

<b>Matter of Ideal Mut. Ins. Co.</b>
2010 NY Slip Op 31365(U)
May 24, 2010
Supreme Court, New York County
Docket Number: 040275/1985
Judge: Marylin G. Diamond
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARYLIN G. DIAMOND

PART 48

Index Number : 040275/1985

**IDEAL MUTUAL INS CO**

VS.

**XX**

SEQUENCE NUMBER : 106

CONFIRM/REJECT REFEREE REPORT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is denied part of the other decision order.

ENTER

**FILED**

JUN 02 2010

NEW YORK

COUNTY CLERK'S OFFICE

Dated: 5/24/10

MGD  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 48

-----X  
In the Matter of the Liquidation of IDEAL MUTUAL  
INSURANCE COMPANY

Index No. 40275/85

-----X  
CLAIMANT: ALLSTATE INSURANCE COMPANY  
CLAIM NO.: I-REIN-82  
LEGAL FILE NO.: L6028

**FILED**  
JUN 02 2010

-----X  
MARILYN G. DIAMOND, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

In this insurance liquidation proceeding, claimant/objector Allstate Insurance Company (Allstate) moves for an order, pursuant to CPLR 4403, rejecting the report of Special Referee Alberto Torres (Referee Torres), dated August 17, 2009. The Superintendent of Insurance of the State of New York, as Liquidator (Liquidator) of Ideal Mutual Insurance Company (Ideal), cross-moves for an order confirming the report of Referee Torres.

**A. Statutory Background**

Insurance Law § 7434(a) governs the distributions to creditors of an insolvent insurer's estate. Prior to 1999, the statute provided that "[u]pon the recommendation of the Superintendent, the Court shall direct the manner in which payments and dividends to creditors shall be made." As such, all creditors took ratably from the general assets of an insolvent insurer's liquidated estate, after administrative expenses were paid. There were no classes of creditors and no preferences among creditors. *See Matter of Knickerbocker [Holz]*, 4 AD2d 71, 73 (1<sup>st</sup> Dept 1957), *affd*, 4 NY2d 245 (1958); *Skandia Am. Reins. Corp. v Schenck*, 441 F Supp 715, 726 (SDNY 1977). The Liquidator was not permitted to make any distributions until each claim had been reviewed and the distribution of assets from liquidated estates was commonly delayed due to the time it took to review the reinsurance claims, which were typically larger than those of other creditors such as policyholders and guaranty funds.

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In 1999, the Legislature rewrote Insurance Law § 7434, changing the parity scheme to a priority scheme creating nine classes of claimants for the distribution of assets from insolvent property/casualty insurers. Insurance Law § 7434 (a)(1) now provided:

Upon the recommendation of the superintendent, and under the direction of the court, distribution payments shall be made in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims. The priority of distribution of claims from an insolvent property/casualty insurer in any proceeding subject to this article shall be in accordance with the order in which each class of claims is set forth in this paragraph . . . . Every claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment. No subclasses shall be established within any class. No claim by a shareholder, policyholder or other creditor shall be permitted to circumvent the priority classes through the use of equitable remedies. The order of distribution of claims shall be:

\* \* \*

Class two. All claims under policies including such claims of the federal or any state or local government for losses incurred, third party claims, claims for unearned premiums, and all claims of a security fund, guaranty association or the equivalent except claims arising under reinsurance contracts.

\* \* \*

Class six. Claims of general creditors including, but not limited to, claims arising under reinsurance contracts.

The 1999 enactment was prospective only and thus did not require repayment by any recipients who had already received a dividend distribution. It did not apply to existing liquidation proceedings, like the Ideal liquidation herein

However, due to problems associated with the nearly bankrupt workers' compensation security funds, the Legislature enacted subsection (e) to section 7434 of the Insurance Law, effective May 11, 2005, which made the priority scheme retroactive and applicable to existing

liquidation proceedings. Subsection (e) provides:

The provisions of this section shall apply to distributions made after the effective date of this subsection in any proceeding under this article, regardless of the date such proceeding was commenced under this article, provided that the foregoing provisions of this subsection shall not apply to distributions made pursuant to a final court order of distribution entered on or before the effective date of this subsection.

## **B. Factual Background**

Ideal was a mutual casualty insurer organized in 1944 under the Insurance Laws of the State of New York, with its principal place of business in New York City. During a regular triennial examination conducted in 1984, the New York State Department of Insurance discovered that Ideal was insolvent in an amount exceeding \$166 million. As a result, in December, 1984, Ideal was placed into rehabilitation. The rehabilitation efforts proved futile and, by order of the Supreme Court, New York County, dated February 7, 1985, the rehabilitation proceeding was terminated, and Ideal was adjudged insolvent and placed into liquidation (Liquidation Order). The court appointed then-Superintendent of Insurance of the State of New York, James P. Corcoran, and his successors as Liquidator of Ideal, and vested the Liquidator with the authority to take possession of the property and to liquidate the business and affairs of Ideal. The Liquidation Order also required, *inter alia*, that potential claimants, policyholders, and creditors of Ideal be notified and that claims be filed no later than February 7, 1986.

Eleven months later, on January 8, 1986, Allstate filed a proof of claim in the amount of \$1,282,912.99, for its reinsurance division and as successor to Northbrook Excess and Surplus Insurance Company. It reserved its right to update its claim periodically, as information became

[\*5]  
available. By letters dated April 5, 1988, June 2, 1988, and March 24, 1992, Allstate inquired about claim procedures, the status of its claim and/or the possibility of a distribution from the Ideal estate. By letter dated April 9, 1992, the Liquidator advised Allstate that it was marshaling the assets of Ideal and that Allstate should contact it again the following year.

By order dated December 1, 1992 (1992 Order), the court granted a petition by the Liquidator and ordered:

that the Liquidator is authorized and directed to disburse assets in accordance with the proposal to distribute assets pursuant to Section 7405 of the Insurance Law subject to a further order of this Court \* \* \* \*

that the Liquidator is authorized and directed after reserving funds for the payment of further expenses of liquidation, taxes and other contingencies, to declare, pay and distribute the remaining funds in the proceeding in the payment of one or more pro-rata dividends on all claims duly allowed in this proceeding . . . alike and along with other creditors in the same class, at such times and in such percentage as, in the discretion of the Liquidator, such funds shall become available for distribution and a sufficient number of such claims are duly allowed in the proceeding to permit the payment of dividends. . .

On April 5, 1995, November 28, 1995, February 25, 1997 and July 8, 1997, Allstate made further inquiry into the status of its claims. By letter dated March 12, 1997, Allstate informed the Liquidation Bureau that it was filing an amended/updated proof of claim.

In or about 1998, the Liquidator determined, *inter alia*, that Ideal had liabilities totaling \$601,436,041 and assets totaling approximately \$114 million. In or about August of that year, the Liquidator proposed a distribution of a 10% dividend to creditors, in an amount totaling \$13,207,522.54.

By order dated November 29, 1999, the court approved a petition by the Liquidator for a

[\*6]  
\$3,122,198.39 reinsurance claim submitted by Group Council Mutual Insurance Company (GCMIC). GCMIC is an insurance company in the same class as Allstate. On November 9, 1999, the Liquidator approved a second dividend distribution of 10%, and on December 23, 1999, GCMIC received a "catch-up" 20% dividend distribution, representing its first and second approved dividends. Between the years 2001 and 2004, GCMIC's third, fourth, and fifth dividend distributions were approved. As of that point, GCMIC had received a total distribution of 37.5% of all of its claims. Allstate, however, had not received any dividend distribution.

In November, 2003, the Liquidator filed another petition for approval of a reinsurance claim submitted by the Transit Casualty Company (Transit), a reinsurance creditor also in the same class as Allstate. By order dated February 24, 2004, the court granted the petition and Transit received a dividend of \$11,853,822.22, an amount representing a pro-rata distribution of 37.5% of Transit's allowed claims of \$31,610,352.61.

By letter dated September 15, 2006, the Liquidator advised Allstate that as the result of the legislative changes made to Insurance Law § 7434 in 1999 and 2005, it was retroactively classifying Allstate's claim to Class Six status, which included claims of general creditors arising under reinsurance contracts. The letter gave Allstate sixty days to file a written objection to the classification, which Allstate did on November 13, 2006. The dispute was then referred to Referee Torres.

Before the Referee, Allstate invoked Insurance Law § 7405(b), which provides that the rights and liabilities of creditor claims against a company in liquidation are fixed as of the date of the order of liquidation unless otherwise directed by the court. It argued that under this provision, the rights of Ideal's creditors were fixed on the date the 1992 Order was entered in December,

1992. Since the 1992 Order permitted the Liquidator to pay pro-rata dividends to creditors in the same class, Allstate argued that it was entitled to a distribution on par with the distributions later made to GCMIC and Transit. It also argued that the later orders authorizing distributions to GCMIC and Transit provided it with a vested right to receive the distributions to which it was otherwise entitled.

In making this argument, Allstate recognized that the Legislature, in 1995, enacted a statute, Insurance Law § 7374, which changed the method of distributing the assets of insolvent property/casualty insurers by the creation of nine classes of claimants having descending priority rights to payment and that this change was made retroactive by an amendment (Insurance Law § 7434[e]) enacted in 2005. However, Allstate argued that the section 7434(e) was not applicable because it expressly excluded distributions made pursuant to a “final court order of distribution.” According to Allstate, the 1992 Order and/or any later judicial orders authorizing distributions to GCMIC and Transit were final orders within the meaning of section 7434(e) and section 7374 could not therefore be applied retroactively. Allstate argued that its interpretation of section 7434(e) was consistent with the public policy of equality among like creditors.

The Special Referee rejected these arguments and, in a written report to the court, dated August 17, 2009, recommended the denial of Allstate’s objections and the approval of the Liquidator’s September 15, 2006 reclassification of Allstate’s claim to Class Six status, in accordance with Insurance Law § 7434 (a-e). He found that (1) Allstate did not have a vested or other right to a dividend distribution in the Ideal liquidation, (2) the “final order” exception referred to in section 7434(e) had not been triggered with respect to Allstate and (3) irrespective of past public policy, the Legislature, in directing that Insurance Law § 7434 be applied

retroactively, chose not to exclude cases where, as here, distributions had already commenced prior to the statutory change. This motion to reject and the cross-motion to confirm the Referee's Report then followed.

### **Discussion**

On its motion to reject, Allstate claims that the Referee's Report was arbitrary and capricious, and an abuse of his discretion. It argues that the retroactive reclassification of its claim was unfair and improper because it has the effect of treating other claimants of the same class, *i.e.*, GGMIC and Transit, in a manner that is preferential and, therefore, prohibited. Noting that it would have been entitled to a 37.5% dividend, worth approximately \$6 million, had the Liquidation Bureau timely adjudicated its claim prior to May, 2005, Allstate argues that Insurance Law § 7434(e) does not prohibit a post-amendment payment of a pre-amendment dividend declaration. It contends that it became vested and entitled to a distribution of its pro-rata share when, pursuant to the 1992 Order, the Liquidator began declaring dividends and distributing assets of Ideal's estate to creditors in Allstate's creditor class. Thus, it suggests that once the Liquidator paid any member of Allstate's class, such as GCMIC and/or Transit, it became vested with the right to receive the same distribution (37.5%) on its timely filed claim.

This argument, however, turns on the issue of whether the 1992 Order was a "final court order of distribution" within the meaning of Insurance Law § 7434(e) so as to fall within the exception to the retroactive application of the 1999 law creating nine classes of claimants. In this respect, the Special Referee was clearly correct in concluding that no "final court order" has been issued in this liquidation proceeding with respect to Allstate. Indeed, although, pursuant to the 1992 Order, distributions were later made to GCMIC and Transit, it was hardly a final order

since legal and factual issues in the liquidation proceeding remain concerning the claims of over 500 creditors, including Allstate. *See State of New York v. Wolowitz*, 96 AD2d 47, 54 (2<sup>nd</sup> Dept 1983).

“It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature.” *Patrolmen’s Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 (1976)[internal citations omitted]. Furthermore, “[w]here a statute describes the particular situations in which it is to apply and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.” *Matter of Jose R.*, 83 NY2d 388, 394 (1994) [internal quotations and citations omitted]. Although there has admittedly been an unequal distribution of assets of the Ideal estate among creditors of the same class, the court is nevertheless constrained to find, under the unambiguous statutory language employed in Insurance Law § 7434, that Allstate’s claims have been properly assigned to Class Six status. Since there is ample support in the record for the Special Referee’s determination that Allstate is not entitled to a distribution based upon the 1999 parity system of insurance insolvency and is, instead, subject to the priority system set forth in Insurance Law § 7434 (a-e), the Report must therefore be confirmed. *See Nager v Panadis*, 238 AD2d 135, 135-136 (1<sup>st</sup> Dept 1997).

Accordingly, Allstate’s motion for an order rejecting the report of Special Referee Alberto Torres is hereby denied and the Liquidator’s cross-motion to confirm is hereby granted

to the extent that the reclassification of the Allstate Insurance Company's claim herein to Class Six status, pursuant to New York Insurance Law § 7434 (e), is hereby approved.

The foregoing constitutes the order and decision of the court.

Dated: New York, New York  
May 24, 2010

  
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MARYLIN G. DIAMOND  
J.S.C.

**FILED**  
JUN 02 2010  
NEW YORK  
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