

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of)
LEWIS R. MELAHN) Docket No. MSBCA 1565
SUCCESSOR RECEIVER OF)
TRANSIT CASUALTY COMPANY)

April 24, 1992

Decision Summary:

Escrow-Interest - The contract documents and conduct of the parties placed a duty upon Appellant (the insurer) to maintain the escrow deposit separate from Appellant's funds for this escrow deposit belonged to MTA (the insured) as well as any interest accruing at 6% thereon, from the date of receipt by appellant and until paid to MTA.

Interest - Maryland insurance law (Art, 48A, Sec. 156) provides that the rights and liabilities of the insurer (Appellant) and its creditors (MTA) shall be fixed as of the date the Order directing liquidation is filed in the court which made the Order. Sec. 156, fixed the rights of the parties to include the right to interest at 6% and not the rate set forth in the General Procurement Law (10%).

APPEARANCES FOR APPELLANT:

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APPEARANCE FOR RESPONDENT:

Jay N. Bernstein
Assistant Attorney General
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OPINION BY MR. PRESS AND MR. MALONE

Appellant timely appeals the Mass Transit Administration's (MTA) determination denying Appellant's equitable adjustment allegedly due and owing under insurance policies.

Findings of Fact

1. Between 1978¹ and 1985, Appellant insured the MTA under Policy Nos. 760370, 780120 and 784544 for personal injury and property damage claims arising out of bus and rail operations. Under the policies, MTA assumed responsibility for losses up to \$25,000 per occurrence for any claim arising out of bus operations, and up to \$500,000 for any claim arising out of rail operations.
2. Pursuant to an endorsement to Policy No. 780120 which covered the period July 1, 1981 to June 30, 1984 MTA made a deductible escrow deposit of \$300,000.² to Appellant. The escrow deposit was to be retained by Appellant until all deductible loss payments made by Appellant were reimbursed by MTA. This

¹July 1, 1978 was the inception date of policy 760370 issued in response to a request for proposals (RFP).

²The escrow deposit was initially \$200,000.00.

deductible escrow deposit was increased to \$500,000 by Endorsement No. 2 to Policy No. 784544 for the policy period July 1, 1984 to July 1, 1987. Appellant agreed to pay 6% simple interest annually on the amount held in escrow. Appellant tendered one payment in the amount of \$18,000 for the period July 1, 1981 through June 30, 1982.

3. Appellant began to experience financial difficulties and on July 1, 1985, MTA cancelled its insurance coverage with Appellant. On December 3, 1985 Appellant was placed in receivership by the Circuit Court of Cole County, Missouri.

4. On February 2, 1990, Appellant filed a claim with the Procurement Officer seeking to recover monies allegedly due and owing under the policies. The total amount of the claim per Appellant's Statement of Costs is \$672,017.29. The claim consists of three components.

a. Billed Deductible Payments

The parties have stipulated that Appellant paid covered claims to claimants under the policies, and subsequently billed MTA \$1,016,103.37 for MTA's deductible share of payments related to bus and subway occurrences under the policies. To date, these billings have not been paid by MTA.³

The parties further stipulated that \$163,803.04 of the \$1,016,103.37 in deductible billings represented Appellant's drafts which were dishonored when presented by claimants/payees for payment, and MTA is entitled to a \$163,803.04 credit against any amount owed to the Appellant. The \$163,803.04 credit reduces liability for unpaid deductible billings to \$852,210.33.

b. Unbilled Deductible Payments

The parties have stipulated that under Policy Nos. 780120 and 760370, Appellant paid claimants \$93,246.52 in deductible payments related to bus and subway occurrences. The

³ The record indicates MTA received monthly billings, i.e. loss runs, for the period September 1985 through March 1986 inclusive.

parties further stipulated that prior to entering receivership, Appellant did not bill MTA for reimbursement of these payments, which to date have not been paid by MTA.

c. Interest

An issue for resolution by the Board arising from the Appellant's claim relates to the accrual of interest on the billed deductible payments totaling \$852,210.33, and on the unbilled deductible payments of \$93,246.52. In its Statement of Costs, Appellant claims 9% interest accruing from December 3, 1985 on the net amount due for bus and subway deductibles, less the \$500,000 escrow deposit. MTA claims interest at 6%.

5. In addition to rejecting the Appellant's claim, the final decision of the Procurement Officer issued in December, 1990 asserted a counterclaim for monies owed to MTA. The Counterclaim consists of two components:

a. Escrow Deposit

MTA sought to offset against any amounts owed to Appellant the \$500,000 escrow deposit paid to Appellant under the policy terms, plus interest. By decision dated August 13, 1991, this Board granted MTA's Partial Summary Judgment motion and ruled that any amount due Appellant is offset up to the amount of the escrow deposit. The Board's decision did not address the issue of MTA's entitlement to, and/or the accrual of, interest on the \$500,000 escrow deposit.

b. Unpaid Rent

The parties have stipulated that during the policy periods, Appellant rented office space from MTA at 1515 Washington Boulevard, Baltimore, Maryland, at a monthly rental rate of \$530 per month. The parties further stipulated that rental charges in the amount of \$2,544 remain unpaid for the period of October 12, 1985 through March 14, 1986, the date the premises were vacated by the Appellant.

Decision

The Board in reviewing the record concludes that it was the intent of the parties that the escrow fund would be used for the

sole purpose of payment of deductible expenses by Appellant pending MTA reimbursement. The contract documents, correspondence, and conduct of the parties further establishes a rate of interest of 6% in the escrow fund to be paid by Appellant to MTA. Appellant had a duty to maintain the escrow deposit separate from Appellant's funds for this escrow belonged to MTA as well as any interest accruing thereon.

At this point, this Board will not renegotiate the contract and will apply Maryland law as required by COMAR 21.07.01.07 and 21.01.01.04.⁴ This is consistent with the provisions of Md. Code Ann. Art. 48A § 132 et. seq. (1991) which now provides and at all times herein provided that the domiciliary receiver of an insurer domiciled in a reciprocal State may sue in this State to recover any assets of such insurer to which he may be entitled under the laws of Maryland. Clearly the application of Maryland Procurement Law would provide entitlement of 6% simple interest per annum to MTA on escrow funds held by Appellant from the date Appellant received them to this date.

Maryland insurance law provides that the rights and liabilities of the insurer (Appellant) and its creditors (MTA) shall be fixed as of the date the Order directing liquidation is filed in the court which made the Order. The Order directing liquidation was filed December 3, 1985. § 156 of Art. 48A, Code supra clearly fixed the rights of the parties on December 3, 1985 to include the right to interest at 6% under the escrow deposit.

The parties cite legal precedent which interpreted identical insurance statutes on "fixing" in various States. However, this Board concludes those forums were discussing the "fixing" of rights in and to general assets of the company being liquidated.

⁴ COMAR 21.07.01.07 Maryland Law Prevails.

Mandatory provision for all contracts unless otherwise authorized by the Board of Public Works.

COMAR 21.01.01.04 states "The principals of the law of Maryland shall be used to interpret the provisions of this title."

and not escrow funds.⁵ The Appellant erroneously and unilaterally included MTA entrusted escrow funds in its general accounts.

Entitlement to interest continues to run to this date and until actually paid to MTA at 6%. Post judgment interest will also run at 6% and not the current rate of 10%⁶ in light of the "fixing" of interest at 6% on December 3, 1985.

MTA Rent

We find MTA is entitled to rent of \$2,544.00. This right to rent at \$530.00 per month from October 12, 1985 to March 14, 1986 is fixed. The right to collect rent at that rate entitled MTA as a contract right to \$2,544.00, for the Appellant could have vacated earlier. Appellant under its interpretation of the law could still be a tenant rent free. The Board will apply a reasonable reading of the statute, for the Board finds the language of Art. 48A § 156 is clear and is unambiguous and should be accorded its clear meaning. Blum v. Blum, 295 Md. 135, 453 A.2d 824, (1983). The rights of the MTA and Appellant are fixed as of December 3, 1985 as they pertain to the assets of Appellant and MTA is entitled to collect rent.

Appellant's Principal and Interest Claim

Appellant is entitled to its principal of \$945,546.85⁷ Appellant paid this amount on behalf of MTA according to the contract documents. However, the parties never entered into a written agreement as to the payment of interest on deductibles

⁵ The underlying principal in Joplin v. State of Oklahoma, 570 P.2d 1161 (1977) was to preserve the assets of the company for fair distribution to its general creditors. That principal cannot be used to abridge the rights of MTA as owner and beneficiary of the escrow account. This and the other cases cited clearly reflect a receiver's entitlement only to reflect "distributable assets of the insurance company" or "general assets" not special funds or escrow deposits belonging to others.

⁶ The contract right to 6% simple interest "fixed" on December 3, 1985 under Art. 48A § 156.

⁷ Entitlement and quantum stipulated by MTA.

for either billed or unbilled amounts. There is no written demand for interest by Appellant until February 2, 1990 when a claim conforming to COMAR 21.10.04.02 was filed with the Procurement Officer. It was not until that date that MTA was officially placed on notice of the amount of principal and claim of interest.

Md. State Fin. & Proc. Code Ann., § 15-222 (b)(2) enacted effective July 1, 1986 provides interest may not accrue before the Procurement Officer receives a contract claim from the contractor. In order for a claim to be considered a claim under Maryland General Procurement Law it must conform to Md. State Fin. & Proc. Ann. §§ 15-215 through 15-219. This requires formal notice to the agency in the manner prescribed. However, the Board recognizes that this dispute had been discussed since December 3, 1985 and MTA had every opportunity to review the books and records of Appellant to determine any liability it may have. Thus the Board finds that on February 2, 1990 the MTA knew or should have known the extent of its liability and thus believes predecision interest could have been awarded from February 2, 1990 pursuant to State Fin. & Proc. Article § 15-222 which provides "interest may accrue from a day the Appeals Board determines to be fair and reasonable after hearing all of the facts until the day of the decision by the Appeals Board".


However, since the rights of the parties "fixed" as to assets of the Appellant on December 3, 1985 the Board will not award interest. Under Maryland Annotated Code Art. 48A § 156 it is both the rights and liabilities of the insurer and its creditors that "fix" as to the assets of the Appellant. To award interest to Appellant here would increase the rights of Appellant contrary to the Maryland Insurance Code. The amounts MTA is entitled to in escrow principal and interest shall be offset against MTA liability to Appellant, for the principal and interest entitlement for deductibles, consistent with this decision and the ruling of this Board on August 13, 1991 for Partial Summary Judgment. This offset shall also include credit

to MTA for the unpaid rent of \$2,544.00 without interest since there was no right to interest on the unpaid rent as "fixed" on December 3, 1985 between the parties.

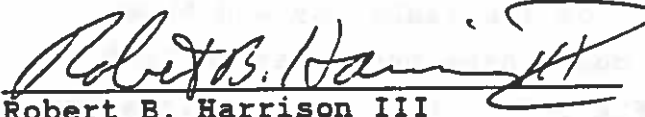
The appeal is thus sustained in part and remanded to MTA for appropriate action.

Dated: *April 24, 1992*


Sheldon H. Press
Board Member


Neal E. Malone
Board Member


I concur:


Robert B. Harrison III
Chairman

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1565, appeal of LEWIS R. MELAHN SUCCESSOR RECEIVER OF TRANSIT CASUALTY COMPANY.

Dated: *April 24, 1992*


Mary F. Priscilla
Recorder