IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. Diane Koken Insurance Commissioner of the Commonwealth of Pennsylvania, in her official capacity as Liquidator of Reliance Insurance Company, Plaintiff	:	
v.	:	No. 664 M.D. 2003
Ingram Micro, Inc. Defendant	:	
M. Diane Koken Insurance Commissioner of the Commonwealth of Pennsylvania, in her official capacity as Liquidator of Reliance Insurance Company, Plaintiff	:	
v.	:	No. 666 M.D. 2003
Mitsui & Co. (U.S.A.), Inc., Defendant	:	
M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, in her official capacity as Liquidator of Reliance Insurance Company, Plaintiff	:	
v.	:	No. 668 M.D. 2003
HJ. Heinz Company, H.J. Heinz Company, L.P., H.J. Heinz Finance Company, and Portion Pac, Inc., Defendants	:	
M. Diane Koken, Insurance Commissioner of the Commonwealth	:	

of Pennsylvania, in her official capacity as Liquidator of Reliance Insurance Company, Plaintiff	:	
v.	:	No. 671 M.D. 2003
Apple Computer, Inc., Defendant	:	

In re: *Defendants' Petition Requesting Reassignment of Case from Referee; Cross-motions for summary judgment*

MEMORANDUM OPINION and ORDER

Before this Court is the motion for summary judgment filed on behalf of Plaintiff M. Diane Koken, Commissioner, Pennsylvania Department of Insurance, acting in her capacity as Liquidator Reliance Insurance Company filed in each of the above-captioned matters. Defendants Ingram Micro, Inc. (Ingram), Mitsui and Co. (U.S.A.) (Mitsui), H.J. Heinz Company, H.J. Heinz Company, L.P., H.J. Heinz Finance company, and Portion Pac, Inc. (collectively, Heinz), and Apple Computer, Inc. (Apple Computer) have filed a consolidated response petitioning for reassignment of the case from a referee; and have also filed cross-motions for summary judgment. Consolidation of these cases was for the limited purpose of deciding whether a pre-liquidation payment by Reliance to each Defendant was a preference within the meaning of Article V, Section 530 of the Act of May 17 (Act), 1921 40 P.S. Section 221.30(a), recoverable by the Liquidator. For the reasons set forth below, the Court concludes the transfers at issue are not preferences recoverable by the Liquidator. Accordingly, the

Liquidator's motion for summary judgment is denied; Defendants motion for summary judgment is granted.

In May 2001, M. Diane Koken, Insurance Commissioner for the Commonwealth of Pennsylvania, presented the Court with a petition to rehabilitate Reliance Insurance Company (Reliance Estate). By order of this Court dated May 29, 2001, the Commissioner was appointed Rehabilitator of the Reliance Estate pursuant to Article V of the Pennsylvania Insurance Department Act, 40 P.S. §§221.1-231. By the terms of that order all assets of the Reliance Estate were placed under the control of the Commissioner acting as Rehabilitator and the Commonwealth Court.

Subsequently, the Liquidator advised the Court that with an Estate value nearing, if not in excess of $200 million, and potential claims numbering in the hundreds of thousands,[1] the insolvency of the Reliance Estate was more profound than initially presented, and it was in need of immediate and constant attention. Upon further petition dated October 3, 2001, the Commissioner advised this Court that she consented to the entry of an order terminating the rehabilitation of the Reliance Estate, placing the Reliance Estate into liquidation, and appointing the Commissioner as Liquidator, pursuant to Article V. This Court granted the petition, and Reliance was placed into liquidation.

Subsequently, pursuant to Section 530 of the Act, 40 P.S. §221.30, the Liquidator initiated actions in Commonwealth Court against Ingram,[2] Mitsui,[3]

---

[1] Nearly 186,000 objections to proof of claims were filed.

[2] This action was filed at 664 M.D. 2003.

[3] This action was filed at 666 M.D. 2003.

Heinz,[4] and Apple[5] (collectively, Defendants), seeking to avoid certain payments made prior to the entry of the liquidation order, and to recover monies paid. Each Defendant has filed an answer and new matter to the Liquidator's complaint. Due to the commonality of facts and issues, on motion of Defendants, this Court consolidated the herein actions for the single purpose of resolving the issue of whether payments made to policyholders are voidable preferences.[6] Having consolidated the matters, the Court on its own motion assigned these cases to a referee for initial disposition.

The Court adopted the Referee[7] appointment program to facilitate the prompt disposition of all filings in the Court. The adoption of this program is reflective of the size of the Reliance Estate, and is consistent with Section 221.41(b) of the Act, 40 P.S. §221.41(b), and Section 323 of the Judicial Code,[8] 42 Pa. C.S. §323, and has occurred with the consent of the Liquidator. The Court employed this method to complement the overall purpose of the Act which purpose is to protect the interests of insureds, creditors, and the public generally. 40 P.S. 221.1(c). The Act seeks to improve methods for rehabilitating insurers, and to enhance efficiency and economy, by minimizing legal uncertainty and litigation. *Id.*

While the referee appointment program was employed to resolve claim disputes (40 P.S. §221.41(b) directs that disputed claims shall be heard by Commonwealth Court or by a court-appointed referee who shall submit to

---

[4] This action was filed at 668 M.D. 2003.

[5] This action was filed at 671 M.D. 2003.

[6] Order dated January 20, 2005.

[7] Arbitrators, auditors, commissioners to take oaths and depositions, custodians, examiners, guardians, masters, mental health review officers, receivers, referees, trustees, viewers and other like officers are "Appointive judicial officers." 42 Pa. C.S. §102.

[8] Act of July 9, 1976, P.L. 586, No. 142, §2, effective June 27, 1978.

Commonwealth Court findings of fact along with a recommendation), it is also used to assist in the resolution of certain discreet litigation which is in the form of actions initiated by the Liquidator.[9] A referee has been used as a means to guide the parties to settlement where possible, and where not possible, to resolve disputes between the parties as well as to distill the facts and issues to determine what, if any, commonality does exist. Where possible the referee will encourage and guide the parties in the preparation of a stipulation of facts. Where, however, the parties are not amenable to the appointment of a referee to oversee the preliminary aspects of their case, the Court will, upon request, withdraw the appointment and resolve the underlying matter. Such an event occurred herein, and on January 20, 2005 this Court entered an Order removing these cases from the referee and transferring them back to the Court.

Overview

The Liquidator brought this adversary proceeding against each named Defendant seeking to recover, pursuant to Section 530(a) of the Act, 40 P.S. §221.30(a), alleged preferential transfers made to the Defendants of approximately $5,000,000.00. In their joint answers, Defendants raise various defenses, including their contention that they are not creditors of the Reliance Estate, the transfers were not on account of an antecedent debt, and that the regular course of business defense is applicable.[10]

---

[9]Section 221.26(a) of the Act, 40 P.S. §221.26(a), provides that the Liquidator must consent to being sued; however, the Liquidator may institute an action or proceeding on behalf of the Reliance Estate upon any cause of action. 40 P.S. §221.26(b).

[10] Due to the Court's disposition of the issue regarding preferential transfers, the issue of the availability of the course of business defense is not reviewed.

The Record on Summary Judgment

The record created by the parties is limited to the pleadings and the documentary evidence attached thereto. Uncontested is that the Liquidator petitioned this Court to place Reliance into rehabilitation on May 29, 2001 (petition). Reliance made certain pre-petition payments/transfers to each named Defendant pursuant to documents titled Trade Credit Agreement and/or Certifications and Release Agreements (Agreement). The details of the policies and payments pertaining to each Defendant are as follows.

Reliance issued two trade credit insurance policies to Ingram, identified as Trade Credit Agreement NDT 1237710 and NDT 1237578-99 both of which have a policy period of March 31, 1999 to January 1, 2001.[11] On April 10, 2001 Ingram received $240,827.24 in settlement of a claim made under Trade Credit Agreement No. NDT 1237578-99.[12] On or about May 8, 2001 Ingram received $888,085.52 in settlement of a claim made under Trade Credit Agreement No. NDT 1237710.[13] In total, Ingram Micro received approximately $1,128,912.76 which the Liquidator seeks to recover.

Reliance issued a trade credit insurance policy Mitsui identified as Trade Credit Agreement NDT 1237634-99 with a policy period of November 1, 1999 through November 1, 2000.[14] On August 28, 2000 Mitsui received

---

[11] See Exhibits 2 and 3 and attached to the Answer and New Matter of Ingram.

[12] Ingram Complaint, paragraphs 19 and 20.

[13] Ingram Complaint, paragraph 23. Subsequently, in August 2001 Ingram received an additional $870,068.00 in settlement of claims under Trade Credit Agreement No. NDT 1237710. However, the Liquidator is not seeking recovery of this payment.

[14] See Exhibit No. 5 attached to Defendant Mitsui's Answer and New Matter. See also, New Matter, paragraphs 1, 2, 3.

$927,576.04 in settlement of a claim under Trade Credit Agreement No. 1237634-99.[15] The Liquidator seeks to recover those monies.

Heinz has denied knowledge as to whether a trade credit agreement exists between its entities and Reliance. However, in the joint stipulated facts, Heinz admits that it and Reliance were parties to a policy of insurance identified as Policy Number 1237828 covering the period November 24, 1999 to November 24, 2000.[16] It is also admitted that on or about August 4, 2000 Reliance paid to Heinz the sum of $1,248,837.98 as settlement on a claim.[17] The Liquidator seeks to recover those monies.

Reliance issued a trade credit insurance policy to Apple Computer identified as Trade Credit Insurance Agreement NDT 1237826 dated November 29, 1999.[18] Apple received $1,639,327.56 in settlement of a claim made under Trade Credit Agreement No. 1237826. The Liquidator seeks to recover those monies.

Position of the Parties

The Liquidator asserts that the payments made under the Trade Credit Agreements[19] (Transfers) represent preferential transfers and seeks to avoid them under Section 503(a) of the Act, 40 P.S. §221.30(a) and recover them for the

---

[15] Mitsui Complaint, paragraph 23.

[16] Joint Stipulated Facts, II B, paragraphs 1, 2.

[17] Heinz Complaint, paragraph 22. Heinz Answer and New Matter, paragraphs 26, 29.

[18] Apple Computer Answer and New Matter, paragraph 17.

[19] Initially, there was a dispute concerning the type of agreement issued by Reliance. The Liquidator characterized the documents as agreements whereas the defendants asserted that the documents were policies of insurance. Regardless of the title, there can be no doubt that the documents, titled agreements, are policies of insurance purchased by policyholders for the purpose of protecting their debt reserve. The issue is no longer relevant, as all parties now agree that the documents are in fact insurance policies.

benefit of the Reliance Estate pursuant to that same section. The Liquidator states that the defendants were creditors with claims antecedent to the Transfers, and the Transfers represent payments to satisfy those antecedent debts. The Liquidator argues that, since the Defendants received one-hundred percent (100%) payment on their claims, they received more than if the Transfers had not been made and their claims allowed in the liquidation proceeding. Section 503(a) of the Act provides in pertinent part:

> (a) A preference is a transfer of any of the property of an insurer to or for the benefit of a creditor, for or on account of an antecedent debt, made or suffered by the insurer within one year before the filing of a successful petition for liquidation under this article the effect of which transfer may be to enable the creditor to obtain a greater percentage of this debt than another creditor of the same class would receive. If a liquidation order is entered while the insurer is already subject to a rehabilitation order, then 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 two years before the filing of a successful petition for liquidation, whichever time is shorter.

40 P.S. §221.30(a). The statute further provides that

> Any preference may be avoided by the liquidator, if (i) the insurer was insolvent at the time of the transfer; (ii) the transfer was made within four months of the filing of the petition; (iii) the creditor receiving it or to be benefited thereby ... had, at the time when the transfer was made, reasonable cause to believe that the insurer was insolvent or was about to become insolvent; or (iv) the creditor receiving it was an officer, an employe or attorney or other person who was in fact in a position of comparable influence in the insurer ....

40 P.S. §221.30(a).

Defendants respond that the Transfers are not property of the Reliance Estate, because the monies were paid to them as policyholders and not as creditors of the Reliance Estate as the term creditor is used in 40 P.S. §221.30. They further contend that when the monies were paid Reliance was not insolvent. Finally, Defendants contend that even if they are creditors the monies paid were received in the regular course of business and as such are not preferential payments.

Alternatively, Defendants contend that if the Court is not going to grant their respective motions for summary judgment, then further discovery must be permitted because the Liquidator has not presented sufficient evidence to support a necessary element of the cause of action. All agree that the underlying issue is whether the aforementioned pre-liquidation petition Transfers made by Reliance to each named defendant were preferential transfers which the Liquidator may subsequently disallow and recover.

Both parties have filed motions for summary judgment agreeing that there are no material facts in dispute. The Court agrees that the facts of record are sufficient for the Court to render a decision.

Summary Judgment

It is black letter law that a motion for summary judgment may only be granted in the clearest of cases. The grant of a summary judgment occurs only where there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or, if after the completion of discovery relevant to the motion, an adverse party who will bear the burden of poof at trial has failed to produce

evidence of facts essential to the cause of action or defense. Pa. R.C.P. No. 1035.2. To defeat a summary judgment motion, the adverse party must come forth with evidence showing the existence of the facts essential to the cause of action or defense. Note to Rule 1035.2. This motion may be filed by a party only after the pleadings are closed, and must be done within such time as not to unreasonably delay the trial. Pa. R.C.P. No. 1035.2. A fact is material if it directly affects the disposition of the case. *Allen v. Coulatti,* 417 A.2d 1303 (Pa. Cmwlth. 1980). A motion for summary judgment does not concede the factual allegations contained in the pleadings; thus, if the motion is denied, a factual question remains. *Bensalem Township School District v. Commonwealth,* 518 Pa. 581, 544 A.2d 1318 (1988). When, the motion is brought on the grounds that the burdened party has failed to produce evidence of facts essential to the cause of action, the motion is premature unless it is made after the completion of discovery relevant to the motion, including the production of expert reports. Pa. R.C.P. No. 1035.2; *Kitchin v. Farber,* 20 Pa. D.&C.3d 11 (1981).

Preference Payments

To protect the interests of insureds, creditors, and the public generally, Section 221.30(a) of the Act was enacted which permits the Liquidator to avoid preferential transfers ... for or on account of an antecedent debt made by the insurer within one year before the filing of a successful petition for liquidation; ... [unless] a liquidation order is entered while the insurer is already subject to a rehabilitation order, then 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 two years before the filing of a successful petition for

liquidation, whichever time is shorter. Where the preference is voidable, the liquidator may recover the property or, if it has been converted, its value from any person who has received or converted the property.... *Id.* There are no affirmative defenses found in Section 221.30 of the Act. Whether an insurance policyholder is a creditor of a failed insurance company is a case of first impression in this Commonwealth.

Since the Act is one designated by the Legislature as requiring strict construction, the Court is required to construe the Act liberally in order to affect its purpose. *Miller v. U.S. Fidelity & Guaranty Co.,* 450 A.2d 91 (Pa. Super. 1982), *affirmed,* 503 Pa. 127, 468 A.2d 1097 (1983); 40 P.S. §221(b). It is the Court's obligation to construe the statute to avoid absurd results, to give effect to the entire statute, and to favor the public interest as against any private interest. 1 Pa. C.S. §1922. The purpose of this Act is to protect the interests of insureds, creditors, and the public generally. 40 P.S. §221.1.

Each Defendant admits to having received monies from Reliance on the basis of claims submitted to Reliance under policies of insurance. Each Defendant contends that it received these monies as an insurance policyholder and that insurance policyholders are not creditors. However, the Act makes no distinction between creditors and insurance policyholders. While the term "creditor" has not been specifically defined in the Act, it has been defined by other Courts as a person, including an insured, having any claim on an insurer's assets. *Wilcox, Utah Insurance Commissioner, as Liquidator of Southern American Insurance Company v. CSX Corporation,* 70 P.3d 85 (Utah 2003). This Court has carefully reviewed *Wilcox* and finds it instructive particularly in light of the

similarities between the Utah Insurance Liquidation statute and that of this Commonwealth.

The Act defines a "creditor" as a person having **any** claim, whether matured or unmatured, liquidated or unliquidated, secured or unsecured, absolute, fixed or contingent." 40 P.S. §221.3. In the definitional section, the Act makes no distinction between the varying types of creditors. Instead, the Act sets forth a broad definition that captures all persons having any claim without regard to whether the claim has been valued. The definition is consistent with the definition set forth in Section 1991 of Title 1 of the Pennsylvania Consolidated States, 1 Pa. C.S. §1991 ("'Creditor' is one to whom the performance of an obligation is owed."). It is also reflective of the common usage definition set forth in Webster's New Collegiate Dictionary ("'creditor' is one to whom a debt is owed"); that found in Black's Law Dictionary ("creditor' is a person to whom a debt is owing by another person who is the 'debtor'"); and that set forth in the United States Bankruptcy Code, which defines a creditor "as an entity that has a claim against the debtor." 11 U.S.C. §101. Moreover, this Court has previously ruled that insurance agents are creditors within the meaning of Section 503 of the Act, and that therefore, their commissions may be recoverable pursuant to Section 530 of the Act. *Foster v. Health Market, Inc.*, 604 A.2d 1198 (Pa. Cmwlth. 1992). Thus, when a claim exists so does a debt. *Energy Coop., Inc. v. SOCAP International (In re Energy Coop., Inc.),* 832 F.2d 997, 1001 (7th Cir. 1987). The concepts of creditor and claim are co-extensive: a creditor has a claim against a debtor; the debtor owes a debt to the creditor. *Wilcox*; *Accord, Foster.* Therefore, this Court concludes that policyholders who have submitted a claim to an insurance company

in liquidation are creditors within the meaning of Section 503 of the Act. Applied herein, each Defendant is a creditor of the Reliance Estate.

Antecedent Debt

Of consideration is whether the transfer was made for, or on account of, an antecedent debt. Debt is antecedent if it is incurred before the transfer. *Wilcox.* This gives rise to the question of when did the debt arise. The Liquidator asserts that the debt arose when Defendant submitted its claim for indemnification. Defendants assert that the debt arose upon the filing of the proof-of-loss form. Defendants assert there is support for this argument in *Wilcox.* The Court disagrees with both assertions. Further, the Court finds *Wilcox* instructive but disagrees with Defendants arguments relative to *Wilcox.*

In *Wilcox*, the Utah Insurance Commissioner acting as Liquidator of South American Insurance Company sought to recover as a preference payment monies paid by the insurer to the insured pursuant to the terms of a settlement agreement. In analyzing whether a transfer was made on or account of an antecedent debt, the *Wilcox*[20] Court concluded that the critical date is the date on which the debt, that is, the claim, arose. To resolve that issue, the Court looked at the term of the underlying obligation. The Court drew distinction between debt which arises on a monthly basis and that which is created upon the execution of the contract.

[20] Initially, the Utah Court concluded that federal bankruptcy law should be used to interpret the voidable preference provisions of Utah Code Ann. §31A-27-321 (2001). The court then reviewed the applicability of the new and contemporaneous consideration found set forth in Utah's Code.

The *Wilcox* Court concluded that leases are not analogous to the present situation as the debt is incurred as the lease progresses and not when the lease is executed. *Wilcox; Iowa Premium Serv. Co. v. First National Bank (In re Iowa Premium Serv. Co.),* 695 F.2d 1109, 1112 n.7 (8th Cir. 1982) (interest payments become debts on their due date, not when the agreement was executed). The Court finds itself in agreement with the reasoning set forth in *Wilcox.* Lease payments or rent payments are a recurring monthly obligation the terms of which are set forth in a contract that by its very terms imposes the obligation on a monthly basis. *In re Upstairs Gallery, Inc. v. Macklowe West Development Co., L.P.,* 167 B.R. 915 (1994). A contract of insurance, on the other hand, sets out its effective date and upon execution the insurance policy becomes effective for the designated period. However, while the legal obligation does not arise until the contract is executed, by its very terms, upon execution, the contract sets forth an obligation that may predate execution and during which period the insurer agrees to indemnify the insureds. It is the insurance policy then that creates the obligation. The obligation to pay a claim under an insurance policy attaches as of the first effective date of the insurance policy. Further, since a valid claim is a debt of the insurer, the debt must also be said to have been created as of the first effective date of the insurance policy. This reasoning is consistent with *Foster v. Health Market, Inc.,* 604 A.2d 1198 (Pa. Cmwlth. 1992), wherein this Court held that at the time an insurance contract is placed, the insurance agent has a claim against the insurer for his or her commission on the sale. *Accord, Wilcox.* Herein, the facts of record for each Defendant established that each respective insurance policy was for a period beginning in 1999 and ending in 2000. The debt arose as of the effective date of the insurance policy, which in each case is in 1999, which

is nearly 2 years prior to the rehabilitation order. The Liquidator has not alleged that there was any collusion involved in the payment of these claims, nor has the Liquidator alleged anything other than the claims were paid in the normal course of doing business between the insurer and the insured. The Liquidator has not presented a rational basis to distinguish between the claims paid herein, and the other hundreds of millions of dollars in claims that were paid during the same pre-petition period and has failed to establish that the claims should properly be considered asserts of the Reliance Estate.

Conclusion

The Liquidator has failed to establish that the Transfers at issue are preference payments as such the Transfers are not property of the Reliance Estate.

Accordingly, the Court enters the following

O R D E R

AND NOW this 26TH day of January, 2006, the Liquidator's motion for summary judgment is **DENIED**; the Defendants' joint motion for summary judgment is **GRANTED**.

Further, the Liquidator is directed to forthwith serve a copy of this Memorandum Opinion and Order on all parties of record, and also, to serve all on the Master Service List associated with the case filed at No. 269 M.D. 2001. An affidavit that service has been effectuated shall be filed with this Court.

James Gardner Colins

JAMES GARDNER COLINS, President Judge