

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company.

Docket No. 03-E-106

**LIQUIDATOR'S OBJECTION TO
INSPIRATION CONSOLIDATED COPPER COMPANY, ET AL.
PETITION TO INTERVENE**

Paula T. Rogers, Commissioner of the State of New Hampshire Department of Insurance, in her capacity as Liquidator of The Home Insurance Company (the "Liquidator"), pursuant to Orders dated June 11 and 13, 2003 (the "Liquidation Orders"), by her attorneys, the Office of the Attorney General, respectfully objects to the Inspiration Consolidated Copper Company, Phelps Dodge Corporation and Phelps Dodge Miami, Incorporated's Petition to Intervene (the "Inspiration/Phelps Petition"). The Liquidator objects because Inspiration/Phelps have asked this Court to order a payment on a policy holder's claim that would violate the claims process, and distribution scheme set forth in RSA 402-C and would be inequitable to other similarly situated policy claim-holders.

Inspiration/Phelps recites facts which, if true,¹ would establish, among other things, the following: Inspiration/Phelps had a claim against The Home that was the subject of litigation in Maricopa County Arizona; after the close of evidence but

¹ For purposes of this Objection, the Liquidator responds to the Inspiration/Phelps Petition upon the assumption that the facts recited in the Petition are true. If this Objection is overruled, the Liquidator requests that she be afforded an opportunity to contest facts alleged in the form of an answer and put Inspiration/Phelps to its proof on disputed facts that may be essential for its entitlement to relief, or commence a summary judgment motion on undisputed facts.

before closing argument in a jury trial, The Home and Inspiration/Phelps settled the claim in principle with a term sheet; the settlement was subject to approval by the Commissioner of Insurance and mutually satisfactory documentation; in exchange for releases and dismissal, The Home would pay \$2.5 million to Inspiration/Phelps; documentation and approval of the settlement was delayed from early December, 2002 until the present; The Home did not inform Inspiration/Phelps of its poor financial condition; and The Home did not execute and deliver the final settlement agreement or pay Inspiration/Phelps the \$2.5 million.

Based upon these facts, Inspiration/Phelps believe that notwithstanding the entry of the Liquidation Order dated June 13, 2003, and the insolvency of The Home, they are entitled to an order from this Court directing the Liquidator to pay Inspiration/Phelps the full settlement amount of \$2.5 million ahead of and in preference to other policyholder claimants.

On these facts, assumed as true for purposes of this Objection, the Liquidator objects to this request because there is no basis for the relief Inspiration/Phelps seeks. To the contrary, the relief Inspiration/Phelps seeks would directly conflict with the liquidation claims, priority and distribution schemes. *See* RSA 402-C:37 & 38 (requiring proofs of claim to share in dividend of liquidation); 402-C:44 (setting forth order of distribution); and 402-C:46 (setting forth rules for making of distributions—“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 . . .”) Indeed, to avoid preferences in the distribution of assets and a rush to the courthouse, the

statute expressly prohibits actions to compel payment while a liquidation is pending. RSA 402-C:59 ("During the pendency . . . of a liquidation proceeding . . . , no action or proceeding in the nature of an attachment, garnishment or levy of execution shall be commenced or maintained in this state or elsewhere against the delinquent insurer or its assets."). Inspiration/Phelps's request directly contravenes the legislative intent to preserve the assets of the insurer for distribution in accordance with the statutory priorities through the claims process.

An order from this Court requiring that Inspiration/Phelps be paid the settlement amount would grant Inspiration/Phelps an inappropriate advantage in the liquidation by elevating their claim to a priority status they do not have and granting them an improper early distribution. Holders of administrative claims have a right to immediate payment in full; others, however, generally must await claim determination and distributions in accordance with the statutory priorities. *See* RSA 402-C:44, I, VI. Claims such as Inspiration/Phelps' would fall into the class for policy related claims, RSA 402-C:44, III. None of the facts alleged in the Inspiration/Phelps Petition, even if true form the basis for a finding that Inspiration/Phelps' claim would be an administrative expense, or any other valid and compelling justification for early payment. The mere fact that The Home may have agreed to pay Inspiration/Phelps during the period of the rehabilitation does not make the debt an administrative expense. *See* RSA 402-C:44, I (administrative expenses include "actual and necessary costs of preserving or recovering the assets of the insurer; compensation for all services rendered in the liquidation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorneys fees.")

While Inspiration/Phelps imply that The Home and the Rehabilitator lulled them into passivity, Inspiration/Phelps have not alleged any bad faith with respect to the time the settlement discussions took or in the assurances given. Moreover, by at least April 28, 2003, when Inspiration/Phelps fedexed the executed final settlement agreement to The Home, it would not have mattered anymore; The Home was insolvent and any payment to Inspiration/Phelps would have constituted a preferential transfer pursuant to RSA 402-C:32. RSA 402-C:32, I(a) & (b). Preferential transfers are disfavored because, among other reasons, they disrupt the primary goal of equality of distribution that the orderly liquidation proceeding provides. *See Union Bank v. Wolas*, 502 U.S. 151, 160-61 (1991) (quoting from H.R. REP. 95-595 discussing federal bankruptcy preference law purposes); *Wilcox v. CSX Corp.*, 70 P.3d 85, 2003 WL 21039983 at 4 (Utah 2003) (outlining similar rationale for insurance liquidation preference statutes).

All of this leads to the conclusion that the delays experienced were not in bad faith and, at least since the settlement agreement was presented, payment of such an amount to this creditor would have been inappropriate. In sum, Inspiration/Phelps should be treated like other policyholder claimants, who can seek coverage from guaranty associations and, in the event those claims are not covered, must, in accordance with the claim and distribution rules set forth in Chapter 402-C, submit proofs of claim to the Liquidator to obtain pro rata distributions in the future.

Significantly, Inspiration/Phelps does not allege in their Petition that the delay in the settlement negotiations itself has caused them any detriment.² Their only harm, then, is the failure of the Rehabilitator or Liquidator to prefer Inspiration/Phelps over other similarly situated claim-holders. *But see* Heckler v. Community Health Servs. of Crawford County, Inc., 467 U.S. 51, 61-63 (1984) (no cognizable harm in losing improper advantage).

WHEREFORE, the Liquidator prays that this Court deny Inspiration/Phelps' request for immediate payment of the \$2.5 million settlement amount, and grant such other and further relief as may be just.

² Also notably absent in the Inspiration/Phelps Petition is any allegation that Inspiration/Phelps reasonably relied upon anything represented by The Home, REM or the Rehabilitator. Similarly, Inspiration/Phelps do not allege that they were actually unaware of The Home's "dire financial condition" or "that there was an increasing possibility that The Home would be placed into liquidation." Inspiration/Phelps Petition at ¶¶ 5 & 7. Finally, the Inspiration/Phelps Petition also lacks any allegation that The Home, REM, or the Rehabilitator had any duty to make such representations or disclosures to them. Thus, the lulling implication is baseless.

Respectfully submitted,

PAULA T. ROGERS, COMMISSIONER
THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF INSURANCE

By her attorneys,

PETER W. HEED
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Dated: June 27, 2003

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CERTIFICATE OF SERVICE

I, Peter C.L. Roth, do hereby certify that on June 27, 2003 I served a true copy of the foregoing upon the attached Service List, by first class mail, postage prepaid.

Dated: June 27, 2003

Peter C.L. Roth
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