to the Court. The Liquidator's attempt to do so now is not possible without materially altering the terms of that agreement.

The Referee also asserts that allowing Swan to "set aside the Agreement would be inequitable to the other claimants in the Liquidation." See Order on the Merits at 4. Although the reason that such a finding would be "inequitable" is unexplained and unclear, for the foregoing reasons, enforcing an unassumable and unperformable 2001 Settlement Agreement against Swan, while at the same time permitting Home to remain in material breach of contract, clearly is inequitable to Swan.<sup>3</sup>

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<sup>3</sup> Furthermore, with all pertinent facts as to Swan's proof of claim provided to it, the Liquidator chose to rely solely upon the rescinded 2001 Settlement Agreement. To allow the Liquidator to come up with new defenses based upon information it requested prior to the Notice of Determination would be inequitable and unfair in light of Swan's extensive cooperation with the Liquidator throughout the evaluation process.

In any event, the explicit terms of the contract required Home to fulfill its obligations within a specific period of time. Whether by law or circumstances, the Liquidator cannot in fact assume the 2001 Settlement Agreement and performance under the contract is impossible. Accordingly, Swan's right to insurance payments as set forth in its proof of claim for insurance proceeds must be determined by the terms of the Home Policies.

**C. The Referee Erred In Permitting The Liquidator To Disregard Swan's \$30,000,000 Proof Of Claim For Insurance Proceeds And Instead Approve The Liquidator's Allowance Of \$500,000 For Alleged Settlement Proceeds Contrary To The Terms Of The Insurance Policies.**

Swan's proof of claim itself does not seek settlement proceeds, but rather payment for Swan's liability to the underlying silica and mixed dust claimants under the terms of the Home Policies. As noted by the Referee, "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." See Order on the Merits at 3. The Liquidator appears to reject Swan's argument based upon the Liquidator's "obligation to review all information." See Order on the Merits at 3. As set forth above, however, an obligation to review does not permit the Liquidator to rewrite the Home Policies. Nor does it permit the Liquidator to resubmit Swan's proof of claim. But it does require that the Liquidator not ignore the evidence requested by and submitted to the Liquidator substantiating Home's \$30 million share of the of Swan's \$787 million loss.

The Liquidator should not be allowed to arbitrarily combine what essentially amounts to an incomplete assumption of contract with a separate and distinct proof of claim for insurance proceeds under insurance policies. In so doing, the Liquidator wrongfully is either (a) unilaterally renegotiating the rescinded settlement or

(b) unilaterally and arbitrarily changing Swan's proof of claim for insurance coverage for tort liabilities into a claim for settlement proceeds.

The issue of the validity or non-validity of the 2001 Settlement Agreement should not even have been under consideration before the Referee. The only issue with respect to the 2001 Settlement Agreement should be whether, at the time Home made its Notice of Determination as to the Home Policies, Home was entitled to a release from Swan of its obligations under the Home Policies which were the subject of the proof of claim. As set forth above, Home was not entitled to a release and therefore the reasoning underlying its Notice of Determination is without merit.

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 actually review the proof of claim 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.***

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 proof of claim submitted by Swan, the Liquidator essentially sought 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.

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 2001 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** proof of claim duly filed with the Liquidator, specifically Swan's proof of claim for insurance coverage under the Home Policies.

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 Home Policies no longer were in effect or were released by the 2001 Settlement Agreement, 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 2001 Settlement Agreement. Therefore, the Liquidator's decision to allow only a fraction of Swan's \$30,000,000 actual proof of claim is without merit.

**D. The Referee Erred In Disregarding The Liquidator's Failure To Meet Its Obligation To Review All Information Related To Swan's Proof Of Claim.**

The Referee states in the Order on the Merits that "the Liquidator is ***under an obligation to review all information related to the claim....***" Order on the Merits at 3. The record, the Order on the Merits, and the Liquidator's Notice of Determination, however, is void of one piece of evidence to suggest the Liquidator did so.

Initially, as detailed in the statement of facts above, the Liquidator appeared to be conducting an evaluation of Swan's claim for insurance coverage. The Liquidator requested and received documentation in connection with Swan's liability, including detailed claims information for underlying bodily injury victims, as well as documentation of insurance coverage underlying the Home Policies. At that time, the Liquidator never asserted that the 2001 Settlement Agreement was applicable to Swan's proof of claim. None of the information requested by the Liquidator and fully complied with and generated at the expense of the Trust, however, is relevant or necessary if the 2001 Settlement Agreement results in a release of Home's liability under the Home Policies. The Liquidator knew, or should have known, this from the instant it began its evaluation of Swan's proof of claim.

The Referee misunderstands Swan's assertion that the Liquidator should not be permitted to reevaluate Swan's claims and assert policy defenses in the event its Notice of Determination is rejected. The Referee alleges that "Swan also argues the Liquidator can't assert policy defenses or other defenses." See Order on the Merits at 3. Based upon that erroneous assumption, the Referee misstates Swan's argument in two ways.

First, the Referee finds that Swan cannot preclude the Liquidator from asserting defenses while at the same time require the Liquidator to ignore the 2001 Settlement Agreement. Swan, however, is not arguing that the Liquidator must ignore the 2001 Settlement Agreement, merely that the 2001 Settlement Agreement, until made valid, cannot override the existing insurance policies which were the subject of

Swan's proof of claim and cannot justify the Liquidator's apparent failure to consider any other information, including information it requested and received from Swan.

Second, Swan is not alleging that the Liquidator cannot assert defenses to coverage, only that the Liquidator should not be given a second bite at the apple. The Liquidator had ample opportunity to engage in a full investigation. The Liquidator in fact requested and received materials from Swan to conduct that investigation. The Liquidator then wholly failed to include any indicia of review of those expressly requested materials in the Liquidator's Notice of Determination.

The Notice of Determination disallowing \$29,500,000 of Swan's \$30,000,000 proof of claim 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 was based upon the 2001 Settlement Agreement the Liquidator admitted it refused to fund when payment was due after failing to seek judicial approval required by statute. See Notice of Determination at CF009. In failing to fully review ***all information***, the Liquidator failed to meet its obligation in reviewing Swan's proof of claim and the Referee erred in approving the Liquidator's Notice of Determination in light of the complete absence of any evidence that the Liquidator reviewed any of the evidence it requested and received from Swan.

V. CONCLUSION


For the reasons set forth above, Swan respectfully requests that this Court reverse the Order on the Merits and order the Liquidator to issue a Notice of Determination approving Swan's proof of claim in its entirety for the amount of \$30,000,000 or, in the alternative, reevaluate Swan's proof of claim on its merits under the terms of the subject insurance policies and in light of the extensive material in support the Swan proof of claim requested by and submitted to the Liquidator.

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

Dated: July 6, 2009

Handwritten signature of Robert M. Horkovich, with the word "for" written to the right of the signature.

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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 Swan Transportation Company's Motion To Recommit And Review The Referee's Order On The Merits Filed June 18, 2009 was served by First Class Mail on the following:

- Office of the Attorney General  
Attn.: Home Insurance  
Department of Justice  
33 Capitol Street  
Concord, New Hampshire 03301
- Eric A. Smith, Rackemann  
Sawyer & Brewster P.C.  
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Dated: July 6, 2009

