STATE OF VERMONT

SUPERIOR COURT
WASHINGTON COUNTY

CIVIL DIVISION
DOCKET NO.: S 444-83 Wnc

FILED
NOV 29 2012
SUPERIOR COURT
WASHINGTON UNIT

In re: AMBASSADOR INSURANCE CO.

ORDER ON BAR DATE

By decision dated November 28, 2012, the court has granted the motion by the Liquidator to establish a final bar date for all claims. Accordingly, the court orders as follows:

1. The court sets December 31, 2013, as the deadline by which any policyholder or other person with a claim against Ambassador Insurance Co. shall submit a final proof of claim which complies with the requirements of paragraph 14 of the Liquidation Order and meets all other requirements for proof of claim established by the Liquidator.

2. All persons who have "policyholder protection" claims as provided by paragraph 14(c) of the Liquidation Order shall submit final proofs of claim by December 31, 2013. Any "policyholder protection" claim which is not supported by a timely-filed proof of claim shall be barred.

3. This order does not alter the deadlines for claims previously established by the Liquidation Order. It establishes a new deadline for claims previously filed as "policyholder protection" claims or otherwise filed without complete documentation.

4. The Liquidator is authorized to issue appropriate requirements in its discretion to determine the procedure and requirements for filing any proofs of claim or supporting documentation.

Dated: November 28, 2012

Geoffrey Crawford,
Superior Court Judge

STATE OF VERMONT

FILED

SUPERIOR COURT
WASHINGTON COUNTY

NOV 29 2012

CIVIL DIVISION
DOCKET NO.: S 444-83 Wnc

In re: AMBASSADOR INSURANCE CO.

SUPERIOR COURT
WASHINGTON COUNTY

DECISION ON MOTION FOR BAR DATE FOR PENDING CLAIMS

This insurance insolvency case has been pending since 1983. The case has been before the Vermont Supreme Court on three occasions. See *In Re Ambassador Ins. Co.,* 147 Vt. 344 (1986); *In re Ambassador Ins. Co*., 153 Vt. 417 (1989); and *In re Ambassador Ins. Co*., 184 Vt. 408 (2008). For purposes of the motion to establish a bar date, these facts are undisputed:

In 1983, the Commissioner of Banking and Insurance filed this case due to financial problems at Ambassador. In 1984, the Washington Superior Court entered a liquidation order after a trial. This order was affirmed in the first appellate decision.

In the course of the liquidation process, the Commissioner acting as liquidator for the company filed a lawsuit against Price-Waterhouse-Coopers LLC – the company's auditor. The case was tried in the U.S. District Court for the District of New Jersey. It resulted in a judgment in 2005 for $182.9 million (including pre-judgment interest). The judgment was affirmed in 2008. *Thabault v. Chait*, 541 F.3d 512 (3d Cir. 2008). It has now been paid in full. With interest during the appeal period, the amount ultimately paid was $205 million.

Since the commencement of this insolvency, Ambassador has paid claims pursuant to the five-tier priority established by 8 V.S. A. § 3595 (repealed in 1991). The first three tiers relate to expenses of administration and other expenses not relevant here. The fourth tier is for the payment of claims for which Ambassador provided coverage. As of December 31, 2010, the estate has paid $343 million with respect to fourth-tier claims. The fifth tier is for costs of legal defense and other expenses incurred by Ambassador in handling claims prior to the insolvency. No payments have been made to fifth-tier claimants because these cannot commence until the fourth tier claims have been paid in full.

In its original liquidation order, the Superior Court set a deadline of March 1, 1988, as the date by which all claimants had to file notices of claims with the court. The order establishing this deadline permitted parties whose claims were contingent or uncertain to file "policyholder protection claims." The purpose of the policyholder protection provision was to allow an insured who believed that it might be subject to a claim covered by an Ambassador policy to hold a place in line in case such a claim developed in the future.

Since 1983, Ambassador has maintained a claims office which operates like the claims department in a functioning insurance company. Claims have been received, investigated, approved or denied, and when necessary litigated before this court, usually through the assignment of masters. Ambassador has employed a staff of adjusters and other claims professionals for almost 30 years. Its physical office is located in Montpelier, Vermont.

In June 2012, the receiver filed a motion to establish a bar date by which all claims, including claims previously filed as policyholder protection claims, would have to be submitted for final consideration. Pursuant to an order of this court, notice was sent out to approximately 80,000 parties who had filed notices of claim. Four objections have been filed with this court.

a. Objection of National Indemnity Co. and A.P. Green Industries

A.P. Green Industries is a manufacturer of refractory products. The company is in Chapter 11 bankruptcy as a result of the great volume of asbestos injury claims and lawsuits filed against it.

Prior to 1983, Ambassador issued two excess insurance policies to A.P. Green for successive policy years. Each provided excess liability coverage of $10,000,000 over underlying policies totaling $25,000,000 (excess) and $1,000,000 (primary). A.P. Green filed timely policyholder protection claims on both policies.

As of 2000, A.P. Green and its insurers have paid out more than $446,000,000 in claims to workers and other persons for asbestos-related bodily injury. It paid an additional $51,404,910 in defense costs. In 2002 A.P Green entered bankruptcy. At that time it faced $492,000,000 in unfunded judgments and settlements as well as 235,000 unliquidated claims.

In 2001 A.P. Green assigned its rights under its two Ambassador policies to National Indemnity Co. ("NICO") for a cash payment of $1,000,000. The assignment provides that NICO will receive $3,000,000 plus expenses as well as half of any additional amount paid by Ambassador with respect to claims against A.P. Green. In a recent Vermont Supreme Court decision, NICO's claim as assignee was determined to be a fourth priority policyholder claim. *In re Ambassador Ins. Co.*, 184 Vt. 408 (2008).

Following resolution of the priority issue, NICO has sought payment of the $20,000,000 in liability coverage from Ambassador. NICO and A.P. Green contend that the underlying coverage has been paid and that Ambassador is next in line to respond to the claims against A.P. Green. The Liquidator has denied this claim on the ground that the underlying excess insurance coverage has not been exhausted.

NICO and A.P. Green object to the establishment of a bar date prior to the liquidation of all claims now pending against A.P. Green. They join the Liquidator in seeking a determination now of how much has been paid by the underlying layers of coverage. They describe any bar date as not permitted by statute and object that it benefits the fifth-tier claims at the expense of fourth-tier claims.

b. Objections of C.P. Chemical Inc. and Phibro-Tech, Inc.

C.P. Chemicals and Phibro-Tech. are Ambassador insureds who face potential Superfund clean-up claims in connection with the Omega Chemical Corporation Superfund Site in Whittier, California. They notified Ambassador concerning the potential coverage in December 2011. The Liquidator has denied the request for coverage under the pollution exclusion in the

Ambassador policies. It also refused to provide a defense. The insureds have submitted a timely request for court review of the Liquidator's decision.

C.P. Chemical and Phibro-Tech object to the bar-date on the ground that their liability and claim to insurance proceeds is unlikely to be established within the proposed 90-day bar date period or, indeed, within the near future at all. They request that no bar-date take effect until their claim has been ruled upon and paid in full.

c. Objections of C.P. Chemical Inc. and Phibro Animal Health Corporation

C.P. Chemical and Phibro Animal Health Corp. face potential liability for environmental clean-up costs at a site in Woodbridge, N.J. They were sued in 1997 by Chevron USA, Inc. which seeks contribution to remediation costs and other damages. Fifteen years later the case remains unresolved. In 2002 the parties agreed upon a settlement and consent order of dismissal. Three years later a dispute arose over the enforcement of the settlement. A second settlement agreement was entered in 2010. As a condition of the settlement, Chevron is required to obtain a permit from the EPA. This has not happened yet. C.P. Chemical and Phibro Animal Health contend that they will not know the full extent of their financial liability for some time to come. Like the C.P. Chemical and Phibro-Tech claimants, they complain that any bar-date will hamper their ability to recover from Ambassador and will unfairly benefit fifth-tier claimants.

d. Objection of Phibro Animal Health Corporation

Phibro Animal Health Corporation has also filed an objection related to a potential claim for clean-up costs at the Centerdale Manor Restoration Project Superfund Site in North Providence, Rhode Island. Although PAHC has received a letter from the EPA stating that it was potentially responsible for a contribution to clean-up costs, it has not been sued. PAHC denies that it has any connection to the Centerdale site.

ANALYSIS

The Ambassador insureds who have filed objections to the bar date raise similar arguments. These are:

1. The court lacks statutory authority to establish a bar date;

2. The establishment of a bar date will favor Tier Five claimants over Tier Four claimants whose claims cannot be liquidated at this time; and

3. A bar date which comes too soon will unreasonably limit the opportunity of the claimants to submit proof of their claims.

I. Statutory Authority to Establish a Bar Date

The Liquidator contends that this case is governed by the prior insurance insolvency statute,

8 V.S.A. § § 3591 – 3603, because that was the statute in effect when Ambassador was placed in insolvency and the Superior Court issued its liquidation order. The court joins in this view. The substantive rights of the parties, including the priority of claims, were established under the prior statute. The subsequent enactment of a new insurance insolvency statute, 8 V.S.A. § § 7031 – 7100, in 1991 did not change the settled practices and expectations in this case which were already established by the liquidation order as affirmed on appeal. The court will follow the prior insolvency statute in adjudicating the parties' claims and ruling on the question of the bar date.

The prior insolvency statute does not address the process of terminating the insolvent estate in any detail. It provides for the filing of proofs of claim (§ 3592), prohibits preferences in favor of residents of one state over another (§ 3593), and establishes priorities for payment of claims (§ 3595). It provides for the distribution of assets "subject to approval by the court" (§ 3601) and requires a "plan of distribution" which recognizes the claims of the state guaranty associations.

The statute contains no direct guidance on how the receiver and the court should distribute the assets. Instead, the process of distribution is left open to court order, subject only to the statutory priorities and the provision for the guaranty funds. The very simple provisions of the statute are best suited to a simple insolvency in which existing claims exhaust all available cash, and no one has any reason to object to the termination of an insolvent insurer with no remaining assets. Except for the extraordinary infusion of cash in 2008, this case would have followed such a course. The fundamental reason for the objections to a bar date and termination of the insolvency is that there is enough money in the estate to pay all known Tier IV claims as well as the Tier V claims.

In approaching the issue of whether the court has authority to establish a bar date for Tier Four claims, it is helpful to consider both sides of the question. Is it possible that the court lacks authority to establish a bar date at all? What happens to the case under those circumstances? If there is no bar date for the Tier Four claimants who hold "occurrence policies," there can be no logical end to this case. With the recovery in 2008 of approximately $200 million dollars, there is enough money in the bank to fund the administration of the estate for many decades to come. After payment of legal expenses, claims and administrative costs between 2008 and 2012, the liquidator is holding more than $90,000,000 in ready money.

In considering what the case would look like without a bar date, the court considers the following:

1. Occurrence coverage of the type written by Ambassador in the early 1980's is essentially limited only by the life of the insured and the insurer. This is especially true for environmental and toxic tort claims which typically involve long periods of latency. See *Towns v. Northern Sec. Ins. Co.,* 184 Vt. 322 (2008).

2. The widespread acceptance of a discovery rule in various forms for most torts in most jurisdictions means that third-party claims will continue to arrive for years into the future.

3. No Tier Five claim can be paid until the Tier Four claims are resolved.

4. After 28 years, only four policyholders (counting related claims as one) out of 80,000 interested parties who received notice have filed objections. This indicates that a perpetual – or at least extremely long-lived insolvency – would be an absurd result in this case which has already been open for 28 years.

It is not possible that the Vermont legislature intended to permit insurance insolvencies to last for an indefinite period of time. Instead, in granting the court authority to approve distributions, the legislature authorized the court to make reasonable provisions, including establishing bar dates for the different priority tiers.

There are several positive reasons why the prior insolvency statute in general and this case in particular support the establishment of a bar date.

First, the necessity of a bar date only arises because of the provisions of the liquidation order which issued in 1987. Paragraph 14(c) authorizes:

> policyholders who do not know, or have reason to know of the existence of actual or potential claims against them [to] nonetheless submit a claim in accordance with subparagraph (a) hereof, in order to preserve their right to assert claims against Ambassador in the future. In the case of such policyholders, the proof of loss requirement shall be deemed satisfied if the policyholder states by way of proof that he intends to reserve his rights to assert all future claims against Ambassador.

There is no statutory right to submit a policyholder protection claim. This was a court-fashioned remedy intended to provide protection to insureds who were not fully aware of claims against them. Under the prior statute alone, the court would have established a process and date for the distribution of assets (§ 3601) without provision for unknown future claims. There is no statutory right to an indefinite period of time to perfect a claim. Since the court established the policyholder protection process, it retains authority to bring that process to a reasonable conclusion.

Second, the establishment of five tiers of priority implies by necessity some process for closing each tier so that the next group in line may receive a distribution. If the future claims of policyholders in Tier Four can never be cut off until the money runs out, then the provisions of the statute which anticipate payment to Tier Five claimants can never be implemented.

Finally, the statute itself is so spare in its outline that it obviously anticipates that court orders will fill in the details of the insolvency process. We saw this process in 1987 in which the court issued a detailed Liquidation Order which was filled with powers for the liquidator which do not appear in the statutory provisions. The prior statute provides no guidance on the particulars of how any individual insolvency will be managed by the liquidator and the court. Instead, the details are left to the judgment of these bodies with appellate review.

For these reasons, the court concludes that it has the authority to set a bar date for the submission of the particulars in support of any claim.

II. Priority of Tier Four Claimants

In setting a bar date, the court recognizes the priority of Tier Four claims at this time. The court rejects the argument that the potential that a Tier Four claim may arise in the future prevents the distribution of funds to the Tier Five claimants. There are several reasons for this conclusion.

As stated above, the very existence of a provision for Tier Five claims implies that there must be some time limit to the Tier Four claims. And a claim which falls outside a reasonable time limit is not a Tier Four claim at all – it is something less than a valid claim. It is time-barred and no longer figures in the calculation of priorities and payments. It does no violence to the system of priorities to rank a Tier Five claim over an invalid claim.

III. The Reasonableness of a Bar Date

The critical issue is not so much whether any bar date can be established. The court has explained its reasons for concluding that it has authority to establish such a date. The more important issue is what date to set.

The court has decided that a one year period, terminating on December 31, 2013, is appropriate. There are several reasons for this decision.

First, several of the small group of policyholders who have objected to the bar date have represented that their claims are close to some impending event which will bring the claims into sharper focus. One year is a deadline which is far enough out that the policyholders may have time to negotiate terms with claimants and their representatives. The court's intention is to open the insolvent estate to as many legitimate claims as possible. One year provides reasonable time for investigation and negotiation of claims which are known now but not fully developed. It also sets a final deadline which will result in the distribution of all funds within a finite period of time.

Second, in the event of an appeal of this order, one year should provide time for review. The liquidator can continue to accept and review claims. There should be no need for a delay in the processing of claims while the question of the bar date is considered by the appellate court.

Third, there is a coverage dispute involving the two A.P. Green policies and other claims which require resolution by this court before the insolvency can be brought to a close. These cases will take time to resolve and there is no particular benefit to a more accelerated bar date for a case which will be open for some time in any event.

IV. What does a claimant have to submit prior to the bar date?

The claims affected by this order have already been the subject of a policyholder protection claim – a placeholder claim which was an exception to the normal claim requirements. With the

establishment of the bar date, the requirements of paragraph 14 as well as all other provisions of the Liquidation Order now apply to all claims which were previously the subject of a policyholder protection claim. This will require submission of a proof of loss and appropriate supporting documentation in such manner and form as the Liquidator may require.

CONCLUSION

The court grants the motion for the establishment of a bar date and sets that date as December 31, 2013. The court will issue a short order establishing the bar date.

Dated: November 28, 2012

Geoffrey Crawford,
Superior Court Judge