UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE:	)	
	)	
SV/Home Office, Inc.,	)	Case No. 01-52701C-11W
SV/Holly Point Properties, Inc.,	)	Case No. 01-52703C-11W
SV/Jupiter Properties, Inc.,	)	Case No. 01-52704C-11W
	)	(Jointly Administered)
Debtors.	)	
	)	

ORDER

These cases came before the court on April 17, 2003 and on May 6, 2003 for a confirmation hearing with respect to Debtors' consolidated plan of reorganization as modified and filed on March 10, 2003, and as further modified on April 11, 2003, and on April 30, 2003 ("the Plan"). Gene B. Tarr and Ashley S. Rusher appeared on behalf of the Debtors, H. Arthur Bolick, II appeared on behalf of Heller Healthcare Finance, Inc., Robyn R.C. Whitman appeared on behalf of the Bankruptcy Administrator and Susan B Morrison appeared by telephone on behalf of ten unsecured tort claimants with unliquidated and disputed claims against one or more of the Debtors.

Under the Plan, Class 9 consists of unsecured, unliquidated and disputed claims for personal injury, wrongful death or other tort liability.[1] The Plan proposes to pay nothing to this class of claims.

'Paragraph 9 of the Plan provides:

> This Class consists of the Unsecured Contingent **Claims** for Personal injury **claims,** tort claims or other similar claims whether asserted before or after petition date, or hereafter asserted, which involve **a Claim** for which the cause of action arose pre-petition ("Pre-Petition

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Instead, recovery by a holder of a Class 9 claim is limited to the proceeds of Debtors' liability insurance policies once such claims have been liquidated. Because Class 9 is impaired and did not vote to accept the Plan, Debtors did not meet the requirements of § 1129(a)(8) of the Bankruptcy Code and hence were forced to seek confirmation through cram down pursuant to § 1129(b) of the Bankruptcy Code.[2]

The Debtors could obtain confirmation under § 1129(b) only upon a showing that the Plan does not discriminate unfairly and is fair and equitable with respect to Class 9. Under § 1129(b), a plan, to be confirmable, must be fair and equitable in a broad sense, as well as in the particular manner specified in § 1129(b)(2).[3] The determination of whether a plan is fair and equitable must be made on a case-by-case basis and depends upon the specific facts and circumstances of each case.' It is not per se unfair discrimination to place claimants with insured claims in a separate class from other

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Litigation Claims").

[2]See In re Jim Beck, Inc., 207 B.R. 1010, 1013 (Bankr. W.D. Va. 1997); In re Higgins Slacks Co., 178 B.R. 853, 856 (Bankr. N.D. Ala. 1995); In re M. Long Arabians, 103 B.R. 211, 215-216 (9th Cir. BAP 1989); In re Friese, 103 B.R. 90, 91-92 (Bankr. S.D.N.Y. 1989); In re Townco Realty, Inc., 81 B.R. 707, 708-709 (Bankr. S.D. Fla. 1987).

[3]See In re Bryson Properties, XVIII, 961 F.2d 496, 505 (4th Cir. 1992), cert. denied, 506 U.S. 866, 113 S.Ct. 191, 121 L.Ed.2d 134 (1992).

[4]See In re Grandfather Mountain Ltd. Partnership, 207 B.R. 475, 487 (Bankr. M.D.N.C. 1996).

unsecured creditors.[5] In the present case, however, the Debtors failed to establish that it was not unfair discrimination to place tort claimants in Class 9 or that it was fair and equitable to relegate the tort claimants solely to available insurance proceeds.

The evidence strongly suggested that the available insurance during at least one year of Debtors' three years of operations is woefully inadequate and that claimants with claims arising during that year likely would receive no distribution if they were limited solely to insurance proceeds. During the twelve months from February 4 of 2000 to February 4 of 2001, the only liability insurance carried by the Debtors was a single policy with a limit of $100,000.00 for a single occurrence and an aggregate limit of $300,000.00 for all claims arising during that twelve-month period. There was no evidence as to how much of this limited coverage, if any. remains available after taking into account settlements that already have been made and defense costs that have been incurred and paid by the insurer. While the evidence showed that there are a number of claims already pending that arose during this policy period, there was no evidence as to the amounts of such claims. Thus, whether the claimants with Class 9 claims would be able to collect any payment from Debtors' liability insurance is a matter of conjecture.

In addition to limiting Class 9 claimants to uncertain and

[5] See In re Dow Corning Corp., 244 B.R. 696, 697 (Bankr. E.D. Mich. 1999); In re Sacred Heart Hospital of Norristown, 182 B.R. 413, 421 (Bankr. E.D. Pa. 1995).

perhaps illusory insurance proceeds, the Plan also provides that confirmation of the Plan would also discharge any co-defendants in tort actions against the Debtors who are named as insureds under Debtors' insurance policies from any liability to the tort claimants with Class 9 claims.[6] The Plan thus purports to release non-debtor third parties from the claims of tort claimants without regard to whether the tort claimants, in fact, receive any distribution.

Under the foregoing circumstances, it was not fair or equitable to the holders of tort claims to place their claims in Class 9, while placing other unsecured creditors in Class 8 where the claimants have the option of receiving distributions for a period of five years from any profits earned by the Debtors during that five-year period. Confirmation of Debtors' Plan therefore will be denied.

IT IS SO ORDERED.

This 14th day of May, 2003.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

'Paragraph 9 of the Plan provides:

> The Confirmation Order shall discharge the Debtors and any other co-defendant which is also a named insured under the Debtors' policies of insurance, or otherwise insured by the Debtors' policies of insurance through a contract of indemnity, from all liability in excess of available proceeds of insurance arising by virtue of any Pre-Petition Litigation Claims.