

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Merrimack Superior Court
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NOTICE OF DECISION

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OCT 18 2013

Case Name: **In the Matter of the Liquidation of Noble Trust Company**
Case Number: **217-2008-EQ-00053**

Enclosed please find a copy of the court's order of October 17, 2013 relative to:

ORDER

October 17, 2013

William S. McGraw
Clerk of Court

(484)

C: Steven A Solomon, ESQ; Russell F Hilliard, ESQ; Thomas Hetherington, ESQ; Gordon J MacDonald, ESQ; John M Sullivan, ESQ; Noble Trust Company; Peter C.L. Roth, ESQ; Byrne J. Decker, ESQ; Michele E. Kenney, ESQ; Jonathan P. Pavlovcak, ESQ; William S. Gannon, ESQ; J. Christopher Marshall, ESQ; Bertrand A. Zalinsky, ESQ; Benjamin E. Marcus, ESQ; Keriann Roman, ESQ; David D. Cowan; Steven J. Lauwers, ESQ; Michael S. Lewis, ESQ; Nathan R. Lander, ESQ; James F. Laboe, ESQ; Stephen A. Serfass

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Liquidation of Noble Trust Co.

No. 08-E-053

ORDER

Glenn A. Perlow, the New Hampshire bank commissioner, in his capacity as liquidator of Noble Trust Company (the “liquidator” and “Noble Trust,” respectively) filed with the court a “Joint Motion of Liquidator and Credit Suisse Assented to by Wells Fargo for Approval of Settlement Agreement and Mutual Release of Claims Regarding PHL Policies” (the “proposed settlement”). David D. Cowan, in his capacity as the purported Trustee of the Angelo Gineris Irrevocable Trust (“AGIT”), and Peter J. Gineris, in his capacity as Personal Representative of the Estate of Angelo Gineris, (jointly, the “objectors”) object. They ask the court to exclude from the proposed settlement the PHL Variable Insurance Company (“Phoenix”) Policy No. 97520285 (the “policy”) purportedly held by the AGIT. The court heard argument on August 20, 2013 and allowed AGIT to file supplemental written argument. The liquidator and Phoenix filed written objections to AGIT’s supplemental argument. The court has considered the original pleadings, the August 20, 2013 oral argument and the supplemental pleadings. Because the policy is part of the liquidation estate and settlement is fair and reasonable, the AGIT motion is DENIED. The proposed settlement is APPROVED.

This case is the product of a liquidation proceeding that began in 2008. The parties have been engaged in this case for some time, and familiarity with the facts of the case and the court’s previous decisions is assumed.

The liquidator seeks approval of numerous settlement agreements. Out of the 45 policies that would be affected by these agreements, only the objectors dispute the legitimacy of the liquidator's actions. The objectors argue the following: (1) the liquidator has no authority over the policy because Noble Trust does not own the policy; (2) Cowan has standing because he is the trustee of the AGIT; (3) the proposed settlement is inconsistent with the goals and procedures outlined in the liquidation statute; and (4) the liquidator failed to afford appropriate due process to the objectors. In response, the liquidator and Phoenix both argue that Noble Trust, not Cowan, is the true trustee of the AGIT and that the proposed settlement complies with the liquidation statute. The court will address these arguments in turn.

The objectors first argue that the liquidator has no control over the Policy because Noble Trust does not own it. According to the objectors, the liquidation order does not apply to the assets of the AGIT. The liquidator and Phoenix disagree. They assert that the policy is properly part of the liquidation estate.

The record supports the liquidator's and Phoenix's claim. The liquidation order preserved the policy by bringing it into the liquidation estate. *See* Liquidation Order (dated March 27, 2008) at 5. As a practical matter, if the policy was not part of liquidation estate, it would have lapsed due to nonpayment. *See* Liquidation Order (dated March 27, 2008) at 5. During his lifetime, neither Mr. Angelo Gineris nor the AGIT ever made premium payments to keep the policy in force. Indeed, the liquidation order is the sole reason the policy remains in force. Furthermore, the policy in question was one of many policies listed by the liquidator as an asset of the liquidation estate. Despite the fact that all actions taken by the liquidator were subject to public filing and disclosure during Mr. Angelo Gineris' lifetime, not once did he or anyone on behalf of the

AGIT object to the liquidator's control over the policy. Thus, the policy is properly within the purview of the liquidation estate.

The objectors next argue that they have standing to object to the proposed settlement. They also assert that the settlement is inconsistent with the goals and procedures outlined in the liquidation statute. *See* RSA 395:2. Specifically, the objectors argue that the proposed settlement is contrary to the bank liquidation statute and is both unfair and unreasonable. Assuming without deciding that the objectors can establish standing, their underlying substantive objection challenging the legitimacy of the proposed settlement lacks merit.

The liquidator obtained a liquidation order, pursuant to RSA 395:2, which states “[i]f in the opinion of said justice the public good requires he may direct the commissioner to take possession forthwith of the property and business of such institution and he may retain possession thereof ... until its affairs shall finally be liquidated as herein provided.” Accordingly, the commissioner has the power to “collect money due to the institution and to do such other acts as are necessary to conserve its assets and business.” RSA 395:5. In support of their argument that the proposed settlement runs contrary to the liquidation statute's purpose, the objectors maintain that the AGIT owns the policy and not Noble Trust. As the court has already determined above that the policy is properly part of the liquidation estate, the objectors' argument cannot stand. Additionally, the objectors' argument neither addresses the statute's policy nor indicates how the settlement violates that policy. Upon review of the settlement agreement, it is clear that the agreement helps further the goal of marshaling and liquidating the assets of Noble Trust so the proceeds can be distributed pursuant to the liquidation order. This settlement agreement will dispose of an insurance policy that was one of many procured as part of a larger Ponzi scheme involving

Noble Trust. Settlement of this policy, as well as all of the others, will allow the liquidator to pool the assets for ratable distribution for the benefit of the victims of the Ponzi scheme.

Additionally, the court has an independent obligation to assess the fairness of a proposed settlement. See *In re Liquidation of Home Ins. Co. (Home I)*, 154 N.H. 472, 489 (2006). The court must apply a multi-factor test in its evaluation of whether a compromise is fair and reasonable: “(1) the probability of success in the litigation being compromised; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexities of the litigation involved, and the expense, inconvenience, and delay attending it; and (4) the paramount interest of the creditors and a proper deference to their reasonable views.” *Id.*, citing *Matter of Boston & Providence R.R. Corp.*, 673 F.2d 11, 13 (1st Cir. 1982) and *In re Estate of Indian Motorcycle Mfg., Inc.*, 299 B.R. 8, 20 (D. Mass. 2003).

In accordance with its obligation, the court has independently evaluated the proposed settlement under this multi-factor test and has determined that it is both fair and reasonable. Phoenix and the liquidator entered into extensive negotiations, during which time the liquidator evaluated Phoenix’s legal arguments and considered the outcomes in similar cases. As a means of avoiding the immense amount of time, expense, and resources that come with litigating a case of this magnitude, as well as the inherent uncertainty of litigation, the liquidator and Phoenix negotiated the proposed settlement agreement and signed it on June 24, 2010. As the liquidator correctly points out, the complexity of the dispute and risks associated with it support the proposed settlement. If the liquidator entered into protracted litigation to resolve these issues, such litigation would be detrimental to the liquidation estate itself because the costs of litigation would erode the estate’s resources. Furthermore, the liquidator analyzed evidence that demonstrates that Mr. Angelo Gineris did not procure the policy for estate planning purposes but instead obtained

the policy in order to sell it. The objectors attempt to argue that there are disputed facts that must be resolved before a settlement can be reached; however, the existence of such disputed facts support the liquidator's decision minimize risk and to resolve this case in an expeditious and fair manner by entering into the proposed settlement. After an independent review of the proposed settlement and facts surrounding the settlement itself, it is clear that the proposed settlement is fair and reasonable given the complex and unique nature of the proceedings before the court.

The objectors next argue that they have not been afforded sufficient due process with respect to the relief requested in the settlement. Specifically, the objectors argue that timeline of events shows that "the Liquidator negotiated a settlement with Phoenix, which extinguishes the rights and claims under 45 insurance policies, without giving the potential claimants any opportunity to be heard prior to that extinguishment, or to participate in that negotiation." Objectors Memorandum In Support Of Renewed Objection at 21. The court is not persuaded.

"Adequate notice is that which is reasonably calculated to give the parties actual notice of the issue or issues to be decided at the hearing.... Due process, however, does not require perfect notice, but only 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *In re Hiscoe*, 147 N.H. 223, 227 (2001) (internal citations omitted); *see also Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950).

Here, the objectors received notice of the hearings on the proposed settlements that would inevitably impact their private interests. *See* Liquidator's Assented-To Motion to Approve Notice and Objection Procedure for Hearings on Motions for Approval of Settlement and Release Agreements (June 6, 2013). Objector Cowan had previously objected to the settlement agreement on January 9, 2013—nearly eight months before the hearing. On the eve of the hearing held on

August 20, 2013, the objectors obtained counsel. Throughout this entire process, the objectors continuously consented to the procedures involved in this case. The court finds that the parties in this case were given notice and an opportunity to be heard at a meaningful time in a meaningful way. Furthermore, the objectors provide no legal basis or reasoning to support their contention that they are entitled to participate in the negotiation process. It is clear that the objectors, as well as the other interested parties, have been afforded ample due process.

Based on the foregoing, the court finds and rules that the objectors' claims lack merit and that the proposed settlement is fair and reasonable. Accordingly, the objectors' objection and motion to exclude the policy from the liquidation estate is DENIED. The proposed settlement between the liquidator and Phoenix is APPROVED.

So ORDERED.

Date: October 17, 2013


LARRY M. SMUKLER
PRESIDING JUSTICE