UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

PENN QUALITY MEATS COOPERATIVE, INC. — CASE NO. 97-60780

Debtor

AETNA CASUALTY & SURETY COMPANY

Plaintiff

vs. — ADV. PRO. NO. 97-70150

L. DAVID ZUBE as CHAPTER 7 TRUSTEE FOR PENN QUALITY MEATS COOPERATIVE, INC.; ALBERT GINGERICH, d/b/a Prime Veal Feeds; JACOB VIERZEN; JACOB WESTERBAAN; RAYMOND VISSER; PUEBLO FARMS; MCCARTHY; SUSQUEHANNA INDUSTRIES; GROBER, INC., USA; JAIME FARGOLNI; DAVID J. DAVIDSON; MICHAEL J. WEBER; ROBERT RATHBUN; LARRY FOREST; JOHN MULAWKA; JOHN LEE, III; MARTIN BEACHEY; N.Y. PENN VEAL; ROBERT JONES; PAUL FAIRCHOK; JOHN MAY; BRYAN BENJAMIN; TRACEY YOUNG; FRED EATON; NEW YORK BEEF; INDUSTRY COUNCIL, INC.; QUALITY FEED, INC.

Defendants

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND REFERENCE

Presently before the Court is a motion for summary judgment filed on January 9, 1998, by The Aetna Casualty & Surety Company ("Aetna") in the adversary proceeding commenced by Aetna on June 30, 1997, against twenty-six defendants. Aetna seeks an order discharging it from liability on Bond No. 45S 100799436 (the "Bond"). In addition, Aetna requests that the Court enjoin the defendants from instituting or prosecuting any action against it in state or federal court.[1] Finally, Aetna seeks an award of attorneys' fees and costs.

[1] On or about November 7, 1997, Susquehanna Industries, Inc. and Jacob Westerbaan, who are named defendants in the matter herein, commenced an action in the United States District Court for the Northern District of New York ("District Court action"). *See* Exhibit 6 of Affidavit of David C. Dreifuss, Esq., sworn to January 7, 1998 ("Dreifuss Affidavit").

Opposition to Aetna's request that its attorneys' fees and costs be paid from the Bond was filed on behalf of defendant Albert Gingerich d/b/a Prime Veal Feeds on February 3, 1998. Also opposing Aetna's motion are Susquehanna Industries, Inc. and Jacob Westerbaan ("Cross-Movants"). The Cross-Movants request that the Court dismiss Aetna's complaint ("Interpleader Complaint") on the basis that the Court lacks subject matter jurisdiction. The Cross-Movants also object to the payment of Aetna's legal fees from the Bond proceeds.

On February 6, 1998, the chapter 7 trustee, L. David Zube, Esq. ("Trustee"), filed an affidavit in response to both the motion and cross-motion. The Trustee takes the position that the adversary proceeding is a "core proceeding" in which Aetna is entitled to summary judgment.

Both motions were heard at the Court's regular motion term on February 10, 1998, at Binghamton, New York. Following oral argument, the matter was submitted for decision.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), 157(b)(3) and 157(c)(1).

FACTS

On September 20, 1996, Penn Quality Meats Cooperative, Inc. ("Debtor") filed a voluntary petition ("Petition") in the U.S. Bankruptcy Court, Eastern District of Pennsylvania ("Pennsylvania Court"), pursuant to chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 101-1330)

("Code"). According to the case docket, on December 12, 1996, the Debtor filed a motion to convert the case from chapter 11 to chapter 7. On December 19, 1996, a motion was made by the U.S. Trustee to dismiss the case or transfer it to the Northern District of New York. On February 5, 1997, the Pennsylvania Court entered an order granting the Debtor's motion to convert and also entered a consent order transferring the case to this Court. The transfer became effective on February 24, 1997.

At the time it filed its Petition, the Debtor was a for-profit member (nonstock) agricultural cooperative in the business of slaughtering and processing veal for "growers" who were members of the cooperative. *See* Exhibit "A" of the Petition.

For purposes of its motion for summary judgment and in compliance with Local Rule 7056-1, Aetna submitted its proposed Statement of Material Facts, which included:

1.* On April 26, 1993, Aetna issued a miscellaneous surety bond for the amount of $190,000 on behalf of the Debtor pursuant to the Federal Packers and Stockyards Act (7 U.S.C. §§ 181-231) (the "PSA"). That amount was later increased to $205,000. *See* Exhibit 2 of Dreifuss Affidavit.

2.* The defendants furnished calves to the Debtor, which, upon information and belief, were accepted and used by the Debtor.

3.* The defendants allegedly did not receive full payment for the calves they furnished.

4. The defendants filed claims for payment under the Bond. The sum of the claims totaled approximately $1,484,717.45.[2]

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[2] According to the Affidavit of Susan Camilli, Esq., sworn to June 26, 1997, in Support of Aetna's Proof of Claim ("Camilli Affidavit"), Aetna received claims totaling $1,484,193.70. *See* Camilli Affidavit at ¶ 7.

5. The defendants filed their claims with the Grain Inspection, Packers and Stockyards Administration ("GIPSA") and/or directly with Aetna, both of which investigated the claims.

6. Based on the analysis of GIPSA, *see* Exhibit 5 of Dreifuss Affidavit, and Aetna's findings, Aetna determined it could not decide how to distribute the Bond proceeds. Therefore, Aetna filed this interpleader action.

7.* Legal counsel for GIPSA concluded that "the Bankruptcy Court is the proper forum for a determination of the disposition of the trust assets, despite the fact that the beneficial interest in the assets is outside the bankruptcy estate." *See id.*

8. Defendants are citizens of various states, including Vermont, New York, Ohio and Pennsylvania.

9. All defendants have filed proofs of claim in the principal case captioned above.

10. The defendants have either filed an Answer to the Interpleader Complaint and/or mailed a Waiver of Service of Summons to Aetna's counsel.

11. All Waivers of Service of Summons received were filed with the Clerk of the Court.

12.* On December 18, 1997, Aetna sent the Clerk of this Court notice pursuant to R. 767(b) of the Local Rules of Bankruptcy Practice for the Northern District of New York.[3] *See* Exhibit 8 of Dreifuss Affidavit.

13. The Debtor and the Trustee have an interest in the outcome of this litigation because Aetna would be subrogated to any of the defendants whose claims are satisfied out of the Bond proceeds.

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[3] The Local Rules of Bankruptcy Practice for the Northern District of New York were amended and, as amended, took effect January 1, 1998. Former Local Rule 767(b) is now embodied in L.R. 7067-1(b).

14. This appears to be the only Court with jurisdiction over all of the claimants.

The Cross-Movants do not dispute the facts set forth in those paragraphs asterisked by the Court. With respect to Paragraphs 4-6 and 8-12, the Cross-Movants state that they have no knowledged or information sufficient to form a belief as to their truth. They expressly deny the statement made in Paragraph 14 and assert that the Court does not have jurisdiction over the defendants/claimants. With respect to Paragraph 13, the Cross-Movants merely acknowledge Aetna's right to subrogation to the extent that any claims of the defendants are satisfied, in full or in part, by the Bond.

ARGUMENTS

Aetna asserts that in order to avoid the costs of time and legal fees associated with potential multiple litigations in connection with conflicting claims to the Bond proceeds, it should be permitted to deposit $205,000 into the registry of the Court and have this Court determine the rights of the various defendants to the monies. Cross-Movants do not appear to oppose the relief sought by Aetna, with the exception of Aetna's request that its attorneys' fees be paid from the Bond proceeds. Rather, they dispute this Court's jurisdiction to provide the relief. They contend that the Bond proceeds are not property of the estate. Furthermore, they assert that because Aetna has a right of subrogation, any distribution of the Bond proceeds to the claimants/defendants will not have any effect on the number, type, quality or amount of the claims against the Debtor. *See* Affidavit of Alfred Paniccia, Jr., Esq., sworn to January 23, 1998 ("Paniccia Affidavit") at ¶ 11. They make the argument that any reduction in the amount of the claims of the defendants will

result in a corresponding increase in the amount of Aetna's claim.[4] Therefore, it is the position of the Cross-Movants that this Court lacks jurisdiction to entertain the adversary proceeding. They request that the Court dismiss the Interpleader Complaint.

In response, Aetna requests that the Court stay the adversary proceeding to allow it an opportunity to apply to the District Court for withdrawal of the reference in the event that this Court determines that the matter is neither a core nor a non-core proceeding. *See* Aetna's Opposition to Cross-Motion, filed February 5, 1998, at 15. Aetna asserts that dismissal of its Interpleader Complaint would not serve any party's interest because all defendants have been served and some have answered or have executed Waivers of Service of Summons. *See id.*

With respect to Aetna's request for attorneys' fees and costs, both the Cross-Movants and Gingerich direct the Court's attention to ¶ 4(g) of the Bond which provides that "[t]he proceeds of this bond shall not be used to pay fees, salaries, or expenses for legal representation of the Surety or the Principal [Debtor]." *See* Exhibit "A" of Camilli Affidavit.

DISCUSSION

Subject Matter Jurisdiction

The Court's subject matter jurisdiction is defined in 28 U.S.C. §§ 157 and 1334. *See Plaza at Latham v. Citicorp. North American*, 150 B.R. 507, 510 (N.D.N.Y. 1993). This Court

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[4] On June 30, 1997, Aetna filed a proof of claim in the amount of $139,753.60, including legal fees of $4,753.60, based on the assertion that at some point it drew on an Irrevocable Letter of Credit from the Debtor in the amount of $70,000, thereby reducing its claim for the full amount of the Bond. *See* Camilli Affidavit at ¶ 9.

has subject matter jurisdiction with respect to (1) cases "under title 11, " (2) civil proceedings "arising under title 11," (3) civil proceedings "arising in" a case under title 11 and (4) civil proceedings "related to" a case under title 11. 28 U.S.C. § 157(a). "Bankruptcy judges *may hear and determine* all cases under title 11 and all core proceedings arising under title ll . . . and may enter appropriate orders and judgments. . . ." 28 U.S.C. § 157(b)(1) (emphasis added).

> A bankruptcy judge may also *hear* non-core proceedings that are otherwise related to a title 11 case. In such a proceeding, however, the bankruptcy judge may not *determine* the issue, but may only submit proposed findings of fact and conclusions of law to the district court.

In re Best Products, Inc., 68 F.3d 26, 30 (2d Cir. 1995), citing 28 U.S.C. § 157(c)(1).

Section 157(b)(3) authorizes the bankruptcy judge to make a determination whether a proceeding is a "core" proceeding or otherwise related to the bankruptcy case. In this regard, a review of the legislative history of 28 U.S.C. § 157 supports the conclusion that Congress intended "a broad interpretation of the parameters of a core proceeding." *See id.* at 31, citing *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1398 (2d Cir.), *vacated,* 498 U.S. 964, 111 S.Ct. 425, 112 L.Ed.2d 408 (1990), *reinstated*, 924 F.2d 36 (2d Cir. 1991).

Whether or not a proceeding is a "core" proceeding depends on the nature of the proceeding if it is not one of those specifically set forth in 28 U.S.C. 157(b)(2). *See In re Kings Falls Power Corp.*, 185 B.R. 431, 438 (Bankr. N.D.N.Y. 1995), citing *In re S.G.Phillips Constructors, Inc.*, 45 F.3d 702, 707 (2d Cir. 1995). Aetna suggests that this matter falls within several of those core proceedings enumerated in 28 U.S.C. § 157(b)(2), specifically, (1) matters concerning the administration of the estate (§ 157(b)(2)(A)); (2) determinations of the validity, extent or priority of liens (§ 157(b)(2)(K)), and (3) other proceedings affecting the adjustment

of the debtor-creditor relationship (§ 157(b)(2)(0)).

The Court's main focus of inquiry must be on whether the essence of the proceeding is "'at the core of the federal bankruptcy power.'" Id., quoting *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). A determination of the proper distribution of the Bond proceeds may ultimately impact on the administration of the estate by the Trustee. At the same time, it does not appear that the Bond proceeds are property of the estate. The Debtor is not a beneficiary of the monies; rather, the monies are intended to secure performance of the Debtor's obligations to the "growers" of the livestock it was sold. *See* Packers and Stockyards Act, Pub.L. No. 94-410, 1976 U.S.C.C.A.N. 2267. Whether Gingerich has a secured claim in the Debtor's case, as Aetna contends Gingerich has claimed, *see* Interpleader Complaint at ¶ 16, should not impact on any determination of whether Gingerich is entitled to recover from the Bond proceeds. Furthermore, the fact that there may be an impact on the debtor-creditor relationship does not convince the Court that there is a basis for a finding of core jurisdiction under the circumstances. A determination of the distribution of the Bond proceeds arises under the PSA, not the Bankruptcy Code. Furthermore, the issues to be addressed did not arise in the case. According to the Bond Claim Analysis set forth at Exhibit 3 of the Dreifuss Affidavit, the defendants' claims were received by GIPSA between June and August 1996, prior to the commencement of the bankruptcy case on September 20, 1996. Therefore, the Court concludes that the matter is not a "core" proceeding.

The Court must then consider whether it is "related to" the bankruptcy case. In *In re Turner*, 724 F.2d 338, 340-41 (2d Cir. 1983), the Second Circuit Court of Appeals held that in order to be found to be "related to," the proceeding must have a "significant connection" to the

debtor's bankruptcy case.[5] The Second Circuit subsequently clarified its position in this regard in *In re Cuyahoga Equip. Corp.*, 980 F.2d 110 (2d Cir. 1992), in which it indicated that "The test for determining whether litigation has a significant connection with a pending bankruptcy proceeding is whether its outcome might have any 'conceivable effect' on the bankruptcy estate." *See id.* at 114 (citations omitted).

Clearly, this matter falls into this definition because an adjudication of the rights to the Bond proceeds is likely to have a "conceivable effect" on the bankruptcy estate. According to GIPSA, unpaid sellers of livestock to the Debtor who have complied with the statutory notice requirements of PSA § 196, must first seek distribution of trust assets,[6] *see* Exhibit 5 of Dreifuss Affidavit (Letter, dated October 8, 1996, to the Honorable Thomas M. Twardowski, U.S. Bankruptcy Judge, Eastern District of Pennsylvania), before seeking recovery from the Bond proceeds pursuant to PSA § 204. If this is, indeed, the case and any valid claims to the Bond proceeds remain after distribution of trust assets, then further distribution on the individual defendants' claims out of the Bond proceeds should reduce the unsecured claims against the Debtor's estate. *See Nationwide Mut. Fire Ins. Co. v. Eason*, 736 F.2d 130, 132 n.2 (4th Cir.

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[5] This approach has been found by some courts to be rather narrow. *See e.g. In re Gen. Am. Communications Corp.*, 130 B.R. 136, 156 (S.D.N.Y. 1991). The more frequently cited test is that found in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), which required the court to consider whether the outcome of the proceeding would have any "conceivable effect" on the bankruptcy estate.

[6] Section 196 of the PSA requires that a trust be imposed on certain assets of a packer for the benefit of unpaid cash sellers of livestock. *See* 7 U.S.C. § 196. According to the U.S. Department of Agriculture, the Bankruptcy Court has jurisdiction with respect to the "trust res" given that the Debtor holds legal title to the property held in trust, including accounts receivables, inventory and proceeds derived from cash sales of livestock. *See* Exhibit 5 of the Dreifuss Affidavit (Letter to the Trustee, dated October 3, 1997).

1984) (noting that "[t]he relationship between the interpleader action and the bankruptcy case involving [the debtor] was manifest. Since the bond beneficiaries were also unsecured creditors of [the debtor], any payment of the bond proceeds to the beneficiaries would simultaneously reduce the beneficiaries' unsecured claims against the estate, thereby making available a larger share of the estate for other unsecured creditors."). Even if Aetna is entitled to subrogation, it has indicated that its potential base claim is not for $205,000, but for $135,000 because it received payment from the Debtor on its Letter of Credit. Therefore, to the extent that the $205,000 in Bond proceeds is deposited with the Court and ultimately distributed to the defendants, there should be a net reduction of the claims against the estate. The fact that the Bond proceeds may not be property of the Debtor's estate should not, under these circumstances, deprive the Court of some level of jurisdiction to determine their distribution. *See id.* at 133. Accordingly, the Court concludes that it has "related to" jurisdiction.

Motion for Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), which is made applicable to this proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), the Court is to grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment is particularly appropriate in the context of an interpleader action. *See Baron Bros. v. Stewart,* 182 F.Supp. 893, 895 (S.D.N.Y. 1960). Indeed, except for the issue of subject matter jurisdiction and Aetna's request for attorneys' fees and costs, Aetna's

motion for summary judgment is unopposed.

An interpleader action occurs in two stages. *See id; General Accident Group v. Gagliardi*, 593 F.Supp. 1080, 1087 (D.Conn. 1984), *aff'd* 767 F.2d 907 (2d Cir. 1985). Initially, the Court must determine whether Aetna has met the statutory requirements set forth in 28 U.S.C. § 1335 (the "Interpleader Statute") and is, therefore, entitled to the relief sought. *See id.* The second stage involves an adjudication of the adverse claims of the defendants and disbursal of the proceeds. *Id.* It is only the first stage for which Aetna seeks summary judgment.

The Interpleader Statute sets forth five criteria relevant to this action that must be met in order for a court to grant interpleader relief: (1) the interpleader action must be brought by a stakeholder that issued the bond and is in possession of the funds to be distributed; (2) the bond must be in the amount of $500 or more; (3) there must be two or more adverse claimants asserting a right to the bond proceeds; (4) at least two of the adverse claimants must be of diverse citizenship; and (5) the full amount of the bond must be deposited into the court's registry. 28 U.S.C. § 1335.

With these criteria in mind, the Court finds that Aetna issued the Bond to the Debtor in the amount of $190,000, which was subsequently increased to $205,000. Aetna's Interpleader Complaint identifies twenty-six defendants, including the Cross-Movants, Gingerich and the Trustee. At least two of the defendants, namely, the Cross-Movants, have asserted a right to the Bond proceeds by commencing an action in the District Court and can be viewed as adverse claimants for purposes of the interpleader action. According to the claim analysis performed by GIPSA, it is evident that the defendants are citizens of various states, including Ohio, Vermont, New York and Pennsylvania. *See* Exhibit 3 of Dreifuss Affidavit. The GIPSA analysis alleges

that there are approximately $1,307,568.34 in valid bond claims. *See* Exhibit 3 of Dreifuss Affidavit. Finally, Aetna has acknowledged its intent to deposit the $205,000 in Bond proceeds with the registry of the Court upon the Court's order. Thus, all five criteria have been satisfied.

The statute is to be liberally construed in order to afford a stakeholder protection from multiple liability in the situation in which there are conflicting claims. *See Bankers Trust Co. of Western New York v. Crawford*, 559 F.Supp. 1359, 1363 (W.D.N.Y. 1983). It is particularly appropriate in the situation in which the fund or bond proceeds are insufficient to satisfy the claims. *See 6247 Atlas Corp. v. Marine Ins. Co., Ltd.,* 155 F.R.D. 454, 462 (S.D.N.Y. 1994). The Court finds that interpleader is proper under these facts.

The Court must then address Aetna's request that the defendants be enjoined from asserting or prosecuting any of their claims against it in connection with the Bond proceeds. Such relief is expressly provided for in 28 U.S.C. § 2361, which authorizes the issuance of an order

> restraining [claimants] from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court.

Without such an injunction, it is clear that the very purpose for permitting interpleader, namely to avoid multiple and vexatious litigation in defending multiple claims to the same funds, would be thwarted. *See State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 527, 534, 87 S.Ct. 1199, 1205, 18 L.Ed.2d 270 (1967). Therefore, the Court determines it appropriate to enjoin the defendants from asserting or prosecuting any claims against Aetna which arise under the Bond.

As a final matter, the Court must address Aetna's request that its attorneys' fees and costs in connection with the interpleader action be paid out of the Bond proceeds. An award of

attorneys' fees to an interpleader stakeholder is within the discretion of the Court. *See In re Mandalay Shores Co-op. Housing*, 178 B.R. 879, 882 (Bankr. M.D.Fl.), *aff'd* 191 B.R. 229 (M.D.Fl. 1995). In making this determination, the courts consider

> whether the allowance of fees and costs will deplete the fund; whether the filing of an interpleader action is part of the stakeholder's ordinary course of business; whether the stakeholder is innocent or has contributed to the controversy; whether the stakeholder has an interest in the outcome of the proceedings; whether the stakeholder has unduly delayed the proceedings; whether the fee requested is modest or substantial; and whether the stakeholder assisted in preserving the fund. (citation omitted). Typically, an award is granted only when the stakeholder is innocent and disinterested, has deposited the fund in the registry of the Court, and has asked for a discharge of further liability.

Id.

In this case, Aetna seeks approximately $5,000 in legal fees, which will certainly not deplete the Bond proceeds of $205,000, which Aetna proposes to deposit in the registry of the Court. This request appears to be a modest one when one considers that it not only had to file and serve the complaint but also had to respond to the cross-motion objecting to the Court's jurisdiction, as well as defend itself in the District Court action. There is no evidence that Aetna contributed to the controversy or has any interest in the outcome of the proceeding. The real question is whether the filing of the Interpleader Complaint is part of the ordinary course of its business.

The potential for competing claims in connection with the issuance of the Bond is certainly a foreseeable and normal risk which Aetna assumed. As one court has noted,

> [A]ttorneys' fees should not be granted to the stakeholder as a matter of course in interpleader actions concerning the proceeds of insurance policies. Although it is true that an interpleader action benefits both claimants and the courts by promoting

> expeditious resolution of the controversy in one forum, the chief beneficiary of an interpleader action is the insurance company. An inevitable and normal risk of the insurance business is the possibility of conflicting claims to the proceeds of a policy. An interpleader action relieves the company of this risk by eliminating the potential harassment and expense of a multiplicity of claims and suits. Furthermore, it discharges the company from all liability in regard to the fund. It thus seems unreasonable to award an insurance company fees for bringing an action which is primarily in its own self-interest.

Minnesota Mutual Life Insur. Co. v. Gustafson, 415 F.Supp. 615, 618-19 (N.D.Ill. 1976); *see also Fidelity & Deposit Co. of Maryland v. A to Z Equipment* Corp., 258 F.Supp. 862 (E.D.N.Y. 1966), citing *Travelers Indemnity Co. v. Israel*, 354 F.2d 488, 490 (2d Cir. 1965). In *A to Z Equipment Corp.* the interpleading party had issued a surety bond on behalf of a ship repair company which later filed bankruptcy. The court denied Travelers' request for attorney's fees, holding that "[t]he ordinary costs of the plaintiff in transacting its business may not be taxed to the parties insured." *See A to Z Equipment Corp.*, 258 F.Supp. at 863.

The Second Circuit in *Septembertide Pub. v. Stein & Day, Inc.*, 884 F.2d 675 (2d Cir. 1989), a case cited by Aetna in support of its request, is easily distinguishable from the conclusion reached in *Israel* and in *A to Z Equipment Corp.*. In *Septembertide* the interpleader was a paperback publisher that was faced with "a situation in which several parties had laid claim to monies it concededly owed." *See Septembertide*, 884. F.2d at 677. The publisher was not an insurance company or surety and in the ordinary course of its business could not have anticipated that it would be faced with conflicting claims to monies it owed for the right to publish a paperback edition of a particular book.

The Court concludes that Aetna, which has submitted neither affidavits nor time records, may not recover its attorneys' fees and costs associated with commencing the interpleader action

from the Bond proceeds. The Court's conclusion is further supported by the provision in the Bond which expressly prohibits the Bond proceeds from being used to pay for legal representation of Aetna. *See* Exhibit "A" of Camilli Affidavit. The application for the Bond provides that it is the Debtor that is responsible for any attorneys' fees which Aetna might "sustain or incur by reason or in consequence of its suretyship." *See* Exhibit "B" of Camilli Affidavit.

Based on the foregoing, it is hereby

RECOMMENDED to the United States District Court for the Northern District of New York pursuant to 28 U.S.C. § 157(c)(1) that

1) Cross-Movants request that the Interpleader Complaint be dismissed based on a lack of jurisdiction be denied;

2) Aetna's motion seeking summary judgment be granted to the extent of

   a) requiring that Aetna deposit with the registry of the Court $205,000 in Bond proceeds,

   b) enjoining the defendants from instituting or prosecuting any action against Aetna in state or federal court, and

   c) discharging it from liability on Bond No. 45S 100799436 ;

3) Aetna's motion seeking an award of attorneys' fees and costs from the Bond proceeds be denied; and finally,

4) the matter be referred back to this Court for a hearing and determination on stage two of the interpleader action pursuant to 28 U.S.C. § 157(c)(2) if all parties consent; otherwise, the matter be withdrawn to the District Court.[7]

Dated at Utica, New York

this 8th day of May 1998

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[7] If, as GIPSA has alleged, a determination must first be made concerning a distribution of trust assets before a distribution of Bond proceeds can be made, for purposes of judicial economy it may be appropriate to consolidate the two actions in the event that one is commenced to recover the trust assets in this Court since both appear to have common issues of fact.