

**NOT INTENDED FOR PUBLICATION**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE: : CASE NO. 02-74974  
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CENTENNIAL HEALTHCARE CORP., et. al., : CHAPTER 11  
: :  
Debtors. : JUDGE MASSEY  
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**ORDER**

Debtors' Third Amended Plan (the "Plan") groups General Liability Claims and Professional Liability Claims, as those terms are defined in the Plan, in Class 16. The Plan provides that holders of Class 16 claims were to elect on their ballots accepting or rejecting the Plan either (1) the option to pursue insurance proceeds, if any are available, and to waive any distribution under the Plan (the "Insurance Option") or (2) the option to pursue a distribution under the Plan (the "Distribution Option"). A holder electing the Insurance Option would waive any distribution under the plan and would "waive any right to pursue any claim or cause of action arising prior to the Confirmation Date against any Related Third Party, except for the sole purpose of establishing a right to receive applicable proceeds of any insurance policy obtained by the Debtors and under which such Related Third Party is an additional insured."

If the Plan is confirmed, holders of Class 16 claims who selected the Distribution Option will share pro rata in a fund, the exact amount of which is presently unknown. If all Class 16 claimants elected the Distribution Option, a holder in that class would receive less than would a holder of a general unsecured claim provided for in Class 12. If enough Class 16 claimants elected

the Insurance Option, those electing the Distribution Option would receive more on their unsecured claims than would holders of Class 12 claims. A holder electing the Distribution Option waived any right to proceed under an insurance policy (subject to confirmation), but there is no provision requiring that claims against Related Third Parties, as that term is defined in the Plan, be waived.

The Plan provides a methodology for estimating unliquidated claims. The Plan also provides that “any holder of a Claim in Class 16 who (a) fails to return a Ballot; (b) fails to elect either the Insurance Option or the Distribution Option on a Ballot; or (c) makes elections that are inconsistent or otherwise in violation of the provisions of this Exhibit shall be deemed to have elected the Insurance Option with respect to any Claim in Class 16 and any related Administrative Claim.” The election of an Option is irrevocable. There are other material provisions concerning treatment of Class 16 claims that need not be detailed here.

Those holders of Class 16 claims represented by the law firm of Wilkes & McHugh (the “W&M Tort Claimants”) appeared earlier in the case and filed an objection (document no. 1183) to approval of the initial disclosure statement on several grounds, including that it failed to “disclose sufficient specific insurance policy information to allow tort claimants to make an informed decision regarding the options.” In that written objection, they stated specifics concerning information need to make an informed decision on how to vote. The Court held three hearings on the disclosure statement, which was subsequently amended twice. Movants’ counsel appeared at the December 15, 2003 hearing at which the Court directed Debtors to provide information to the extent they had such information requested by movants, as discussed in more detail below.

The Court entered an Order on January 9, 2004, approving the Debtors’ Third Amended Disclosure Statement and setting a deadline of March 5, 2004 for casting ballots. The W&M Tort

Claimants timely filed ballots rejecting the Plan but made no election of either the Insurance Option or the Distribution Option.

On March 4, 2004, the W&M Tort Claimants filed a motion seeking an order extending the period within which they might elect a Class 16 Option and/or allowing them to modify filed ballots pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure. The Court held a hearing on the motion on March 18, 2004, at which neither the movants nor Debtors presented evidence or requested a continuance to present evidence.

In the motion, the W&M Tort Claimants assert that the Plan is not confirmable. Their objections to confirmation will be heard at the continued confirmation hearing presently scheduled for April 19, 2004.

With respect to the relief sought in the motion, movants allege that "Tort Claimants do not have enough information to 'irrevocably' elect either the Insurance Option or the Distribution Option" and assert that "the Plan is ambiguous as to whether a Claimant voting to reject the Plan must elect an Option." They cite Rule 3018 of the Federal Rules of Bankruptcy Procedure, which permits a creditor to change or withdraw an acceptance or rejection of a plan "for cause shown." They assert that to require them to make an irrevocable election for an Option that is likely to change through the Plan's Confirmation process would be inequitable and would deny them due process.

Debtors filed a response in which they assert that the motion is addressed to the disclosure statement and that objections to the adequacy of the disclosure should have been raised during the hearings at which the Court considered the approval of the disclosure statement. They further allege that the W&M Tort Claimants asked for and received additional information after the

hearings on the disclosure statement hearings and “did not indicate that there was information the Debtors refused to provide that was necessary to make the election for distribution or insurance.” They further allege that they agreed prior March 4, 2004 that if treatment of Class 16 claims in a further amendment of the Plan is materially different from that in the Plan, any Class 16 creditor could change its election of the Insurance Option or the Distribution Option, in writing, within fourteen days of service of notice of confirmation of the plan. Finally, Debtors assert that the ballot approved by the Court is unambiguous in providing, as does the Plan, that holders of Class 16 claims who make no election are deemed to have elected the Insurance Option.

Debtors’ Plan required holders of Class 16 claims to make an election between the Insurance Option and the Distribution Option on ballots that had to have been submitted by March 5, 2004. Movants filed ballots rejecting the plan but failed to make an election. Under the terms of the Plan, they are deemed to have elected the Insurance Option. If, as movants assert, the Plan does not meet the requirements of 11 U.S.C. § 1129, their failure to elect an option will be of no consequence. If, on the other hand, the Plan is confirmed, they are stuck with the Insurance Option. The motion is not a substitute for making the election.

The Court has no authority to require Debtors to give movants additional time to make an election. It is not the Court’s Plan; it is the Debtors’ Plan. To change the terms of the Plan is to amend it, which is the Court does not have the power to do. All the Court can do is to confirm the Plan or deny confirmation. Bankruptcy Rule 3018 permits the amendment of a ballot to change a vote for cause shown. Movants are not proposing to change their vote against the plan. The election of one of the two options was not a vote on the plan, and nothing in the form of ballot,

which the Court approved, required a claimant to vote in order to make an election. In any event, movants offered no evidence showing good cause for changing their ballot in any way.

As to the contention that movants lacked sufficient information to make an informed decision as to how to vote and which election to make, the Court notes that movants raised that issue at the December 15, 2003 hearing on approval of the disclosure statement. The Court agreed with the Debtors that detailed information about insurance policies and related matters of interest only to holders of Class 16 claims should not be in the disclosure statement sent to other creditors but should be provided separately. Debtors' counsel, Mr. Jordan, stated that the Debtors did not have some of the information sought. The Court directed Debtors to tell the W&M Tort Claimants what Debtors did not know and were unable to provide and to provide information requested by claimants that Debtors had. Mr. Jordan stated in response to the Court's direction that such information be provided that "if anybody requests this information from us after reading the disclosure statement, we'll provide it to them." Transcript, Dec. 15, 2003 Hearing, p. 51. [In fact Mr. Jordan said "our disclosure statement;" see footnote 1.] The Court then stated to movants' counsel,

Beyond that, Ms. Hart, I think if you're not satisfied with it, you're going to have to make some kind of motion about the disclosure. In other words, I'm going to make the assumption that when they make the disclosure at this point that they are doing the best they can. That's what they are going to tell me anyway. And if you don't believe them, then you just need to come take their depositions, and we'll deal with that as a separate matter. Okay?<sup>1</sup>

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<sup>1</sup> The Transcript states, ". . . In other words, I'm going to make the assumption that we may make the disclosure at this point, but they are doing the best they can. . . . And if you don't believe them, you just need to come take they're depositions . . ." The Transcript is wrong. In addition to having a court reporter present, these proceedings, like all proceedings before me, were recorded electronically. Requests for audio files may be directed to the Courtroom Deputy Clerk.

Ms. Hart replied, "OK, your Honor."

Movants never filed a motion contending that they had not been provided with adequate information to be able to cast their ballots or to make an election between the two options. Hence, they will not be heard now to contend that disclosure was inadequate. Moreover, they offered no evidence and sought no continuance to provide evidence at the March 18 hearing that they lacked sufficient information to make an informed decision to cast their ballots or to elect one of the two options.

If the Plan is amended to materially change the treatment of holders of Class 16 claims, holders of such claims will have the opportunity to change their elections during a time frame fixed by the Court.

For these reasons, it is

ORDERED that the Motion to Extend Time to Motion to Extend the Period to Elect a Class 16 Option and/or to Allow Wilkes & McHugh Tort Claimants to Modify Filed Ballots for Cause Shown (document no. 1605) is DENIED.

This 19th day of March 2004.

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JAMES E. MASSEY  
U.S. BANKRUPTCY JUDGE