

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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

In Re Liquidation Number: 2008-HICIL-34
Proof of Claim Number: INSU 701572-01
INSU 701573
Claimant Name: Swan Transportation Co.
Claimant Number:
Policy or Contract Number:
Insured or Reinsured Name: Swan Transportation Co.
Date of Loss:

ORDER ON THE MERITS

Swan Transportation Company ("Swan Transportation") f/b/o Swan Asbestos and Silica Settlement Trust ("the Trust")(collectively "Swan") seeks an order: (1) that its proof of claim is allowed; (2) that the Liquidator has no affirmative defenses to payment of the claim in the amount of \$30 million, to total of the limits of liability of the two Home policies at issue; and (3) denying the amount for which the claim was allowed.

RELEVANT FACTS

Home issued two general liability insurance policies to Swan, policies HXL-F 86 61 07 and HXL-C 11 17 16. Both policies had limits of liability of \$15 million. Swan faces claims for liquidated damages because of bodily injuries sustained by individual underlying claimants from exposure to asbestos, silica, and/or mixed dusts under the State of Texas' "Good Samaritan" tort liability law. Because the value of the claims against Swan exceeds its assets, it sought protection under the bankruptcy code. Swan also entered into settlements with its liability insurers.

Swan and Home entered into a settlement agreement ("the Agreement") on or about October 31, 2001. The Agreement made clear that Swan and Home disagreed with respect to certain issues regarding the insurance coverage available under the Home policies for the claims against Swan. The Agreement further noted Swan's intent to file for bankruptcy and the wish of Swan and Home to resolve any and all disputed issues between them regarding past, present and future insurance claims under the two Home policies. The Agreement indicated that Home agreed to pay \$500,000 to Swan. The Agreement made Home's payment contingent upon Swan providing written notice to Home that certain conditions had been met. Those conditions included the issuance of a Confirmation Order by the Bankruptcy Court. Swan made reasonable commercial efforts to perform under the contract. However, before performance was complete, the Order of Rehabilitation of Home was filed on October 5, 2003, followed by the Order of Liquidation filed on June 13, 2003.

An Amended Final Order confirming the Bankruptcy Plan for Swan was entered December 13, 2003. At that time, the Trust was established to compensate the valid pending and future asbestos, silica and mixed

dust claims. The assets from Swan's liability insurers, paid based on the settlements with those insurers, comprised the basis of the Trust. It is the Trust which has the ability to pursue claims against Home. Thereafter, by letter dated January 13, 2004, Swan provided written notice to Home that the conditions subsequent to the Agreement had been met, and demanded payment pursuant to the Agreement. Home responded by letter dated January 19, 2004 that it could not comply with Swan's demand for payment and directed Swan to the liquidation proceedings.

Swan filed a proof of claim with the Liquidator on June 23, 2004, seeking the full limits of liability under the Home policies listed above, a total of \$30 million. The proof of claim did not seek to enforce the Agreement.

LEGAL ANALYSIS

Swan asserts that the Liquidator's decision to approve only \$500,000 of Swan's \$30 million proof of claim was inappropriate for these reasons:

- The Agreement is not binding on Swan because the Liquidator did not properly assume the contract
- The decision relies solely on the Agreement, which the Liquidator repudiated
- The Liquidator can't perform the obligations set forth in the Agreement
- The Agreement does not accurately reflect the value of Swan's claims under the Home policies

The Liquidator argues that it must act according to the New Hampshire Statute, RSA Chapter 402-C Insurers Rehabilitation and Liquidation. The Liquidator further argues that it was unable to assume the Agreement and was not required to disavow the Agreement. The Liquidator also asserts that in the liquidation Swan is entitled to the same treatment as other claimants, in other words, for a Class II claim in the amount of \$500,000.

RSA 402-C controls the rights and duties of the Liquidator. Once a liquidation order is entered, the Liquidator is bound to take only actions allowed and/or required by the statute. It is to RSA 402-C the Referee must look to determine the requirements imposed upon and actions allowed to the Liquidator.

Swan first argues the Agreement is not binding on Swan because the Liquidator did not assume the contract. The Liquidator argues that it could not do so. Nothing in RSA 402-C requires the Liquidator to assume or disavow any contract. Under RSA 402-C:25, IX, the Liquidator has the ability to take certain actions regarding assets of the insurer. RSA 402-C:25, XI allows the Liquidator to affirm or disavow any contracts to which Home is a party, but does not require the Liquidator to do so. Therefore, the Referee finds that the Liquidator was not required to assume or disavow the Agreement.

The Liquidator argues that it could not assume the Agreement, because to do so would make Swan's claims administrative claims, falling within Class I. RSA 402-C:44 sets forth the order of distribution of assets. Class I is administrative costs, defined to include: costs of reserving or recovering assets of the insurer; compensation for services rendered in the liquidation; necessary filing fees; fees and mileage payable to witnesses; and reasonable attorney's fees. Class II is policy related claims, which includes all

claims by policyholders and insureds arising from and within the coverage of the applicable limits of insurance policies.

The Agreement relates to Swan's pre-liquidation claim for coverage under policies issued by Home. Pursuant to RSA 402-C, the Liquidator may affirm or disavow any contracts to which Home is a party, but by doing so, those contracts become first priority administrative costs. The New Hampshire Supreme Court has addressed the issue of assumption of a contract and indicated that the Liquidator must consider whether the contract provides a benefit to the liquidation and should be considered an administrative cost. In the Matter of the Liquidation of The Home Insurance Co., 154 N.H. 472 (2006). Because the Agreement does not provide benefit to the liquidation, it can't be considered an administrative cost and therefore can't be treated as a Class I contract. To do so would be inequitable to other claimants and against the requirements of the statute. The Liquidator has properly designated Swan's claim as a Class II claim.

Swan next argues that the Liquidator can't rely on the Agreement because it failed to perform the Agreement and because it can't now perform the Agreement. The Liquidator asserts that Home would have complied with the Agreement but for the fact that Home was in liquidation when the payment was due, and under RSA 402-C, the Liquidator was unable to do so. Therefore, the Liquidator alleges 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 and liquidation.

Once the liquidation order was entered, the Liquidator was bound to adhere to the provisions of RSA 402-C and follow the order of distribution set forth in Section 44. Swan's claims must be treated as Class II claims, pursuant to the statute. See also In the Matter of Rehabilitation/Liquidation of the Home Insurance Company, Merrimack County Superior Court Order, September 13, 2003, regarding claims by Inspiration and Phelps Dodge.

Swan also insists that its choice to submit a proof of claim not for \$500,000 but for \$30 million is dispositive. Swan asserts that its claim must be reviewed based on the claim submitted, for \$30 million, and not on the Agreement. 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. However, the Liquidator is under an obligation to review all information related to the claim, including in this case, the Agreement. To require the Liquidator to ignore the Agreement would be to ignore the requirements imposed on the Liquidator by RSA 402-C and allow Swan a benefit to which it is not entitled, in comparison to others with claims against the estate.

Swan also argues that because the Liquidator did not perform under the Agreement it is void, and therefore Swan is entitled to make a claim for the full value of amounts due under its policies. Swan also argues the Liquidator can't assert policy defenses or other defenses. In addition, Swan asserts that it entered into the Agreement under pressure because of financial concerns. With these arguments, Swan asks the Referee to ignore a deal it was willing to accept in 2001 and at the same time refuse to allow the Liquidator to offer defenses to a new and different deal. Swan can't have both. Swan was represented by counsel and understood the parameters of the Agreement when signed.

The Referee is cognizant of the fact that Swan relied on portions of the Agreement with which the Liquidator did not and could not comply. However, given the parameters of RSA 402-C, under which the Liquidator is required to act, the Referee finds that the Liquidator acted within the statute and to allow Swan to set aside the Agreement would contravene the statute. In addition, allowing Swan to set aside the Agreement would be inequitable to the other claimants in the Liquidation.

CONCLUSION

For the reasons set forth above, the Referee affirms the Liquidator's basis for its Notice of Determination.

So Ordered.

June 18, 2009
Date

Melinda S. Gehris
Referee, Melinda S. Gehris