

# In the United States Court of Federal Claims

No. 03-1418 C  
(Filed April 26, 2005)

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L. TIM WAGNER, LIQUIDATOR OF )  
AMWEST SURETY INSURANCE )  
COMPANY, IN LIQUIDATION, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
THE UNITED STATES, )  
 )  
Defendant. )

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Douglas Schmidt, Esq., Blackwell Sanders Peper Martin, Kansas City, MO, for plaintiff.  
Michael D. Fielding, Esq., Blackwell Sanders Peper Martin, Kansas City, MO, of counsel.

E. Kathleen Shahan, Esq., Trial Attorney, John W. Showalter, Assistant Director, J. Christopher Kohn, Director, Commercial Litigation Branch, Civil Division, Peter D. Keisler, Assistant Attorney General, United States Department of Justice, Washington, DC, for defendant.

## **OPINION AND ORDER**

**GEORGE W. MILLER**, Judge.

This case involves a claim by plaintiff, Director of Insurance of the State of Nebraska (“Liquidator”), in his statutory capacity as the liquidator of Amwest Surety Insurance Company (“Amwest”), for recovery of preferential transfers made to or for the benefit of defendant, the United States (“Government”). Plaintiff claims, *inter alia*, that under Neb. Rev. Stat. § 44-4828, he is entitled to avoid and recover all preferential transfers made to or for the benefit of the Government during the one-year period preceding Amwest’s successful liquidation petition. *See* Am. Compl. ¶¶ 79-99.

The Government filed a motion to dismiss plaintiff's amended complaint for lack of subject matter jurisdiction, which was denied by this Court on December 22, 2004.

On January 18, 2005, the Government filed an answer to plaintiff's amended complaint and three counterclaims. In its third counterclaim, titled "Third Contingent Counterclaim," the Government stated:

15. On information and belief, the Liquidator intends to make preferential payments to other supposed creditors of the Amwest estate over and instead of the claims of the United States.
16. Such payments will violate 31 U.S.C. § 3713(a) because at the time the payments are to be made, Amwest is and will be indebted to the Government and is and will be insolvent.
17. Within the meaning of 31 U.S.C. § 3713(b), on information and belief, [the Liquidator] is a representative of Amwest who has indicated that he will make payments of claims or parts of claims of others, before and rather than paying the claims of the United States.
18. By reason of the foregoing, [the Liquidator] will be liable to the United States for the amount of said payments.

The Government based its third contingent counterclaim on the Federal Priority Statute, 31 U.S.C. § 3713 (2000), which provides, in pertinent part:

- (a)(1) A claim of the United States Government shall be paid first when—
  - (A) a person indebted to the Government is insolvent and —
    - (i) the debtor without enough property to pay all debts makes a voluntary assignment of property;
    - (ii) property of the debtor, if absent, is attached; or
    - (iii) an act of bankruptcy is committed; or
  - (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

\* \* \*

- (b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the

Government is liable to the extent of the payment for unpaid claims of the Government.

*Id.* The Government alleges in its third contingent counterclaim that if the Liquidator makes preferential payments to other supposed creditors of the Amwest estate over and instead of the interests of the United States, he will be in violation of the Federal Priority Statute. In that event, the Government argues, the Liquidator will be liable to the United States for the amount of the payments. *See Answer to Amended Complaint and Counterclaim at 18.*

On February 18, 2005, the Liquidator filed a motion to dismiss the Government's third contingent counterclaim pursuant to Rule 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC") for failure to state a claim upon which relief can be granted.<sup>1</sup>

Though the Liquidator files his motion to dismiss pursuant to RCFC 12(b)(6), he also points out that the Government's third contingent counterclaim is not ripe. "The Government candidly admits . . . that its counterclaim is 'contingent upon the Liquidator actually making payments that are inconsistent with the Federal Priority Statute and the McCarran-Ferguson Act.'" Pl. Reply at 1. Because the Government alleges that the Liquidator has not yet made any payments, the Liquidator argues that there is no actual controversy before the Court, and therefore the Government's third contingent counterclaim must be dismissed on ripeness grounds. The Court agrees.

"A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)). "If a claim is not ripe, the court does not have jurisdiction to hear the case, and it must be dismissed without prejudice." *Bannum, Inc. v. United States*, 56 Fed. Cl. 453, 462 (2003) (quoting *Crawford v. United States*, 53 Fed. Cl. 191, 195 (2002)).

The Government acknowledges that its counterclaim is contingent upon the Liquidator actually making payments that violate the Federal Priority Statute, and that "at this point in time, the United States is not aware that the Liquidator has actually made any such payments." Defendant's Response at 3. The Government explains that it sought to put the Court and the Liquidator on notice of "this potential claim" by filing its counterclaim as a "contingent counterclaim." *Id.* at 2 n.1.

The Government's efforts to provide notice notwithstanding, because there is no allegation that the Liquidator has made any payments in conflict with the Federal Priority Statute, the Government's third contingent counterclaim is not yet ripe for adjudication. Therefore it

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<sup>1</sup> The Liquidator argues that the Federal Priority Statute has been "reverse-preempted" by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* and Neb. Rev. Stat. § 44-4828 and, therefore, has no applicability to this matter. Because we dismiss on ripeness grounds, we express no view on the Liquidator's argument based upon "reverse-preemption."

must be dismissed without prejudice for lack of subject matter jurisdiction. *See* RCFC 12(h)(3).

The Court notes that RCFC 13(e), Counterclaim Maturing or Acquired After Pleading, provides that a claim that matures after the defendant serves its pleading “may, with the permission of the court, be presented as a counterclaim by supplemental pleading.” The Government, therefore, would have a basis for re-asserting its third counterclaim when and if it were in a position to allege that the Liquidator had actually made payments in violation of the Federal Priority Statute.

For the reasons stated above, defendant’s Third Contingent Counterclaim is dismissed without prejudice.

The deadlines set forth in the Court’s January 25, 2005 Order adopting the parties’ discovery schedule remain unchanged.

IT IS SO ORDERED.

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GEORGE W. MILLER  
Judge