UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA

In re: ALLVEST CORPORATION, Debtor.	Case No. A02-01042-DMD Chapter 7

MEMORANDUM DECISION

Pending before the court are a motion and cross-motion to determine whether certain insurance proceeds are property of the bankruptcy estate or property of Evelyn Brown, trustee of the estate of Wassillie William Alexie. These are core proceedings under 28 U.S.C. § 157(b)(2)(E). This court has jurisdiction over the dispute pursuant to 28 U.S.C. § 1334(b) and (e) and the district court's order of reference. I find in favor of the bankruptcy estate and the J.W. creditors.

Background

William Weimar was a successful businessman in Alaska. Among other activities, his corporation, Allvest, Inc., provided services to the Municipality of Anchorage for a "Community Service Patrol." The patrol was utilized to remove intoxicated people from the streets of Anchorage and place them in a safe environment until they were sober. Alexie was injured by employees of Allvest in July of 1995 and died as a result of his injuries. The following year, other parties, hereinafter called the J.W. creditors, were also injured as a result of actions by Allvest employees. The injuries to the J.W. creditors occurred between October 1, 1995, and June 1, 1996. Both Brown, as trustee of the Alexie estate, and the J.W. creditors sued Allvest in 1997. The J.W. creditors received a judgment for $58,090.00 in compensatory damages and $1,000,000.00 of punitive damages in April

of 2002. Brown obtained a judgment for over $1,000,000.00 in compensatory damages and $2,000,000.00 of punitive damages in July of 2001. Neither of the judgments were paid by Allvest's insurer, Classic Fire and Marine. Classic was in liquidation. Brown and the J.W. creditors both filed claims against Classic in its liquidation proceeding before this bankruptcy case commenced.

Weimar sold the assets of Allvest for $20 million in 1998 and began a series of asset transfers to separate corporations and trusts. After the J.W. creditors and Brown had obtained their state court judgments against Allvest, they each filed supplemental complaints in aid of execution in their respective state court actions. The supplemental complaints were against Weimar and other non-debtor entities, and sought to recover the Allvest assets on fraudulent transfer, alter ego and other grounds.

In May of 2002, the J.W. creditors seized $490,854.00 from Allvest. Brown filed an involuntary chapter 11 bankruptcy petition against Allvest in October of 2002. Allvest filed a non-opposition to the involuntary petition, and an order for relief was entered in November of 2002. Allvest also moved to convert the case to one under chapter 7. Its motion was granted and Kenneth Battley was appointed trustee of the chapter 7 case.

On November 1 and 2, 2002, Weimar removed the state court actions of both Brown and the J.W. creditors to this court. The J.W. creditors responded by seeking relief from stay and remand of their action to state court. Oppositions to the J.W. creditors' motions were filed by the trustee, Weimar, and several other parties who had been named as defendants in the supplemental complaint. After a hearing on the J.W. creditors' motions, held on December 11, 2002, this court set a briefing schedule for further responses, with the final set of briefs to be filed by December 23, 2002.

No final order was entered with regard to the J.W. creditors' two motions. Instead, as 2002 drew to a close, Weimar, the trustee, Brown and the J.W. creditors started

negotiations for a settlement. Weimar and the other entities being sued wished to end the litigation, which had become contentious. Additionally, Weimar would receive substantial tax advantages if a settlement could be reached before year end. The parties presented a hastily drafted settlement agreement to the court for approval on December 31, 2002. This agreement was approved by the court after a lengthy hearing and some last minute modifications.

The parties disagree on the meaning of the settlement agreement. The J.W. creditors contend that the claim asserted by Brown against Allvest's insurance liquidator on account of her state court judgment became property of the bankruptcy estate by virtue of the settlement agreement. The trustee also contends that Brown's claim belongs to the estate, but by operation of law rather than through the settlement agreement. Brown insists that the claim was, and has remained, her separate property. The two issues which must be determined are, first, whether Brown's insurance claim belongs to the bankruptcy estate by operation of law and, second, whether the insurance claim came into the bankruptcy estate as part of the settlement agreement.

Did Brown's Claim Belong to the Estate by Operation of Law?

Allvest purchased a $1 million liability insurance policy from Classic Fire and Marine Insurance covering the period from August 1, 1994, through July 31, 1995. Alexie's injuries occurred while this policy was in effect. Allvest purchased a $2 million liability insurance policy from Classic to cover the period from August 1, 1995, through July 31, 1996. All of the J.W. creditors' injuries occurred during this second policy period.

Accordingly, the claims of Brown and the J.W. creditors are each being asserted against separate policies issued to Allvest by Classic.[1]

The liability policy in effect during the period when Alexie's injuries were sustained (hereinafter, "the 1994 policy") contained the following endorsement regarding coverage:

> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of:
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> a) any negligent act, error, or omission arising out of the performance of professional services for others in the practice of the Insured's business described in the declarations.
>
> b) any liability that may arise based solely on the negligent acts, errors, or omissions of any employee of the Named Insured in the performance of professional services to others, for which the Named Insured may be held liable.[2]

Brown argues that the debtor's interest in this insurance policy does not include the proceeds of such policy. She maintains that her claims against Classic Fire & Marine are excluded from the estate. The trustee, on the other hand, argues that the insurance policy is a major source of value to the estate. He contends the endorsement, which says the insurer "will pay on behalf of the insured all sums that the insured shall become legally obligated to pay as damages," is a basic right of indemnification belonging to the debtor. He argues that the proceeds from the 1994 policy should come into the estate, by operation of law, so they can be distributed pro-rata among the debtor's creditors.

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[1]The J.W. creditors' insurance claim is not at issue here because the trustee has sold this claim back to the J.W. creditors, after having decided not to contest the insurance liquidator's valuation of that claim. *See* Order Approving Sale of Trustee's Claim Against Receiver, entered July 26, 2005 [Docket No. 221].

[2]*See* Ex. 1.4 to Brown's Mem. in Supp. of Mot. for Order that Proceeds of Ins. Policy are not Property of the Estate, filed Apr. 29, 2005 [Docket No. 204].

A bankruptcy trustee succeeds to the debtor's interest in insurance policies.[3] Under 11 U.S.C. § 541(a)(1), property of a bankruptcy estate encompasses "all legal or equitable interests of the debtor in property as of the commencement of the case." The extent to which a debtor's insurance coverage is property of the estate has been examined in several contexts, with varying results.

In *Battley v. Tisdale, et al. (In re Martech)*,[4] I reviewed issues which are analogous to the ones which have been raised here. In *Martech*, trustee Battley attempted to recover proceeds from the debtor's officers and directors insurance coverages as property of the estate. After reviewing authority from the Ninth and other Circuits, I rejected his attempt to include such proceeds within the estate. However, as I noted in *Martech*, a number of cases generally supported the trustee's position.[5] Several of these determinations,

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[3]11 U.S.C. § 541(a)(1).

[4]5 A.B.R. 510 (Bankr. D. Alaska 1998).

[5]*Id.,* 5 A.B.R. at 513 n.7, *citing St. Clare's Hosp. and Health Center v. Ins. Co. of N. America (In re St. Clare's Hosp. and Health Center)*, 934 F.2d 15 (2nd Cir. 1991) (Chapter 11 debtor's liability insurance was property of the estate); *Minoco Group of Companies, Ltd. v. First State Underwriters Agency of New England Reinsurance Corp. (In re Minoco Group of Companies, Ltd.)*, 799 F.2d 517 (9th Cir. 1986) (Prepaid officers and directors insurance was an asset of debtor's chapter 11 estate and subject to the automatic stay); *A.H. Robbins Co. v. Piccinin,* 788 F.2d 994 (4th Cir. 1986) (Insurance policies purchased by debtor were property of the chapter 11 estate and no Dalkon shield litigation could be brought against the debtor's insurers, officers and directors without violating the automatic stay); *In re Davis*, 730 F.2d 176 (5th Cir. 1984) (Automatic stay applied to asbestos workers' suits and prevented them from proceeding against debtor's insurance companies and executives); *Johns-Manville Corp. v. The Asbestos Litig. Group (In re Johns-Manville Corp.),* 40 B.R. 219 (S.D.N.Y. 1984) (Manville's liability insurance was property of the estate and third party actions against its insurers were subject to the automatic stay); *In re Sacred Heart Hosp. of Norristown*, 182 B.R. 413 (Bankr. E.D. Penn. 1995) (Chapter 11 debtor hospital's indemnification interest in officers and directors policy proceeds was sufficient to constitute property of the estate); *Celotex Corp. v. AIU Ins. Co. (Matter of Celotex Corp.)*, 152 B.R. 667 (Bankr. M.D. Fla. 1993) (Asbestos manufacturer's insurance policies and proceeds are property of its chapter 11 estate); *Circle K. Corp. v. Marks (In re Circle K Corp.),* 121 B.R. 257 (Bankr. D. Ariz. 1990) (Officers and directors policies were valuable estate assets and securities fraud litigation against two former CEOs of the debtor violated the automatic stay); *City Ins. Co. v. Mego Int'l, Inc. (In re Mego Int'l)*, 28 B.R. 324 (Bankr. S.D.N.Y. 1983) (Insurer's state court action against officers and directors of chapter 11 debtor seeking declaratory judgment as to liability under policy would have an impact on potential property of the estate and insurer is not entitled to relief from the automatic stay).

however, were made in the context of a chapter 11 case where the debtor had mass tort claimants competing for the proceeds of its liability insurance.[6] In contrast, the instant case is a chapter 7 proceeding involving just two tort claimants. Moreover, each of the tort claimants holds a claim against a separate liability insurance policy issued to the debtor. The policy considerations applicable in mass tort bankruptcy cases are not applicable here.[7]

In several other cases, courts have found that while the debtor owns the insurance policy itself, the liability coverage under the policy is not property of the estate.[8] The Ninth Circuit reached this conclusion in *Pintlar.*[9]

> We have held that [insurance] interests are "property of the estate" if "the debtor's estate is worth more with them than

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[6]*Robbins*, 788 F.2d 994; *Manville*, 40 B.R. 219.

[7]*Martech*, 5 A.B.R. at 518.

[8]*Martech*, 5 A.B.R. 514 n.12, *citing Pintlar Corp. v. Fidelity and Casualty Co. of New York (In re Pintlar Corp.)*, 124 F.3d 1310 (9th Cir. 1997) (Officers and directors liability coverage does not have sufficient potential impact upon the chapter 11 estate to bar insurer's declaratory judgment suit against officers and directors of debtor in Delaware state court); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Titan Energy, Inc. (In re Titan Energy, Inc.)*, 837 F.2d 325, 329 (8th Cir. 1988) (Products liability policies found to be property of the estate but the policy proceeds do not flow into the coffers of the estate); *Liberty Mut. Ins. Co. v. Official Unsecured Creditors Comm. of Spaulding Composites Co. (In re Spaulding Composites Co., Inc.)*, 207 B.R. 899 (B.A.P. 9th Cir. 1997) (Insurer's state court suit to obtain declaratory judgment of its liability to shareholders under comprehensive general liability proceeds did not threaten estate property or violate the stay); *In re Daisy Sys. Sec. Litig.*, 132 B.R. 752 (N.D. Cal. 1991) (Chapter 11 trustee's motion for turnover of proceeds of officers and directors insurance policies denied as proceeds were not property of chapter 11 estate); *Amatex Corp. v. Stonewall Ins. Co.*, 102 B.R. 411 (E.D. Pa. 1989) (Asbestos manufacturer in chapter 11 could not compel its insurers to turnover lump-sum payments to it contrary to the terms of the policies; assets protected under the automatic stay are not necessarily required to be turned over to the estate); *Goldin v. Primavera Familienstiftung, Tag Assoc., Ltd. (In re Granite Partners, L.P.)*, 194 B.R. 318 (Bankr. S.D.N.Y. 1996) (Chapter 11 trustee's suit to enjoin investors from pursuing claims against debtor's officers and directors and their insurance was not barred by the automatic stay); *In re Sfuzzi, Inc.*, 191 B.R. 664 (Bankr. N.D. Tex. 1996) (Liability insurance proceeds are not property of the estate because no mass torts were involved and the debtor had no right to keep the proceeds under the terms of the policy); *In re Fernstrom Storage and Van Co.*, 100 B.R. 1017 (Bankr. N.D. Ill. 1989) (Tort creditor obtained relief from stay to pursue action to recover fire loss from insurance proceeds as chapter 11 policy concerns of mass tort cases not applicable to single claimant); *Cardinal Cas. Co., v. Correct Mfg. Corp. (In re Correct Mfg. Corp.)*, 88 B.R. 158 (Bankr. S.D. Ohio 1988) (Product liability insurer denied stay of direct actions against insurer because insurance proceeds were not property of chapter 7 bankruptcy estate).

[9]*Pintlar Corp. v. Fid. and Cas. Co. of New York (In re Pintlar)*, 124 F.3d 1310 (9th Cir. 1997).

> without them." *In re Minoco Group of Companies, Ltd.*, 799 F.2d 517, 519 (9th Cir. 1986). *Minoco* stayed an action by an Insurer to cancel a debtor's directors and officers policy outright. The court found the policy to be property of the estate because the estate was worth more with indemnification coverage than without it.[10]

The situation in *Pintlar* was distinguishable, however. Cancellation of the policy was not an issue. In *Pintlar*, the debtor had an officers and directors liability policy that provided two types of coverage: liability coverage for directors and officers, and reimbursement for the corporate debtor's indemnification of directors and officers. The issue addressed was whether the liability coverage was property of the estate. A state court declaratory judgment action had been initiated by the debtor's insurer against its directors and officers, after the bankruptcy had been filed, seeking a declaration that the policy's "insured v. insured" exclusion barred liability coverage for the directors and officers. The debtor sued its insurer in the bankruptcy court to enjoin this action, contending it violated the automatic stay. The bankruptcy court held in favor of the debtor, but the Ninth Circuit reversed. It found that the directors' and officers' claims for coverage and the insurer's right to litigate coverage implicated interests independent of the debtors.[11] Moreover, it found that litigation regarding the liability portion of the debtor's insurance coverage, particularly since the debtor was not a named party in that litigation, would not have a *res judicata* effect on any litigation concerning the scope of the debtor's indemnification coverage.[12] The court concluded that

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[10] *Id.* at 1313.

[11] *Id.*

[12] *Id.*

the liability portion of the directors and officers insurance was not property of the estate such that litigation concerning its scope was stayed during the debtor's bankruptcy proceedings.[13]

There is no basis for distinguishing between a liability policy that insures a debtor against consumer claims and one that insures against claims by officers and directors.[14] If the policy at issue here is a liability policy, it would not be property of the estate under *Pintlar*. The trustee argues, however, that this is an indemnification policy and therefore property of the estate. He says the policy doesn't direct Classic to pay the plaintiff who sustained the injury, nor does it require Allvest to actually pay an adverse judgment before it is obligated to pay. He places heavy reliance on the provision which requires Classic to "pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury." He contends this language creates a basic right to be indemnified, a contractual right held by the debtor. The trustee concludes that the "bankruptcy estate has the right to be paid that indemnification, which then becomes an asset of the estate that can be distributed pro rata among creditors."[15]

I disagree with the trustee's interpretation of the policy. This is a commercial general liability policy that obligated Classic to pay damages *on behalf of* Allvest. The policy states, "Our obligation under the Bodily Injury Liability and Property Damage Liability Coverages to pay damages *on your behalf* applies only to the amount of damages in excess of any deductible amounts stated in the Schedule above as applicable to such coverages."[16] The Professional Liability Endorsement also specifies that Classic will "pay *on behalf of the*

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[13]*Pintlar*, 124 F.3d at 1313-14.

[14]*Minoco*, 799 F.2d at 519.

[15]*See* Trustee's Response to Brown's Mot., filed July 25, 2005 [Docket No. 222], at p. 3.

[16]*See* Brown's Mem. in Supp. of Mot. for Order that Proceeds of Ins. Policy are not Property of the Estate, filed Apr. 29, 2005 [Docket No. 204], at Ex. 1.2, p. 1 (emphasis added).

Insured all sums which the Insured shall become legally obligated to pay as damages" on account of certain acts or omissions.[17] Finally, third parties such as Brown have the right to sue to recover sums from Classic. The policy provides:

> A person or organization may sue [Classic] to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.[18]

The provisions in the 1994 policy at issue here extended liability coverage to Allvest. But Brown's claim against the 1994 policy, based on a state court tort judgment against Allvest, is independent of any interest Allvest can assert in the policy. Any coverage under the policy for payment of Brown's claim did not become property of the estate by operation of law when the order for relief was entered in this case.[19]

Did Brown's Insurance Claim Become Estate Property Under the Settlement Agreement?

The claims that Brown and the J.W. creditors have asserted against the policy did not become estate property by operation of law. If, however, the settlement agreement included such claims as property of the estate, the trustee has an independent right to them. The J.W. creditors contend the trustee became authorized to administer the insurance claims under the terms of the settlement agreement, particularly its paragraph 10, which provides:

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[17] *Id.* at Ex. 1.4, p. 1 (emphasis added).

[18] *Id.*, at Ex. 1.3, p. 7.

[19] Brown argues that the debtor's interest in the policy does not include the proceeds of such policy, citing *Louisiana World Exposition, Inc. v. Fed. Ins. Co. (In re Louisiana World Exposition, Inc.)*, 832 F.2d 1391 (5th Cir. 1987), and other cases. I feel it is unnecessary to discuss this distinction because, under controlling Ninth Circuit law, the liability portion of the policy is not property of the estate.

> 10. The Trustee will retain any insurance claims with respect to any insurance given in favor of Allvest as insured (or insurance of any nature may [sic] apply to underlying claims by J.W. et al. and by Brown for the existing judgments held by these parties) and any claims associated with such insurance including claims against brokers, excess line carriers, receivers, or claims in insolvency proceedings for any insurance company. Weimar, the Weimar entities, and the Released Parties will cooperate in Trustee's efforts to make recovery on insurance and insurance-related claims. There shall be no director or officer claims. Weimer shall represent in his affidavit that to the best of his recollection and good faith there is no director and officer insurance policy.[20]

Brown disagrees with the J.W. creditors' interpretation, placing heavy emphasis on the use of the word "retain" in paragraph 10. She argues that the trustee couldn't retain Brown's insurance claim because he didn't already hold this interest. But this word cannot be isolated from the rest of the settlement agreement, or the transaction as a whole. Examining the entire agreement as well as extrinsic evidence to determine its meaning, I conclude that the agreement was intended to, and does, encompass both Brown's and J.W. creditors' insurance claims.

"[I]n determining the meaning of a contract prior to the application of the parol evidence rule, extrinsic evidence should be consulted."[21]

> The parol evidence rule is a rule of substantive law which holds that an integrated written contract may not be varied or contradicted by prior negotiations or agreements. Before the parol evidence rule can be applied, three preliminary determinations must be made: (1) whether the contract is integrated, (2) what the contract means, and (3) whether the prior agreement conflicts with the integrated agreement. Extrinsic evidence may always be received on the question of

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[20] *See* Ex. A to Judgment Approving Settlement Agreement, entered Dec. 31, 2002 [Docket No. 73], at pp. 5-6.

[21] *Alaska Diversified Contractors, Inc. v. Lower Kuskokwim Sch. Dist.,* 778 P.2d 581, 584 (Alaska 1989).

> meaning. Once the meaning of the written contract is determined, however, the parol evidence rule precludes the enforcement of prior inconsistent agreements.[22]

I find that the settlement agreement is an integrated agreement. Although there is no integration clause in the agreement, this omission will not preclude such a finding.[23] "Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression."[24] The settlement agreement reasonably appears to be a complete agreement that constitutes the final expression of the parties. It contains fifteen typed and two handwritten paragraphs over seven pages that detail various obligations of the parties. Before it was approved by the court, it was amended by the parties over the course of a hearing that ran in excess of four hours. There were several breaks during the hearing where the parties met, conferred and resolved their differences. After the settlement was approved by this court, all parties substantially changed their positions on the basis of the agreement. Tax advantages accrued to Mr. Weimar. The trustee received assets from Weimar and the J.W. creditors. Brown's and the J.W. creditors' state court complaints in aid of execution, which had been removed to the bankruptcy court, were dismissed with prejudice. The trustee's first interim distribution, approved by this court, paid funds to Brown and the J.W. creditors based on the 53/47% split specified in paragraph 17 of the settlement agreement, rather than the pro-rata formula provided by 11 U.S.C. § 726(b).

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[22] *Id.*, at 583-84 (citations omitted).

[23] Restatement (Second) of Contracts § 209 cmt. b (1981).

[24] *Lower Kuskokwim Sch. Dist. v. Alaska Diversified Contractors, Inc.,* 734 P.2d 62, 64 (Alaska 1987), *citing* Restatement (Second) of Contracts § 209(3) (1981).

Having concluded that the settlement agreement is an integrated agreement, the next step is to determine its meaning. Brown argues that the insurance claims were never discussed when the agreement was negotiated, so there is no way she could have assigned her interest to the trustee. She also argues, as noted above, that paragraph 10 of the agreement could not be interpreted to encompass her insurance claim, because the trustee can't "retain" an interest which he doesn't already hold. I find this argument unpersuasive because the trustee believed, at the time the agreement was negotiated, that he held the insurance claims by operation of law. Moreover, paragraph 10 of the agreement specifies that the trustee will retain "any insurance claims with respect to any insurance given in favor of Allvest as insured (or insurance of any nature may [sic] apply to underlying claims by J.W. et. al. and by Brown for the existing judgments held by these parties)." This is extremely broad language which expressly encompasses the insurance applying to Brown's claim, based upon the judgment held by her. The agreement says that the trustee will retain all insurance claims, including Brown's.

Another provision in the settlement agreement supports this interpretation. Paragraph 17, which was handwritten on the document during the course of the hearing on approval of the agreement, states:

> 17. The distribution of estate assets on account of general unsecured claims of J.W., et al. and Evelyn Brown shall be as follows: 47% J.W. et al and 53% Brown until J.W. et al have received total payments equal to the balance of principal and interest owed on the J.W. et al judgments against Debtor as of the petition date (approx. 1.4 million). Thereafter Brown will receive 100% of all subsequent distributions on account of unsecured claims.

There is no provision in this paragraph for the J.W. creditors or Brown to offset any insurance proceeds ultimately disbursed from Classic's liquidator against their claims in the

bankruptcy case. If the parties had not intended for these insurance claims to come into the estate, there should have been a provision in the agreement for either a credit or setoff of insurance recoveries against the funds to be disbursed to these two creditors from the bankruptcy estate. There wasn't, however, because the insurance proceeds were to come into the estate, along with the assets contributed by Weimar and the portion of the levied funds held in the J.W. creditors' state court proceeding. Both Brown and the J.W. creditors would look exclusively to the bankruptcy estate for payment of their claims, under the formula specified in paragraph 17.

Brown contends she never would have agreed to the 47/53% split if she had understood that the trustee intended to administer her insurance claim. She points out that, if the distribution formula contained in 11 U.S.C. § 726 were used instead, the J.W. creditors' large punitive damage claim would have been subordinated to her compensatory damage claim, resulting in the J.W. creditors receiving only $58,090 plus costs and Brown receiving the remainder of any funds disbursed by the trustee until her compensatory claim of more than $1 million had been paid in full.[25] If this is so, why did Brown agree to the split in the first place, unless she was also compromising her interest, as had the J.W. creditors by releasing funds that they had seized in state court levies, in order to induce Weimar and his related entities to enter into a global settlement? Her argument is not persuasive.

The settlement agreement says all insurance claims, including the tort claims held by the J.W. creditors and Brown, would be administered by the trustee. The weight of the extrinsic evidence produced by the parties supports this conclusion. Prior to the hearing on approval of the settlement agreement, the parties held several meetings. Attorneys representing Brown, the J.W. creditors, the trustee and Weimar were present at those

[25] *See* Brown's Mem. in Supp. of Mot. for Order that Proceeds of Ins. Policy are not Property of the Estate, filed Apr. 29, 2005 [Docket No. 204], at p. 5, n.2.

meetings. Trustee Kenneth Battley prepared a term sheet that listed insurance claims with a value of $440,000 as an asset of the estate. Battley also included $487,000 of cash seized by the J.W. creditors as an asset of the estate. This sheet was distributed to attorney Don Bauermeister, who represented Brown, and Brett von Gemmingen, who represented the J.W. creditors, during the course of the negotiations. There were apparently no specific discussions about what comprised the $440,000 in insurance claims listed on the trustee's term sheet. Bauermeister says it was his understanding that this figure represented any claims belonging to Weimar or the Weimar entities, which would be assigned to the trustee.[26] He didn't believe the figure included Brown's insurance claim, noting that Brown's claim alone at that time was worth in excess of $3.3 million, and that he had filed a claim on Brown's behalf with the liquidator for in excess of $10 million.[27] But, during the negotiations, he didn't clarify what was encompassed in the trustee's $440,000 estimate. The attorneys participating in the settlement negotiations made no comments relative to the estate's administration of the insurance claims. This lack of discussion does not provide a rationale for voiding the clear meaning of paragraph 10 of the settlement agreement.

John Seimers, attorney for the trustee, filed a motion to approve the settlement agreement on December 31, 2002. He had served the attorneys for Brown and the J.W. creditors with this motion via fax the previous day, on December 30, 2002. The motion reflects that the trustee anticipated administering significant insurance claims. It stated, at page 2:

> The settlement is fairly simple. William Weimar has agreed to pay in full all creditor claims of the bankruptcy estate for Allvest, Inc. except for the judgment creditor claims of J.W.,

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[26] Aff. of Don Bauermeister, attached to Brown's Reply Mem., filed July 25, 2005 [Docket No. 219] at p. 2.

[27] *Id.*

> et al. and the judgment creditor claims of Evelyn Brown. These two groups of judgment creditors will be the only creditors remaining in the estate once the settlement has been approved and consummated. The settlement requires Weimar to transfer assets (as described below) which will create a value to the estate of approximately $2.7 to $2.8 million. The aggregate value of the estate may actually exceed that amount if the trustee is successful in asserting additional insurance claims against insurers of Allvest, excess carriers, insurance brokers, and the like arising out of the tort claims originally asserted by J.W., et al., and by Evelyn Brown. One or more of Allvest's insurers is insolvent, but it is believed that in the insolvency proceedings, a dividend of 80% is possible and that a recovery to the estate might occur in the amount of $400,000 or more on a net basis. However, at present, these insurance claims are contingent and have not yet been realized.[28]

Later, at pages 4 through 6, the motion stated:

> In addition to the foregoing, Weimar will pay all pre-petition unsecured creditors in this case other than J.W., et al. and Evelyn Brown. J.W., et al. and Brown will be the only pre-petition creditors remaining. J.W., et al. and Evelyn Brown have in turn entered into an agreement *inter se* with respect to the distribution of assets in the Allvest case to creditors holding pre-petition unsecured claims. The total amount of the J.W., et al. claim as of the petition date is approximately $1.4 million. The total amount of the Evelyn Brown claim as of the petition date is in the neighborhood of $3.7 to 3.8 million. Because of an agreement that has been entered into between J.W., et al. and Brown, the normal pro rata distributions between those two creditors will be adjusted in a manner which favors J.W., et al., and Brown has also agreed to reduce Brown's total claim against the estate. The details of that arrangement will be separately disclosed. J.W., et al. and Brown have indicated that in light of this settlement *inter se*, they will agree to provide a release to Weimar, Weimar entities, and a variety of Weimar professionals and associates, as discussed below.
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> . . . .

[28]Mot. to Approve Settlement Agreement, filed Dec. 31, 2002 [Docket No. 69], at p. 2.

> The bankruptcy estate will retain whatever interest Allvest, Inc. had in any right to indemnification or other recovery from any insurance company with respect to the tort claims asserted by J.W., et al. and by Brown. This will include any related insurance claims, such as claims against the receiver in any insolvency proceedings for any such carriers, claims against brokers, claims against surplus line carriers, and so on. This will preserve to the estate the possibility of an additional recovery beyond the assets being transferred by Weimar to the estate.[29]

At the time the settlement was negotiated, the trustee believed the insurance claims of Brown and the J.W. creditors belonged to the bankruptcy estate as a matter of law. He has acted consistently with this belief since the settlement was approved. The J.W. creditors have also proceeded on the assumption that the insurance claims were to be administered by the trustee, but on the basis of the settlement agreement. The conduct of these two parties is consistent with the provisions of paragraph 10 of the settlement agreement.

I conclude that the contract meant what it said and that Brown has failed to provide compelling extrinsic evidence justifying her view of the contract. As this court has determined the meaning of the contract, Brown is precluded from enforcing any contrary or inconsistent agreements.[30]

Conclusion

Brown's motion for order that proceeds of insurance policy are not property of the estate will be denied. The J.W. creditors' motion for order that insurance claims are

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[29] *Id.* at pp. 4-6.

[30] *Alaska Diversified Contractors, Inc.,* 778 P.2d at 584.

part of settlement fund will be granted. An order and judgment will be entered consistent with this memorandum decision.

DATED: January 12, 2006

BY THE COURT

DONALD MacDONALD IV
United States Bankruptcy Judge