IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joel S. Ario, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, Plaintiff	:	
v.	:	
Reliance Insurance Company, Defendant	:	No. 269 M.D. 2001

IN RE: Order Approving interim decision
Referee of Henry Ian Pass re POC No. 1142945

ORDER

AND NOW, this 15th day of May 2008, the Court has given consideration to the decision of Referee Pass recommending the grant of the Liquidator's motion that the consent judgment of October 2, 2002 may not be used as evidence of liability or value of POC No. 1142945. There being no objection to the recommendation of Referee Pass, the Court accepts the Recommendation, which is attached hereto and marked as Exhibit A.

A copy of this Order shall be served by the Liquidator upon all listed on the Master Service List. Thereafter, an affidavit of service shall be filed with the Court.

By the Court:

JAMES GARDNER COLINS, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joel S. Ario, Insurance Commissioner of the Commonwealth of Pennsylvania Plaintiff	:	
	:	**Docket No. 269-MD-2001**
v.	:	
Reliance Insurance Company Defendant	:	

REFEREE'S DETERMINATION AS TO PROOF OF CLAIM NO. 1142945 - MYRON HAIRRELL

Background

1. By Order of the Court dated December 20, 2004, Henry Ian Pass, Esq. ("Referee") was appointed referee for the purpose of recommending to the court the disposition of Claimant Myron Hairrell's ("Claimant") objection in the instant matter.

2. Referee participated in numerous telephone conversations and/or conference calls with Claimant's counsel and counsel for the Liquidator ("Liquidator"). In the course of the proceedings, Claimant and Liquidator provided various documents which Referee reviewed.

3. At the request of the Claimant, and with the consent of the Liquidator, proceedings before the Referee were held in abeyance in anticipation that all or a portion of Claimant's claim could be obviated through proceedings against the excess insurance carrier pending in the Federal District Court for the Northern District of Illinois (Western Division) captioned *Hairrell v. Winterville Marine Services, Inc., et al.*, U.S.D.C., N.D. of Ill., Case No. 04 C 50340 ("Pending Litigation").

4. When it was determined that a decision in the Pending Litigation might not be forthcoming for a significant period of time, the Referee directed the parties to proceed with the disposition of the Claim before the Referee.

EXHIBIT A

5. The Liquidator submitted a Motion for an Order that the Consent Judgment of October 2, 2002 May Not Be Used as Proof of Evidence of Liability or Value of Claim No. 1142945 ("Motion") requesting entry of an order that the October 2, 2002 Consent Judgment need not be considered by the Liquidator as evidence of liability or quantum of damages in Claim Number 1142945.

6. Claimant filed a Response ("Response") to the Liquidator's Motion requesting that Referee issue a decision denying the Liquidator's Motion.

7. The Liquidator filed a Reply ("Reply") to Claimant's Response to the Liquidator's Motion rebutting Claimant's arguments in his Response and requesting that the Liquidator's Motion be granted.

8. Referee reviewed the Liquidator's Motion, Claimant's Response and the Liquidator's Reply thoroughly, conducted legal research regarding the issues raised by the parties, and held a hearing by telephone conference call[1] with the parties to allow them to plead their respective cases regarding the merits of the Motion.

9. Referee conducted additional research emanating out of the issues discussed during the hearing, and has concluded that the Liquidator's Motion should be granted.

10. A status conference was held on March 14, 2008 pursuant to the Court's Order dated March 6, 2008.

In support of the foregoing, Referee has set forth below his findings of fact and conclusions of law.

Findings of Fact

1. In October of 1997, Claimant initiated a civil action in the Circuit Court of the 19th Judicial Circuit in McHenry County, Illinois captioned *Hairrell v. Winterville Marine Services Co., Inc.*, No. 00-LA-78, against Winterville Marine Services, Inc. alleging he suffered a back injury in

[1] Claimant was provided with the opportunity to have an in-person hearing, but elected to have the hearing proceed telephonically.

October of 1994 while lifting a piece of equipment from the deck of a barge. The complaint sought damages under the Jones Act, 46 U.S.C. § 688 and for unseaworthiness and maintenance and cure.

2. Winterville tendered its defense to its insurer, Reliance Insurance Company ("Reliance"), which agreed to defend the action.

3. Winterville's policy of insurance ("Policy") with Reliance had a policy limit of $1,000,000.

4. Winterville rejected a $250,000 settlement demand by Claimant and filed a motion for partial summary judgment on the Jones Act/Unseaworthiness claims in September 2001, asserting there was no basis, as a matter of law, for a finding of liability or causation.

5. On October 3, 2001, Reliance was placed into statutory liquidation by this Court and was unable to continue its defense of Winterville.

6. On June 13, 2002, Claimant's counsel wrote to the PA Insurance Department advising that Claimant and Winterville intended to enter into a consent judgment in which Winterville admitted liability and requesting the Department advise as to its position on the matter. The amount of the proposed consent judgment was not indicated in the letter.

7. On June 26, 2002, the Liquidator's counsel responded to the June 13, 2002 letter from Claimant's counsel advising that "pursuant to paragraph 24 of the Liquidation Order, the Liquidator would not be required to accept the consent judgment as evidence of liability in this matter."

8. On September 27, 2002 (at which time the Summary Judgment Motion was still pending), Claimant and Winterville entered into a $2 million[2] consent judgment under the terms of which Claimant agreed not to seek collection of the judgment against Winterville, its officers,

[2] While the Referee's decision herein is based solely on applicable law and accordingly does not directly address Liquidator's arguments in its Motion regarding the propriety of the amount of the Consent Judgment, it should be noted that the amount of the Consent Judgment is troubling, not only because it is double the applicable Policy limits of $1,000,000 but also taking into consideration that the last known offer tendered by Claimant (and rejected by Winterville) had been $250,000 and a decision on Winterville's Preliminary Objections (which Reliance and Winterville deemed to have merit) was still pending.

directors or shareholders unless it was determined that material misrepresentations had been made by Winterville regarding its financial status.

9. The Consent Judgment was approved by Judge Maureen P. McIntyre of the Circuit Court in McHenry County, Illinois.

10. On October 28, 2003, Claimant's counsel wrote to the PA Insurance Department advising that a Consent Judgment had been entered into and approved by the trial judge and requesting the Department advise as to the official status of the claim.

11. Claimant subsequently filed Proof of Claim 1142945 ("POC") dated May 23, 2003 seeking $2,000,000 in damages, based on the Consent Judgment.

12. On December 15, 2003, the Liquidator issued a Notice of Determination ("NOD") regarding Claimant's POC, valuing its worth at $245,000.

13. On February 13, 2004, Claimant submitted his objection to the NOD to which the Liquidator filed its response on March 23, 2004.

14. Claimant's claim was assigned to the Referee for determination on December 20, 2004.

Conclusions of Law

The Referee finds that the Statutory Liquidator is entitled to the grant of an order that the Consent Judgment of October 2, 2002 cannot be used as proof of evidence of liability or value of Claim No. 1142945 as a matter of law because 40 P.S. § 221.38(c) clearly states that a judgment or order entered after the date of filing of a petition for liquidation need not be considered as evidence of liability or of quantum of damages. That statute and precedent emanating therefrom are dispositive of this issue. Moreover, claimant's attempt to assert that the applicability of such statute is barred by the doctrines of waiver, *res judicata* and collateral estoppel is also without merit.

It should be noted that Illinois has a statute (215 ILCS 5/209(8)) substantially similar to that of Pennsylvania governing the efficacy of judgments and orders entered after an insurer's petition

for liquidation. The Referee has determined that the Illinois liquidation statute, to the extent it has any applicability here, mandates the same conclusion.

Referee asserts the following in support of the foregoing:

POST-LIQUIDATION JUDGMENTS ARE NOT BINDING IN LIQUIDATION PROCEEDINGS

1. Pennsylvania's liquidation statute, 40 P.S. § 221.38(c), applicable to the proof of claim procedure for a liquidated insurer, states as follows:

> (c) No judgment or order against an insured or the insurer entered after the date of filing of a successful petition for liquidation, and no judgment or order against an insured or the insurer entered at any time by default or by collusion, need be considered as evidence of liability or of quantum of damages.

2. The Order of Liquidation entered by the Commonwealth Court on October 3, 2001 in this matter, incorporates the substance of this provision, specifically stating as follows:

> No judgment or Order against Reliance or its insured entered after the date of filing of the Petition for Liquidation, and no judgment or Order against Reliance entered at any time by default or by collusion, need be considered as evidence of liability or quantum of damages by the liquidator.

3. The applicability of the foregoing is supported by the Commonwealth Court's decision in *Allen v. Reliance Nat'l Ins. Co. and Yellowbird Bus Co.*, 821 A.2d 651 (Pa.Cmwlth., 2003) (an order made final after entry of the Order of Liquidation is not binding on the liquidator and is not evidence in the liquidation of liability or of quantum of damages).

4. The State of Illinois, where the Consent Judgment was entered, has a statute (215 ILCS 5/209(8)) similar to Pennsylvania's applicable to the proof of claim procedure for a liquidated insurer, which states as follows:

> No judgment against such an insured or an insurer taken after the date of the entry of the liquidation, rehabilitation or conservation order shall be considered in the proceedings as evidence of liability, or of the amount of damages, and not judgment against an insured or insurer taken by default, or by collusion prior to entry of the Liquidation Order shall be considered as conclusive evidence in the proceeding either of the liability of such insured to such person upon such cause of action or of the amount of damages to which such person is therein entitled.

5. Pennsylvania and Illinois are reciprocal states with respect to their respective liquidation acts since their laws regarding interstate relations in insurer liquidation proceedings are the same in "substance and effect." See *All Star Advertising Agency, Inc. v. Reliance Insurance Company*, 898 So.2d at 369 (La. 2005) (holding that Pennsylvania is a reciprocal state); *Twin City Bank v. Mut. Fire Marine & Inland Ins. Co.*, 646 F. Supp. 1139, 1140 (S.D.N.Y. 1986), *aff'd* 812 F.2d 713 (2d Cir. 1987) (same); *Hicklin v. CSI, Inc.*, 940 P.2d 447, 283 Mont. 298 (1997) (same); *Venetsanos v. Zucker, Facher & Zucker*, 638 A.2d 1333, 1338, 271 N.J. Super. 459 (1994) (same).

COMMON LAW DOCTRINES ARE NOT APPLICABLE

6. The Pennsylvania legislature provided a comprehensive and exclusive statutory scheme to govern distribution of assets from a liquidated insurer's estate. Common law doctrines governing equity do not trump such statutes as evidenced by the Pennsylvania Supreme Court's opinion in *First Federal Savings and Loan Association v. Swift*, 457 Pa. 206, 210, 321 A.2d 895, 897 (1974), which states in part: "It is a mistake to suppose, that a court of equity is amenable to no law, either common or statute, and assumes the rule of an arbitrary legislator in every particular case."

7. As discussed above, Pennsylvania and Illinois are reciprocal states regarding their respective liquidation statutes, and Illinois law also dictates that equitable doctrines should not be permitted to alter the exclusive and comprehensive statutory scheme governing an insurer's insolvency. *See In re Liquidation of Security Casualty Company*, 127 Ill.2d 434, 537 N.E.2d 775 (Ill. 1989), where the Supreme Court of Illinois, in rejecting a claim that the equitable doctrine of constructive trust should be imported into the Illinois liquidation statute, the Court held that the Illinois legislature had provided a comprehensive and exclusive statutory scheme governing the distribution of assets from a liquidated insurer's estate and, accordingly, equitable relief, such as a constructive trust, was precluded by Illinois' exclusive statutory mandates.

8. Even if common law doctrines could override the statute, there is no factual basis in the record here to support a waiver or estoppel claim.

9. The doctrine of estoppel requires inducement and reliance. Claimant appears to assert that he was induced into entering into the Consent Judgment by the failure of the Liquidator to object when notified that Claimant intended to take such action[3], and that Claimant relied on such failure to object in deciding to enter into the Consent Judgment. However, the Liquidator's counsel's letter dated June 26, 2002, clearly advised Claimant of its position that "the Liquidator would not be required to accept the consent judgment as evidence of liability in this matter," invalidating any claim that Claimant relied to its detriment on a failure by the Liquidator to object to the entry of the Consent Judgment.

10. The doctrine of waiver requires the voluntary and intentional relinquishment of a known right inconsistent with an intent to enforce it. Again, Claimant uses the Liquidator's alleged failure[4] to respond to its notices that it was entering into and had entered into the Consent Judgment to assert that the Liquidator waived its right to object to the Consent Judgment. Again, Claimant's assertion ignores the Liquidator's clearly stated position in the June 26, 2002 letter that it would not be required to accept the consent judgment, which shows a clear intent to enforce its rights in this matter.

---

[3] It should be noted that none of Claimant's purported notices to the Liquidator regarding the potential entry of the Consent Judgment mention the amount of the judgment the parties proposed to enter. In light of the fact that the liability limit for the insurance policy under which Reliance had insured Winterville was only $1,000,000, Claimant had no reasonable grounds to believe in, let alone rely upon, the Liquidator's acceptance of a judgment that was more than double the policy limits.

[4] Claimant's Response alleges that a "failure of the Liquidator to respond to all such notices acts as a waiver" without any mention of the June 26, 2002 letter from the Liquidator's counsel. As the Referee received the June 26, 2002 letter as part of the materials provided to him at the time of his appointment in December 2004 (as Appendix C to the Response of the Liquidator to the Objection of Myron Hairell/Winterville Marine Services to the Notice of Determination on proof of Claim Number 1142945 which had been previously sent to Claimant), and Claimant's Response does not affirmatively assert that he never received such letter, Referee's decision assumes the letter was, in fact, received by Claimant.

INAPPLICABILITY OF RES JUDICATA AND FULL FAITH AND CREDIT PRINCIPLES

11. The Consent Judgment is not *res judicata* as to Reliance since it was entered against Winterville, not Reliance. As Reliance was not a party to the Consent Judgment and was no longer acting as the insurer of Winterville at the time the Consent Judgment was entered, Reliance cannot be considered a judgment debtor subject to *res judicata* in this matter.

12. As discussed above, Pennsylvania and Illinois are reciprocal states regarding their respective liquidation statutes. Therefore, since the Consent Judgment would not be honored in a similar liquidation proceeding in Illinois under its statute (see *In Re Liquidation of Pine Top Insurance Co.*, 266 Ill. App. 3d 99, 639 NE 2d 168 (Ill. App. 1st 1994)), the Pennsylvania courts are under no obligation to afford full faith and credit under the U. S. Constitution to the Consent Judgment in the instant proceeding. See *Aroyo v. Chesapeake Ins. Co.*, 209 Pa.Super. 174, 224 A.2d 101 (1966) and *Stopper v. Chesapeake Ins. Co.*, 209 Pa.Super. 747, 228 A.2d 35 (1967).

13. This statutory preclusion applies whether the judgment is against an insured or the insurer because, in either case, the effect would be to make a potentially inflated claim against the insolvent insurer's assets to the detriment of other claimants and policyholders.[5]

14. Claimant's assertion that Reliance should be precluded from contesting the judgment because Reliance did not seek a stay of the proceedings under 40 P.S. § 221.17 is inapplicable to the case at bar since Section 221.17 relates to proceedings in rehabilitation not those in liquidation.[6]

---

[5] Under the Pennsylvania Uniform Enforcement of Judgments Act, 42 Pa.C.S.A. § 4306, a foreign judgment is entitled to full faith and credit only if the judgment court had proper jurisdiction over the defendant and afforded him due process of law. *See Capital Funding Inc. v. Franklin Square Hosp.*, 620 A.2d 1154, 423 Pa. Super. 149 (Pa. Super. 1993). It is undisputed that the Illinois court had jurisdiction over Winterville. However, as discussed above, Reliance was not a party to the underlying litigation and was not under the jurisdiction of the Illinois court, therefore, claimant's attempt to use the preclusive effect of the judgment against Reliance is ineffective.

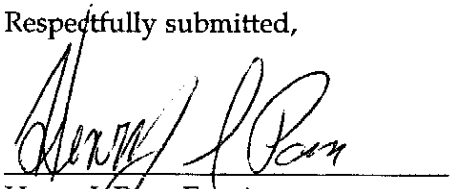
[6] Reliance met its obligation under Guaranty Association statutes (see 215 IL ST CH 215 §5/551) requiring that suits against insureds being defended by an insolvent insurer be stayed on a temporary basis to permit proper assumption

15. Claimant's rights were not impaired in any way since he always had the option to choose between pursuing a claim against the insured to judgment and executing on that judgment against the insured rather than filing a claim in the estate and releasing the insured. See *Koken v. Reliance Insurance Company* (Appeal of Mawson & Mawson, Inc.), 893 A.2d 70 (Pa. 2006). However, in making that choice, Claimant cannot circumvent the statutory scheme requiring that any judgment obtained not be binding on the Liquidator who has not only the right, but the statutory obligation, to evaluate the claim in the liquidation proceedings to determine its fairness and reasonableness.

Recommendation

In light of the above Findings of Fact and Conclusions of Law, it is the Referee's recommendation that (i) the Court grant the Liquidator's Motion that the Consent Judgment of October 2, 2002 May Not be Used as Evidence of Liability or Value of Proof of Claim No. 1142945.

Respectfully submitted,



Henry I. Pass, Esquire
Referee
Attorney I.D. No. 21437
Law Offices of Henry Ian Pass
401 E. City Avenue, Suite 600A
Bala Cynwyd, PA 19004
Telephone: (610) 660-8001
Fax: (610) 660-8004
E-mail: hip@hipesq.com

March 27, 2008

of the defense by the guaranty funds by including in the Court's October 3, 2001 Order a request for stays of suits against insureds outside of the Commonwealth for 90 days to allow claims to be forwarded to an evaluated by the Guaranty Associations for handling and defense, as appropriate. Neither the Illinois nor the Pennsylvania statutes require an indefinite stay of proceedings.