

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

RECEIVED AND FILED
COMMONWEALTH COURT
OF PA (PHILA)
2008 JUN 20 A 10:11

IN RE: Order Approving Referee Schwartzman's Decision in
POC No. 1929834, the matter of Eller Media

ORDER

AND NOW, this 20th day of June 2008, the Court has given consideration to the decision of Referee Schwartzman issued in the above-captioned matter. The Court notes that Referee Schwartzman has resolved the matter and the parties have entered into a stipulation wherein Eller Media will withdraw with prejudice its Objection to the Liquidator's Notice of Determination, and the Liquidator will assign the claim a to a priority level (b) with a value of \$575,000; as the parties have consented to this action, the Court does CONFIRM and ACCEPT the decision of Referee Schwartzman attached hereto and marked as "Referee Decision 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,
Acting Insurance Commissioner of the
Commonwealth of Pennsylvania

No: 269 M.D. 2001

Plaintiff,

POC #1929834

v.

Reliance Insurance Company,

Defendant.

**IN THE MATTER OF OBJECTIONS TO NOTICE OF DETERMINATION BY
ELLER MEDIA FOR PROOF OF CLAIM NUMBER 1929834
REFEREE FINDINGS AND RECOMMENDATIONS**

James C. Schwartzman, Esquire, duly appointed Referee in the Matter of Objection by Eller Media Corporation ("Eller") to Notice of Determination for Proof of Claim Number 1929834 hereby recommends to the Honorable Judges of the Commonwealth Court of Pennsylvania that the Objection of Eller Media to Notice of Determination on Proof of Claim Number 1929834 be marked withdrawn with prejudice and that the Liquidator's Amended Notice of Determination setting a claim priority level of (b) and a Claim value of \$575,000 be approved and that this matter be dismissed. In support thereof the following is presented:

BACKGROUND

1. By Order of the Commonwealth Court of Pennsylvania ("Court") dated October 3, 2001 ("Liquidation Order"), Reliance Insurance Company ("Reliance") was found to be insolvent and placed into liquidation. M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania ("Liquidator") was appointed Liquidator of Reliance.¹
2. By Order of the Court dated September 9, 2002 ("Claims Filing Order") the Honorable James Gardner Colins, established claims filing procedures, claims' filing deadlines and dispute resolution procedures for claims against Reliance.
3. Eller Media (referred to herein as "Claimant" or "Eller") submitted its Proof of Claim Number 1929834 ("POC #1929834") seeking a claim amount of \$1,534,225.40 in expert fees and costs incurred in defending criminal proceedings against it arising out of the death of a young boy. Eller asserts that these fees and costs are covered under its commercial general liability policy with Reliance because they benefited the defense of

¹ Joel S. Ario has been appointed by the Governor to serve as Insurance Commissioner, and, as such, replaces Ms. Koken as the Statutory Liquidator.

" Referee Decision Exhibit A "

parallel civil proceedings filed against Eller and were incurred before Reliance's defense obligation was extinguished by the pre-liquidation payment of its policy limits.

4. In response to POC 1929834, the Liquidator issued a Notice of Determination ("NOD") to Claimant assigning an allowed amount of zero and class e priority amount as the claim of an unsecured creditor for uncovered criminal expert fees and expenses. It is the Liquidator's position that the fees were owed, if at all, not under the policy (which does not provide coverage for criminal defense fees and costs) but pursuant to a separate contract/agreement by Reliance to pay for some portion of the expert work-product, to the extent Reliance determined that it would benefit the on-going civil defense. Reliance's defense obligation was extinguished as of September 14, 2001, by payment of its limits, before the civil defense had proceeded to the expert phase. Thus, it was Reliance's position that it was not responsible for payment of any portion of the claimed fees and costs and they should be the responsibility of Eller's excess carrier who assumed the defense obligation once the policy limits were paid.

5. On or about November 20, 2006, Claimant filed an Objection to the Notice of Determination of the Liquidator to the Proof of Claim ("Objection"). In its Objection, Claimant argued that the Liquidator improperly set Eller Media's Claim at priority level (e) when in fact the Claim should be set at priority level (b) and that the Liquidator should allow the full value of its claim.

6. By order of the Court dated February 2, 2007, the undersigned was appointed Referee to provide findings of fact and a recommendation to the Court regarding issues raised by Claimant.

7. Prior to the initial conference, the parties advised the Referee that they were attempting to resolve their dispute. The parties entered into protracted negotiations. Ultimately, the parties successfully settled the claim. Reliance agreed to issue an Amended Notice of Determination, subject to Court approval, assigning class b priority, recognizing that there was at least an argument that there was coverage under the duty to defend clause of the policy. Further, the parties agreed to a compromised allowed amount of \$575,000, reflecting both sides' assessment of their costs and risks of litigating the coverage issue to conclusion.

8. On November 6, 2007, counsel for the parties jointly filed with the Referee, the attached Stipulation. Pursuant to the Stipulation, the parties have agreed that:

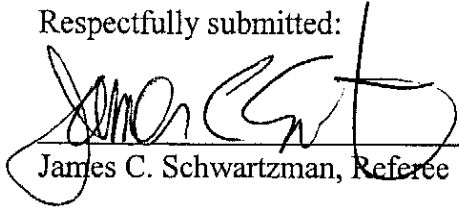
- a. The Liquidator will, and has, issued an Amended Notice of Determination to Claimant's claim setting a claim priority level of (b) and a Claim value of \$575,000, subject to Court approval. Claimant will not object to this Amended Notice of Determination.
- b. Claimant will file a Praeceptum to Withdraw With Prejudice its Objection as Moot.

9. In light of the Stipulation, and in consideration of the representations of counsel for the parties, it is recommended to this Honorable Court that the Claimant's Objection to the Liquidator's Notice of Determination be marked withdrawn with prejudice, and that this matter be dismissed. It is further recommended that the Liquidator's Amended Notice

of Determination setting a claim priority level of (b) and a Claim value of \$575,000 be approved.

WHEREFORE, in that the parties have filed a Stipulation it is hereby respectfully recommended that the Objection of Eller Media to Notice of Determination on Proof of Claim Number 1929834 be marked withdrawn with prejudice; that the Liquidator's Amended Notice of Determination to Claimant's Claim setting a priority level of (b) and a Claim value of \$575,000 be approved; and that this matter be dismissed.

Respectfully submitted:

 6/19/2008
James C. Schwartzman, Referee