

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**

**LIQUIDATOR'S MOTION FOR APPROVAL
OF SETTLEMENT AGREEMENT WITH CLEAVER-BROOKS
AND COCA-COLA**

Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), moves that the Court enter an order in the form submitted herewith approving a Settlement Agreement and Mutual Release ("Settlement Agreement") between Cleaver-Brooks, Inc., formerly known as Aqua-Chem, Inc. ("Cleaver-Brooks"), The Coca-Cola Company ("Coca-Cola") (collectively "Claimants"), and the Liquidator. As reasons therefor, the Liquidator states as follows:

1. Coca-Cola, a global corporation in the beverage industry currently headquartered in Georgia, owned Aqua-Chem, Inc. (now Cleaver-Brooks) from 1972 through 1981. Aqua-Chem, Inc., a manufacturer of industrial boilers located in Wisconsin, is listed as a named insured on six excess liability policies Home issued to Coca-Cola for policy periods between January 1, 1973 and January 1, 1979. Coca-Cola and Cleaver-Brooks (the Claimants) filed proofs of claim in the Home liquidation regarding these policies. The proofs of claim seek coverage under the policies for claims, including but not limited to claims for asbestos bodily injury, asserted against the Claimants. Settlement Agreement at first and third Whereas clauses. Affidavit of Peter A. Bengelsdorf in Support of Approval of Settlement Agreement with Cleaver-Brooks and Coca-Cola ("Bengelsdorf Aff.") ¶ 2.

2. The Liquidator and the Claimants have reached an agreement to resolve the proofs of claim and all matters under the policies which is reflected in the Settlement Agreement attached as Exhibit A. It is subject to approval by the Court. Settlement Agreement ¶ 1. Bengelsdorf Aff. ¶ 3.

3. Coca-Cola has filed additional proofs of claim asserting claims under seven other Home policies issued to it after September 1, 1981 that contain asbestos exclusions. These additional proofs of claim and policies are not affected by the Settlement Agreement. Settlement Agreement at first and third Whereas clauses. Bengelsdorf Aff. ¶ 4.

4. The Settlement Agreement provides that the Liquidator will recommend allowance of Claimants' proofs of claim in the aggregate amount of \$74,000,000 as a Class II claim under RSA 402-C:44. Settlement Agreement ¶ 2(A). Allowance of the recommended amount as a Class II claim will fully and finally resolve the Claimants' proofs of claim, with the exception of those identified in paragraph 3 above. Id. ¶ 2(B). Distributions based on that allowance will be made at the same intervals and at the same percentages as distributions to other Class II creditors of Home. Id. ¶ 2(C). The distributions will be made to an escrow account to be used solely for the payment of defense and indemnity costs incurred in connection with asbestos claims against Cleaver-Brooks. Id. ¶ 2(D). Bengelsdorf Aff. ¶ 5.

5. The Settlement Agreement is intended to resolve the Claimants' proofs of claim and all matters relating to the policies. See Settlement Agreement ¶ 2(B). To that end, the Settlement Agreement provides for mutual releases of all claims between Home and the Claimants arising from or related to the proofs of claim or the policies. Id. ¶¶ 3, 5. Bengelsdorf Aff. ¶ 6.

6. The Liquidator's review of proofs of claim has identified proofs of claim filed by seven law firms on behalf of numerous persons asserting third party asbestos claims against the Claimants' policies. See RSA 402-C:40, I. In resolving all matters relating to the proofs of claim and the policies, the Settlement Agreement contemplates denial of all third party claimants' claims in the Home liquidation without prejudice to their claims against the Claimants. Accordingly, the Claimants acknowledge in the Settlement Agreement that it is intended to resolve all matters between them and the Liquidator/Home relating to the policies and proofs of claim, including asserted rights of third party claimants. Settlement Agreement ¶ 7. The Claimants agree to address, at their sole cost, the claims of claimants asserting asbestos claims against Cleaver-Brooks as if the Claimants had no insurance coverage from Home under the policies. *Id.* The Claimants agree to indemnify the Liquidator and Home against claims arising from the policies. *Id.* Bengelsdorf Aff. ¶ 7.

7. The denial of the third party claimants' proofs of claim without prejudice to their claims against Claimants will not harm the third party claimants, who will continue to have their full claims against Cleaver-Brooks. As noted above, Cleaver-Brooks has agreed to address these claims as if it had no insurance coverage from Home under the policies. Settlement Agreement ¶ 7. The third party claimants' proofs of claim against the insolvent Home, if not denied with this agreement, would release Cleaver-Brooks from those claims up to the limits of the policies (which all equal or exceed \$5 million above the limits of primary policies issued by other insurers) but only entitle the third party claimants (assuming their claims are allowed) to a presently undetermined percentage distribution at the future date when a distribution is made. See RSA 402-C:40, I; Gonya v. Commissioner, New Hampshire Insurance Dept., 899 A.2d 278, 282, 289 (N.H. 2006) (noting "the inherent uncertainty of any creditor's recovery in a

liquidation”). It is not expected that the allowed claims of third party claimants (or other Class II creditors) will be paid in full. Under the Settlement Agreement, the Claimants will continue to be fully responsible for the third party claimants’ claims against Cleaver-Brooks, and the distributions on the recommended amount are to be used solely for the payment of defense and indemnity costs of such claims. See Settlement Agreement ¶¶ 2(D), 7. The seven law firms have been provided with copies of this motion. See Bengelsdorf Aff. ¶ 8.

8. The Claimants have previously entered and may in the future enter settlement agreements with other insurers regarding coverage for asbestos claims. Settlement Agreement at fourth Whereas clause. These agreements may contain provisions under which the settling insurers agree not to pursue claims, including claims for contribution, reimbursement, set-off, indemnity, subrogation, attorney’s fees or costs, against non-settling insurers (such as Home) who agree not to pursue claims against the settling insurers. In order to take advantage of these provisions, the Settlement Agreement contains an additional release provision. Id. ¶ 6. By this provision, the Liquidator and Home release settling insurers from claims provided that the settling insurers release Home. This will avoid contribution and other claims between Home and other insurers regarding asbestos claims against Cleaver-Brooks. The Settlement Agreement includes a contingent release and judgment reduction provision that is also intended to avoid contribution claims under Wisconsin law. Id. ¶ 4. (A coverage action between Cleaver-Brooks and various insurers is pending in Wisconsin.) Bengelsdorf Aff. ¶ 9.

9. The Settlement Agreement reflects a compromise of the claims asserted in the Claimants’ proofs of claim. It is the result of negotiations involving Home’s Claims Department, under the supervision of the Special Deputy Liquidator, which has extensive experience in assessing the exposure presented by asbestos claims under Home’s insurance policies. The

agreed settlement amount is based on careful evaluation and negotiation of coverage obligations under Home's policies respecting the numerous underlying claims against Cleaver-Brooks. The Liquidator accordingly recommends approval of the Settlement Agreement and allowance of the \$74,000,000 settlement amount as a Class II claim in accordance with RSA 402-C:45 and RSA 402-C:44. Bengelsdorf Aff. ¶ 10.

10. The Court has previously approved similar settlement agreements with Lucent Technologies, Inc. and AK Steel Corporation. See Order Approving Settlement Agreement with Lucent Technologies, Inc. (August 23, 2006); Order Approving Commutation Agreement with Northwestern National Insurance Company and Settlement Agreement and Assignment of Distribution with AK Steel Corporation (March 10, 2006). The Liquidator's negotiation and the Court's approval of such agreements are authorized by the broad authority of the Liquidator to "compound, compromise or in any other manner negotiate the amount for which claims will be recommended to the court," RSA 402-C:45, I, and the authority of the Court to "approve, disapprove or modify any report on claims by the liquidator." RSA 402-C:45, II. It is also an appropriate exercise of the Liquidator's authority ("[s]ubject to the court's control") to "do such other acts . . . as are necessary or expedient for the accomplishment of or in aid of the purpose of liquidation." RSA 402-C:25, XXII.

11. In his Motion for Approval of Commutation with Northwestern National Insurance Company and Settlement Agreement and Assignment of Distribution with AK Steel Corporation ¶¶ 19-23 (February 16, 2006), the Liquidator provided his analysis of New Hampshire law, including RSA 402-C:40 III, as it applies to this type of comprehensive policy coverage compromise and settlement in an insurer liquidation context. That analysis also applies to the proposed Settlement Agreement with the Claimants.

12. The Liquidator submits that the Settlement Agreement is fair and reasonable and in the best interests of the policyholders and creditors of Home. See Bengelsdorf Aff. ¶ 11.

WHEREFORE, the Liquidator respectfully requests that this Court:

- A. Grant this Motion;
- B. Enter an Order in the form submitted herewith approving the Settlement Agreement, approving the Liquidator's claim recommendation, and allowing the Claimants' claim as a Class II claim in the amount of \$74,000,000; and
- C. Grant such other and further relief as justice may require.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER
OF INSURANCE OF THE STATE OF
NEW HAMPSHIRE SOLELY AS
LIQUIDATOR OF THE HOME
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March 29, 2007

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Motion for Approval of Settlement Agreement with Cleaver-Brooks and Coca-Cola, the Affidavit of Peter A. Bengelsdorf, and the Proposed Order, were sent, this 29th day of March, 2007, by first class mail, postage prepaid to all persons on the attached service list.

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

Eric A. Smith

THE STATE OF NEW HAMPSHIRE

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