IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

STATE OF TENNESSEE, ex rel. PAULA A. FLOWERS, Commissioner of Commerce and Insurance for the State of Tennessee,	)	
Petitioner,	)	
VS.	)	NO. 04-245-III
TENNESSEE TRUCKING ASSOCIATION SELF INSURANCE GROUP TRUST, a Tennessee workers compensation self-insurance group, TRUCKING SERVICES, INC., a Tennessee corporation,	)	
Respondent.	)	

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MEMORANDUM AND ORDER

This case arises out of a trust association which was set up to provide workers' compensation insurance in the State of Tennessee. The Trust is composed of member trucking companies. The case commenced when the Trust was found to be insolvent and the Tennessee Department of Commerce and Insurance ("the Department") petitioned the Court to liquidate the Trust. On February 6, 2004, the Court granted the petition, finding the Trust was insolvent and that its continued operation would be hazardous, financially and otherwise, to its policyholders, members and the general creditors and public.

The present status of this case is that the Liquidator, pursuant to its statutory obligations, is marshaling the assets of the Trust and paying off its liabilities. In that regard one of the tasks of the Liquidator is to address a Trust deficit of $2.8 million for the 2002 fund year and a deficit for fund year 2003. The Trust documents and law provide that members are jointly and severally liable for Trust deficits. The Liquidator has proposed a method for assessing members to address the deficit. Certain members have objected to the Liquidator's proposed method. The Court conducted an evidentiary issue to decide whether to approve the Liquidator's assessment method. For the reasons stated below, the Court approves the method of assessment proposed by the Liquidator.

Another task of the Liquidator is to establish and administer a process for evaluating and paying claims made against the Trust. In the February 6, 2004 order appointing a liquidator the Court set a May 10, 2004 deadline for claims against the Trust to be filed. That deadline has passed and a significant percentage of anticipated claims have not been filed. The Liquidator has filed a motion for the Court to determine whether to abide by the original May 10 deadline and clarify the legal consequences of the deadline, or to alter and extend the deadline. The Court has decided that the deadline should be extended. That reasoning is also contained below.

Addressing first the Liquidator's motion concerning the claims filing deadline, the Court notes that no proof was needed. The controversy was an argument of law on whether

the Court had the authority to extend the deadline and whether the Court had the authority to put in the same priority classification payment of temporary total disability benefits and medical benefits for late-filed claims. The result of the hearing on this motion was a consensus as to the following:

1. In its original order of February 6, 2004, the Court set the deadline of May 10, 2004, for anyone having claims against the Trust to file those claims.

2. It is undisputed that a significant number of anticipated claims have not been filed to meet that deadline.

3. The Court finds that the process and measures used by the Liquidator to notify claimants of the liquidation and claims process have been competent and appropriate.

4. In weighing the competing interests of promptly liquidating claims against the Trust versus the accessibility of the claims process, case law located by counsel for one of the members illustrated that in several cases at least a year had been accorded for claims to be filed. No cases with a claims filing deadline of less than a year were located.

5. The wording of the February 6, 2004 order setting the May 10, 2004 deadline reserved to the Court the right to alter and extend the deadline.

Based upon all of the foregoing, the Court concludes that it is appropriate to extend the deadline for filing claims against the Trust to December 31, 2004. The Liquidator shall prepare another set of notices to be disseminated in the same manner as it previously used to notify claimants of the December 31, 2004 claims deadline.

Prospectively, with respect to claims filed after December 31, 2004, the Court determines that they shall be treated as late-filed claims and given a lower priority. This

lower classification, the Court concludes, shall include as a consequence the termination of medical benefits and temporary total disability benefits on claims filed after the December 31, 2004 deadline. The Court further determines, pursuant to Tennessee Code Annotated section 56-9-232(d), that the statute reserves the right of the Court and the Liquidator to evaluate the financial status of the estate after the December 31, 2004 claims deadline and to reconsider and allow for the payment of late-filed claims, including reinstatement of medical benefits and temporary total disability benefits, upon a showing that such payment does not prejudice the orderly administration of the liquidation.

With respect to the second motion, the method to assess members for the Trust deficit, the Court approves the Liquidator's assessment method based on the following reasoning.

The facts relevant to the assessment issue begin with an examination of the Trust for the 2002 fund year commenced by the Tennessee Department of Commerce and Insurance on May 5, 2003, in accordance with Tennessee Code Annotated section 50-6-405 and Tenn. Comp. R & Regs. ch. 0780-1-54-.06. The Court finds that the examination revealed that the Trust had filed with the Department independently audited financial statements for the year ending December 31, 2002, indicating that there was a deficit of $2,843,656 for the 2002 fund year. Payroll audits subsequently resulted in a slightly lower deficit of $2,834,287. As established by the testimony of the State's examiner, Mr. Jacquish, the Trust had not followed established rules and procedures required by the Department nor sought approval

by the Commissioner in structuring premiums for its members. The Trust was placed under an agreed order of supervision by the Department on May 1, 2003, and was directed, on July 24, 2003, to assess its members to remedy the 2002 deficit.

The Court further finds that the Trust failed to make the assessment directed by the Department. In accordance with Tenn. Comp. R & Regs. ch. 0780-1-54-.18(3), the Commissioner entered an order on October 1, 2003, requiring that members be assessed for the 2002 deficit. On November 17, 2003, the actuarial report submitted by the Trust to the Department estimated that the loss for the year 2003 would be $4,632,331. By the end of 2003, the Trust had not cured the 2002 deficit nor had it submitted a plan to the Department to address the deficit.

In the face of these deficits, there are several sources of authority for the Liquidator to assess the members to address the deficit as recited in the papers of the Liquidator.

First, prior to liquidation, the Commissioner is granted the authority by Rule 0780-1-54-.18(3) to assess members if a group has failed to make an assessment. The Commissioner is required, within 30 days of the failure of the group to assess its members, to order the group to do so.

Then, in the event of liquidation, Rule 0780-1-54-.18(5) provides, in the event of liquidation, that the Commissioner is required to levy an assessment upon the members for "such an amount as the Commissioner determines to be necessary to discharge all liabilities of the group . . . ."

Another source of authority for the Liquidator to make an assessment in this case is the order of February 6, 2004, appointing the Liquidator. The order required the Liquidator, as part of a liquidation process, to pursue assessment of the Trust members for liability, premised on Tennessee Code Annotated §§ 56-9-101, *et seq.* authorizing the Liquidator to act on behalf of the Trust and to exercise the powers the Trust might have exercised under its organizing instruments and contract rights. Based upon the proof offered at the hearing of this matter, the Court finds that the indemnify agreement executed by each member in connection with joining the Trust association specifically references, at section 9(c), the authority of the Trustees to assess the members to eliminate deficits. The Court, in its February 6, 2004 order, based upon Tennessee Code Annotated §§ 56-9-101, *et seq.* required the Liquidator to serve an assessment on the members for the 2002 fund year to address the Trust deficit.

Also a source of authority for the assessment is the organizing and contractual documents of the Trust which provide that the members are jointly and severally liable for the obligations of the Trust. Tenn. Comp. R. & Regs. ch. 0780-1-54-.04(2)(e) provides that to obtain a certificate of approval, a workers' compensation self-insurance group must have, among other requirements, "an indemnity agreement jointly and severally binding the group and each Member thereof to meet the workers' compensation obligations of each Member." The indemnity agreements signed by each member and made an exhibit to the hearing require that each member execute an agreement to be jointly and severally liable and specifies that

the Department of Commerce and Insurance may enforce the joint and several liability obligation of the members. The indemnity agreement provides in its covenants, "In the event of a loss fund deficit and depletion of all available excess insurance, the board may adopt any plan it deems equitable for the elimination of such deficit, including, without limitation the assessment of all Members in the proportion of which the contribution of each member bears to the total contributions of all Members in the year in which such deficit occurs [emphasis added]."

Notably absent from the foregoing sources authorizing an assessment to address a deficit is any limitation, structure or formula on the method of assessment. This absence, the Court concludes, indicates wide latitude and discretion of the Commissioner to use reasonable methods to make up the deficiency. The only proscription is found in the Trust documents which require the assessment to be equitable, i.e. fair.

Applying a fairness standard, the Court finds that reliable and weighty proof that the method proposed by the Liquidator is fair is that it is a method commonly used and one created and endorsed by experts in the field. The method proposed by the Liquidator is derived from the manual, guidebook, tables and procedures of the NCCI, an organization which gathers data on a nationwide basis and creates tables reflecting the loss experience in each state for each type of employment. Conceived by experts in the field and having achieved the status of a nationwide data and procedure is strong evidence that the method is a fair system.

In addition to its endorsement and use by experts in the field as indicative of its fairness, the Court also credits the testimony of Mr. Jacquish, the examiner of the Trust, who demonstrated the workings of the assessment method proposed by the Liquidator. Using the NCCI manuals, the Department begins with the effective advisory prospective loss cause, which is the rating that is appropriate for a particular line of work. The Department then multiplies this generic rating by the multiplier created by the actuary of the insured group. The purpose of the multiplier is to create an added-on allowance for expenses the actuary estimates the business would incur in addition to the actual losses. This application of the multiplier and rating produce a manual rate that is applied to the payroll (divided by 100, because the prospective loss rating is a "per $100 of payroll" rating) that each business has in each job category. Adjustments in the form of a debit or credit to an account are then made for members that qualify under certain listed categories, for example, a discount is available for a "drug free workplace" certification. Over a period of time, the actual loss experience of the subject business is taken into consideration, and the ratings for a business may be adjusted upward or downward depending on its actual experience over a period of three years ("experience modification factor"). An additional computation may then be taken into consideration, referred to as a "schedule rating adjustment." For example, a carrier may adopt practices in which a timely report concerning premises condition or the existence of readily available medical facilities will permit a limited adjustment in premium as modified.

In addition to explaining the assessment method proposed by the Liquidator, the testimony of Mr. Jacquish also contrasted the method proposed by the Liquidator to the method used by the Trust to set premiums. While two different species, one premium, the other assessment, the comparison is necessary to appreciate the fairness challenge raised by certain members discussed *infra*. Mr. Jacquish's testimony established that the premium methodology used by the Trust gave discounts to certain members and increased the premium of others. Moreover the Trust's premium method used incorrect class code rates and incorrect or incomplete claims of payroll history in determining experience rating modification factors. Also, the Trust, in creating premium methodology, did so with a primary aim to attract more business.

The controversy raised by certain members of the Trust is not the intrinsic competence of the Liquidator's proposed method of assessment but, instead, whether the method is fair given the unique facts of this case. Some members of the Trust assert that they were induced to reject other worker's compensation insurance plans and participate in the Trust because they were promised a certain rate of premium, i.e. they were induced into becoming a member of the Trust and relied upon the guarantee of trust marketers and employees that the members' cost and liability would be limited to the cost-effective, competitive premium the representative of the Trust promised them. The assessment of these members proposed by the Liquidator increases the cost and liability of these members and poses financial challenges and harm to those members.

An important point in this argument is that premium and an assessment are two different charges. The premium is the amount the member agreed to pay, based on employees and job type and experience factors, to be insured by the Trust. The assessment in issue is a charge to each member for them to contribute to the Trust funds to cover a Trust deficit. The purpose of the assessment is to eliminate the deficit. The issue before the Court with respect to the assessment is the method to be used to allocate payment of the deficit among the members. As to the assessment, for example, the Department could have proposed other funding methods to address the deficit such as an equal pro rata charge. The Department concluded, however, that employing a premium-type methodology, because it does take into account nationwide data and procedure and number of employees, types of jobs, experience factors, was a good method to be fair with the assessment. But the assessment is not a premium.

Mindful, then, of the premium/assessment difference, the Court returns to the members' argument that the assessment proposed by the Liquidator is not fair.

Always a consideration in assessing fairness is notice. The Court concludes that the Trust members knew or should have known from the statutes, regulations and rules, and Trust documents that by joining the Trust they took on the risk of having to pay an assessment if there was a deficit and that the law authorizes the method of assessment to vary from the method of premium assessment. Independent of alleged factual misrepresentations

by Trust employees, the members knew by virtue of the law, of the risk of being assessed costs in addition to premiums if there was a deficit.

As to any facts which the Trust marketers and employees allegedly misrepresented to the members which induced them to join the Trust, those, by law, do not alter the primary joint and several liability of the members, set out above, to fund the Trust. Instead those misrepresentations may be the basis for a lawsuit by the Liquidator and/or members against Trust marketers and employees.

Thus, taking into account the intrinsic fairness of the method proposed by the State and the demonstration of the fairness of that method by the Liquidator's witness as well as the Court's finding that the members had notice of the risk of an additional assessment and that any claims of misrepresentation do not eliminate their obligation to fund a Trust deficit, the Court concludes that the State's proposed method of assessment is fair.

Finally, there is the argument by certain members that the Liquidator's efficient claims handling and recent collections of money from members have or will address immediate insolvency concerns and alleviate the need at this time to impose the method of assessment proposed by the Liquidator.

Relying upon its finding at the time the Court ordered the liquidation that the Trust was insolvent and that the record before the Court establishes that payment by members to fund the deficit have been slow to the extent that the Liquidator has filed a motion for

contempt to force members to pay, the Court rejects the argument that insolvency concerns have abated.

It is therefore ORDERED that the deadline for filing claims against the Trust is extended to December 31, 2004. The Liquidator shall prepare another set of notices to be disseminated in the same manner as it previously used to notify claimants of the December 31, 2004 claims deadline.

It is further ORDERED, prospectively, with respect to claims filed after December 31, 2004, that those claims shall be treated as late-filed claims and given a lower priority. This lower classification, the Court concludes, shall include as a consequence the termination of medical benefits and temporary total disability benefits on claims filed after the December 31, 2004 deadline. The Court further determines, pursuant to Tennessee Code Annotated section 56-9-232(d), that the statute reserves the right of the Court and the Liquidator to evaluate the financial status of the estate after the December 31, 2004 claims deadline and to reconsider and allow for the payment of late-filed claims, including reinstatement of medical benefits and temporary total disability benefits, upon a showing that such payment does not prejudice the orderly administration of the liquidation.

It is additionally ORDERED that the Court approves the assessment methodology proposed by the Liquidator and provides that the assessment will be continuing in nature, i.e. shortages resulting from insolvency of member will be proportionately assessed against

others, while credits resulting from favorable loss experience and third party recoveries will be proportionately applied to credit the assessment obligation of each member. The Liquidator therefore shall:

(1) proceed to collect the sums that are due as a result of the assessment;

(2) commence and continue such activities as may be necessary and appropriate in order to determine the assessment that will be necessary to remediate the Trust's deficit for 2003;

(3) adopt and circulate to the members a procedure for addressing such disputes as may arise concerning the calculation of assessments and the correct application of the methodology authorized by the Court's order, and to propose to the Court a procedure for resolving any disputes that cannot be so addressed.

Finally, it is ORDERED that the Liquidator shall determine and notify Trust members, on or before September 24, 2004, whether the Liquidator will pursue claims against Trust employees and marketers for alleged misrepresentations made to induce members to join the Trust.

ELLEN HOBBS LYLE
CHANCELLOR

cc: The list of persons and entities who have been mailed a copy of this order is attached to the original order and the list may be viewed in the office of the Davidson County Clerk and Master.