

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:

HMH MOTOR SERVICES, INC.
ID# 58-1509198

Debtor

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Chapter 11 Case

Number 89-20232

MEMORANDUM AND ORDER

On February 6, 1991, a hearing was held upon the Debtor's Objection to a Claim of National Surety Corporation. At the close of the hearing I took the matter under advisement and ordered the Debtor to submit a brief on the subject within twenty (20) days. National Surety Corporation ("National Surety") was to respond within two weeks after the Debtor's submission of its brief. To date I have received no brief from the Debtor, but I have received Proposed Findings of Fact and Conclusions of Law from National Surety Corporation. The parties have submitted stipulations which I will incorporate into the Findings of Fact. Based upon the evidence adduced at trial, the brief submitted by National Surety, the factual stipulations of the parties, and application authorities I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) On June 30, 1988, the Debtor, HMH Motor Services, Inc. ("HMH") filed an Application for Worker's Compensation Insurance through the assigned risk plan which assigned the insurance obligation to the creditor, National Surety Corporation.

2) Pursuant to the Application, from on or about June 30, 1988, coverage was bound for HMH, by B & H Direct Delivery Service, Inc., and Mash, Inc., for worker's compensation insurance.

3) From June 30, 1988, through December 11, 1988, claims were made by various employees of HMH and the co-insureds, B & H Direct Delivery Service, Inc., and Mash, Inc., which were paid by National Surety.

4) On or about December 11, 1988, the policy of worker's compensation insurance was cancelled due to non-payment of premiums.

5) According to the terms of the policy, the total premiums to be paid were based upon audit. A final audit for the period of coverage was performed and

determined an unpaid premium due in the amount of \$195,666.00.

6) Premium payments, following an initial deposit premium, for the worker's compensation coverage were made as follows:

- A. July 22, 1988, HMM Motor Service, Inc., Check No. 57832 for \$14,954.00;
- B. September 8, 1988, HMM Motor Service, Inc., Check No. 58611 for \$63.00;
- C. November 14, 1988, HMM Motor Service, Inc., Check No. 59552 for \$17,864.00;
- D. November 14, 1988, Mash, Inc., Check No. 006889 for \$714.00;
- E. November 14, 1988, B & H Direct Delivery Service, Inc., Check No. 056561 for \$17,149.00.

7) Larry C. Brewer is the sole stockholder, director and president of HMM Motors, and is the sole stockholder, director and president of B & H Direct Delivery Service, Inc., and is the sole stockholder, director and president of Mash, Inc.

8) The co-insureds, B & H Direct Delivery Service, Inc., and Mash, Inc., were sued on the same indebtedness which is the subject matter of the disputed claim and National Surety secured a summary judgment against B & H Direct Delivery Service, Inc., and Mash, Inc., in the amount of \$195,666.00 plus interest of \$22,126.08 on August 27,

1990.

9) National Surety Corporation has not received any payment from HMH, B & H Direct Delivery Service, Inc., or Mash, Inc., in discharge of the indebtedness claimed or any portion thereof.

10) Premiums are computed by employee payroll of the insured, HMH, B & H Direct Delivery Service, Inc., and Mash, Inc.

11) National Surety is not scheduled as a creditor on the schedules filed in this matter by the Debtor, but has filed a timely proof of claim.

CONCLUSIONS OF LAW

The Debtor seeks to avoid its obligation under the National Surety policy by arguing that National Surety is precluded as a matter of Georgia Law from pursuing recovery from HMH by their failure to include HMH as an indispensable party in the underlying District Court action. I disagree and note that the District Court action is wholly irrelevant because the parties have stipulated to the amount of the unpaid premium due as \$195,666.00. Thus the issue narrows to whether HMH is jointly and severally

liable for the \$195,666.00 debt or whether it is only liable for its pro rata share of that amount. HMH takes the position that it is only liable for \$121,859.00.

It has been stipulated that the sole shareholder, director, and president of each of the three-named corporations was Larry C. Brewer. Each of the three corporate entities were included on a single Georgia application for worker's compensation insurance dated June 30, 1988, which was signed by Larry C. Brewer in his capacity as president of HMH Motor Service. In Liberty Mut. Ins. Co. v. Petroleum Venture Capital Corp., 216 So.2d 925 (La.App., 2d Cir. 1968), the Court addressed a similar factual situation in which an insured corporation had made application for and purchased, in its individual capacity, policies covering it and other corporations having common ownership. The Court determined that a division of liability as between the insureds was of no importance or concern to the Plaintiff, and held that the insured corporation which had made the application for the policies was responsible for the payment of the premiums. *See also* Commercial Union Ins. Co. v. A-1 Contracting Co. of Louisiana, Inc., 447 So.2d 39 (La.App., 1st Cir. 1984); Carroon and Black of Louisiana, Inc. v. O'Regan, 478 So.2d 1367 (La. App., 4th Cir. 1985). In light of the common ownership of all three corporations by Mr. Brewer, the fact that all premiums from July 22, 1988, through November 14, 1988, were paid by HMH Motor Services, that the application for worker's compensation insurance includes all three entities, and that a single policy was issued upon that application for all three insureds, I find that HMH has joint and several liability

for the claim of National Surety in the amount of \$195,666.00. Accordingly, HMH's objection to the claim is overruled. To the extent that HMH may pay more than what it deems to be its fair share, it may seek contribution from B & H Direct Delivery Service, Inc., and Mash, Inc.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Debtor's Objection to the Claim of National Surety Corporation is hereby overruled.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of June, 1991.