

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 thereby 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\\

Kathleen A. McGuire,
Presiding Justice