

IN THE SUPREME COURT OF MISSOURI

MSEJ, L.L.C.,)
)
 Appellant,)
) No. SC89663
 v.)
)
 TRANSIT CASUALTY COMPANY)
 IN RECEIVERSHIP,)
)
 Respondent)

Appeal from the Cole County Circuit Court
Nineteenth Judicial Circuit
The Honorable Richard G. Callahan, Circuit Judge

BRIEF OF *AMICUS CURIAE*
CBS CORPORATION

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STATEMENT OF INTEREST

This Appeal involves the proper interpretation of Administrative Order No. 49 (“AO 49”) entered by the Circuit Court of Cole County, Missouri (the “Receivership Court”) in connection with the liquidation of Transit Casualty Company (“Transit”). *Amicus Curiae* CBS Corporation, formerly known as Viacom Inc., is the successor-in-interest to Westinghouse Electric Corporation¹. For ease of reference, *Amicus* will be referred to as “Westinghouse”.

Westinghouse purchased three excess-insurance policies from Transit with a policy issued for each of the policy years 1980, 1981 and 1982. Each policy contains a \$15 million per occurrence limit and is excess to \$100 million of underlying coverage. In order to establish a claim against Transit, Westinghouse had to establish that all of the underlying coverage had been exhausted.

On or about April 15, 1987, Westinghouse filed timely proof of claim forms. These claims were in the nature of policyholder protection proof of claims since at that time, Westinghouse had yet to exhaust the coverage underlying Transit’s coverage. Thereafter, Westinghouse, on a periodic basis, forwarded additional claim information to Transit reflecting the additional amounts spent by Westinghouse and the new claims filed

¹ In December 1997, Westinghouse Electric Corporation, a Pennsylvania Corporation, changed its name to CBS Corporation. In May 2000, CBS Corporation was merged into Viacom Inc., a Delaware corporation. In December 2005, Viacom Inc. changed its name to CBS Corporation.

against Westinghouse. Westinghouse's claim against Transit was made up of two distinct classes of claims: toxic tort bodily injury claims and steam generator product claims. The toxic tort bodily injury claims overwhelmingly involve individuals alleging injury due to exposure to asbestos, with a few of the claims involving allegations of exposure to Polychlorinated biphenyls ("PCBs") and welding rod fumes. The steam generator claims involve allegations of property damage due to allegedly defective steam generators.

On October 31, 2000, the Receivership Court entered AO 49. This Order required that Westinghouse and other policyholders "file the existing evidence of their current unresolved claims and any actuarial evidence (or another accepted method of valuing claims with reasonable certainty), at their present value, of future claims that may be covered by a Transit policy or other contract by 3/15/2008". The Order made it clear that "no new claims or evidence of claims shall be accepted" after March 15, 2001.

In response to AO 49, Westinghouse submitted detailed loss runs identifying all claimants asserting claims against Westinghouse, the injury that they alleged to have sustained, exposure information confirming that the Transit policy years were triggered, and the amount spent in defense and resolution of these claims. Westinghouse also advised Transit of the amount of committed but unpaid settlements, and number of pending claims and a conservative estimated value to resolve those claims. This detailed and extensive information was supplied so that Transit had sufficient information on all remaining current, pending claims of Westinghouse as well as an estimate, based on reasonable certainty, of Westinghouse's future claims as of March 15, 2001.

On October 19, 2001, Transit issued a Notice of Determination denying Westinghouse's claim arguing that, under Missouri law, the loss should be prorated evenly to each insurer based on the time that insurer was on the risk compared to the entire time period represented by the underlying claimant's alleged dates of first exposure to the alleged toxin until manifestation of a disease. Based on this allocation methodology, the Transit policies were not impacted. Transit also challenged the methodology by which Westinghouse valued its future claims with reasonable certainty. Westinghouse filed a timely Request for Review asserting, *inter alia*, that Pennsylvania law, not Missouri law applied and that under Pennsylvania law an "all sums" allocation was appropriate allowing Westinghouse to select the 1981 and 1980 years into which to slot all of this loss. Ultimately, this Court in *Viacom Inc. v. Transit Casualty Co.*, 138 S.W.3d 723 (Mo. 2004) held that Pennsylvania law applied to Westinghouse's claim and that an "all sums" allocation was appropriate.

On remand, Westinghouse and Transit were able to reach agreement on the value of its claim. This amount was substantially less than the \$45 million of per occurrence limits, in no small part due to the fact that the information submitted by Westinghouse pursuant to AO 49 did not support the exhaustion of all three Transit policies. If, as argued by Appellant MSEJ, AO 49 and Third Amended Rule 75, read as a whole, cannot be read as an absolute "claims cut-off date" and all claimants are free to submit new and updated information to the referee or Receivership Court, Westinghouse's claim would increase dramatically. A similar result would undoubtedly follow for other similarly

situated policyholders that settled with Transit or had their claims denied based on AO 49 and Third Amended Rule 75 after March 15, 2001.

Westinghouse writes to advise this Court of the prejudice and inequality that will be visited upon policyholders such as Westinghouse in the event that the relief that is sought by Appellant MSEJ, is granted *i.e.* that the “claims cut off” set by AO 49 is overturned and certain preferred creditors are permitted to submit new evidence and claims.

JURISDICTIONAL STATEMENT

Westinghouse adopts the Jurisdictional Statement found in Transit’s Substitute Respondent’s Brief.

STATEMENT OF FACTS

Westinghouse adopts the Statement of Facts found in Transit’s Substitute Respondent’s Brief.

ARGUMENT

I. By its Express Terms, AO 49 Ordered Each Creditor to Submit All Evidence in Support of Claims No Later than March 15, 2001; Failure to Comply Would Result in That Creditor's Claim Being Barred.

On October 31, 2000, pursuant to Third Rule 75.32 and §375.670, the Receivership Court entered AO 49 which read, in pertinent part:

[I]t is apparent that this Receivership is now in its final stages. In order to expedite the closure of the Receivership, this Court has determined that it is necessary that all Class III claimants, as defined by §375.700 (policyholders, state guaranty funds, third-party claimants, etc.) must present evidence of all unresolved claims, whether existing or contingent, to the Special Deputy Receiver so that he can make final determinations on such claims.

In order to effectuate this strategy, all claimants, including those that have already filed policyholder protection proof of claims forms, must file the existing evidence of their current unresolved claims and any actuarial evidence (or another accepted method of valuing claims with reasonable certainty), at their present value, of future claims that may be covered by a Transit policy or other contract by 3/15/2001. After that date, no new

claims or evidence of claims shall be accepted or reviewed by the Special Deputy Receiver.

Supplemental Legal File (Transit filed below) 59-62.

AO 49 represents what is traditionally called in the industry a “claims cut-off order” or a “final bar date”. There is, of course, nothing new or novel about such final bar dates in insolvency proceedings. Under the bankruptcy code, failure to submit a proof of claim by the bar date will result in a claim being bared. Section 375.670 of the Missouri Insurance Code, provides that “the Court, upon the application of the receiver, shall establish claims procedures and shall limit and may extend the time for the presentation of claims against the receivership, and notice thereof shall be given in such manner as said Court shall direct; and any creditor neglecting to present his claim within the time so limited, shall be debarred of all right to share in the assets of the insurer.” Liquidators of other insolvent insurers in the UK, Bermuda and the United States have used this same device. For example, The Amended Liquidation Closing Plan in the Liquidation of Integrity Insurance Company provides “The Liquidator shall not allow any additional Absolute Claim unless a Final Proof of Claim form . . .with full supporting documentation, is Filed on or before the Final claims Filing Date. See ¶3.3 of Amended Liquidation Closing Plan, Appendix at A7. The Final Claims Filing Date is defined as the date upon which “all supporting claim documentation must be filed”. See Appendix at A4. Similarly, the Scheme of Arrangement in connection with the KWELM Companies in the UK, provided for a bar date by which the Liquidator must have received details of the claim and “all” supporting information. Appendix at A17. Frankly, there can be no

serious issue with the operation and effect of AO 49. All creditors knew that they were required to submit evidence of their claims by March 15, 2001 and thereafter no additional evidence would be accepted.

The need to establish a claims cut-off is self-evident. In any liquidation, there are competing interests between those creditors with current claims and those creditors with contingent and incurred but not reported (“IBNR”) claims. It is in the interest of current creditors that the estate be closed as soon as possible so that they can receive their share of the assets of the estate as soon as possible. Presumably, those policyholders who agreed their claims early in the Transit proceedings have been waiting for years, maybe decades, to receive their final payment. Yet final payment can not be made until all claims are agreed. Those creditors with contingent and IBNR claims wish for the estate to remain open as long as possible so that their claims can have a chance of developing and that they can share in the assets of the estate.

It is, of course, the obligation of the receiver to balance these competing interests. In making the determination of when to close the estate, the receiver in Missouri is aided by Section 375.1220 which permits the receiver to resolve claims and determine claims by “claims estimation”, using methods based upon actuarial evaluations or other accepted methods of valuing claims with reasonable certainty. This includes IBNR² claims. *See*

² It should be noted that this estimation process is not permitted in all states. In some states, contingent claims are not recognized as valid claims against the estate. *See for example, In Re Liquidation of Integrity Insurance Company*, 935 A.2d 1184 (N.J. 2007).

Angoff v. Holland-America Ins. Co. Trust, 937 S.W.2d 213 (Mo. App. 1996). This allows the estate to be closed sooner than would otherwise be possible, avoiding additional administrative costs that would further reduce the amount paid to policyholders. In order for this estimation process to work fairly, all claims must be evaluated at the same “value as of date”, based on evidence submitted at that time. To permit certain creditors to submit additional and new information at a later date in support of their claims is fundamentally unfair and represents nothing short of an unlawful preference.

II. Permitting Appellant to Submit New Information is Unfair to Other Creditors and Will Prejudice Other Creditors by Diminishing the Recoveries Due to Other Creditors.

If this Court grants the relief request by Appellant MSEJ, and permits the introduction of new evidence in support of its claim, Appellant MSEJ, will be impermissibly favored over others. Creditors, like Westinghouse, have abided by the Receivership Court’s Order that each creditor “must present evidence of all unresolved claims, whether existing or contingent” by March 15, 2001 and have not had the opportunity to supplement and enhanced their claim. Clearly, given the contingent nature of a large part of Westinghouse claim, evaluating this claim based on information eight years after the fact would result in a substantially enhanced claim for Westinghouse, in that the estimate used at the time was not as certain as it can now be proven to be by actual claim data.

In addition, permitting Appellant MSEJ, to introduce new information in violation of AO 49, assuming this would result in an enhanced award to Appellant, will diminish the distribution to the other creditors who complied with AO 49. Because Transit has been a limited asset estate for many years since it commuted or settled almost all of its reinsurance in or about 2001, any amount paid to Appellant MSEJ, will be monies that cannot be distributed to other creditors. Creditors will also be prejudiced because prolonged proceedings will delay the timing of the final distribution, the closure of the estate and will drain resources that could otherwise be paid to creditors. All this prejudice is potentially visited upon Westinghouse and other similarly situated creditors if this Court is to reward Appellant's violation of AO 49 and permit it to submit additional evidence in support of its claims.

To rectify this prejudice in the event that this Court was to grant the relief requested by Appellant MSEJ, all claimants who complied with AO 49 must be given the opportunity to introduce new evidence of further loss development. While this result has some facial appeal, in reality it does nothing to cure this prejudice and unequal treatment since such a remedy will only throw Transit into chaos, delaying further the closure of the estate. Indeed, the only way to fairly handle this issue is to enforce the claims cut-off deadline contained in AO 49.

It has been argued that because AO 49 states that no new claims or evidence of claims shall be accepted or reviewed by the Special Deputy Receiver, the Circuit Court intended to permit evidence and new claims to be submitted to the referee or Court. To suggest that the Receivership Court contemplated a system that would not permit

evidence to be submitted to the receiver, or his court-appointed Special Deputy Receiver, the person charged with and in the best position to resolve claims, but would permit evidence to be submitted to the referee or the Receivership Court when appealing the receiver's decision, is ludicrous. The goal of the claim process is to resolve claims in a fair, efficient and expeditious method. Why would one exclude information from the initial analysis of the claim but permit that information to be submitted in the review of the result of the initial analysis. To ask the question is to answer it; no one else would do so.

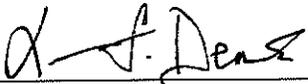
CONCLUSION

This Court should ensure that AO 49 is applied in accordance with its express terms. All claims against Transit must be evaluated solely on the evidence submitted to Transit by March 15, 2001. This is the only way in which to treat all interested parties in a fair and uniform manner.

Respectfully Submitted,

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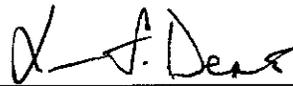
CERTIFICATE OF COMPLIANCE

COMES NOW Lawrence S. Denk, attorney for *Amicus Curiae*, and submits this Certificate of Compliance pursuant to Rule 84.06(c) Missouri Rules of Civil Procedure stating as follows:

1. I, Lawrence S. Denk, attorney for *Amicus Curiae* in the above-styled matter state that my work address is 1001 Highlands Plaza Drive West, Suite 400, St. Louis, Missouri 63110, my Missouri Bar No. is 37753, and my work telephone number is 314-645-7788.

2. The Brief filed herewith in the above-styled matter complies with the limitations contained in Rule 84.06(b), Missouri Rules of Civil Procedure and said Brief contains 427 lines of monospaced type and 3,184 words.

3. A CD Rom is filed herewith which has been scanned for viruses and is virus-free to the knowledge of the undersigned. CD Rom versions of the Brief have been transmitted to all counsel of record as well.



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CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that two (2) copies (one printed copy and one copy on CD Rom) of the foregoing "Brief of *Amicus Curiae* CBS Corporation" was served on the following parties by placing same, postage prepaid in the U.S. Mail, this 5th day of February, 2009.

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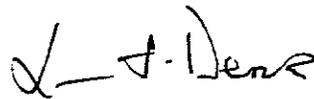
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