

To resolve a dispute between the District and the DCHA receiver regarding who was responsible for paying pre-receivership claims, the District and DCHA entered into an *ex gratia* agreement in 1999 which provides that DCHA would be responsible for all pre-receivership claims of which DCHA had notice but failed to disclose to the District in the District-DCHA agreement. Two of the Schlosser cases, CAB Nos. D-0903 and D-0905, appear on the attachments to the agreement but the other appeal numbers do not. The Board resolved CAB No. D-0903 on summary judgment, determined an amount due to Schlosser, and the District paid Schlosser. After the new appeal in CAB No. D-1122 was filed, the District paid Schlosser an amount to resolve CAB No. D-0905. Schlosser seeks the remaining amounts due under the 1994 Schlosser-District settlement agreement.

We conclude that the District, not DCHA, is responsible for making payment to Schlosser for the remaining amounts due under the Schlosser-District settlement agreement. The District government, not DCHA or its receiver, entered into the settlement agreement with Schlosser because as of November 1994, neither DCHA nor the receivership had been created, and DPAH still existed and was an agency of the District government. The Schlosser-District settlement agreement superseded the original DPAH contract claims, and the settlement agreement does not constitute a “pre-receivership claim” as defined in the District-DCHA agreement. Alternatively, even if we were to conclude that the District-DCHA agreement were meant to cover the Schlosser-District settlement, we believe that the Schlosser settlement was effectively incorporated in the schedules of the District-DCHA settlement agreement. Accordingly, the District shall pay Schlosser \$395,000, less the amount the District has already paid Schlosser for CAB No. D-0905, plus interest as provided in the settlement agreement.

### **BACKGROUND**

Between January 3 and March 17, 1992, Schlosser filed notices of appeal from deemed denials of various claims it had filed regarding Contract No. 4641-72-A1-86 with the District to renovate the Arthur Capper dwellings. Those appeals were docketed at the Board as CAB Nos. D-0903, D-0904, D-0905, D-0906, D-0907, D-0908, and D-0911. The only parties to the appeals were Schlosser and the District government, because DCHA did not come into existence until March 1995. In an order of May 15, 1992, the Board consolidated all of the appeals for further proceedings. In the order, the Board noted that CAB No. D-0904 had been settled and payment had been made by the District but execution of a release was pending. CAB D-0904 was subsequently dismissed by order of May 20, 1994. After the May 1992 consolidation, the parties and the Board generally listed in the case caption for subsequent pleadings all of the case numbers starting with CAB No. D-0903, but starting in approximately September 1993, the District began abbreviating the caption to “CAB No. D-0903, etc.” or “CAB No. D-0903, et al.”

Schlosser moved for summary judgment only in CAB No. D-0903, which was granted by the Board in a decision dated September 13, 1994, determining the District liable for \$644,373 plus interest. The District paid Schlosser. After the Board resolved CAB No. D-0903, only CAB Nos. D-0905, D-0906, D-0907, D-0908, and D-0911 remained pending. With a prehearing conference set for September 28, 1994, and a hearing on the merits scheduled to begin October 3, 1994, the District and Schlosser reached a settlement of the remaining appeals and so informed the Board on September 27, 1994. On October 4, 1994, the District reported that it would pay Schlosser a total of \$395,000 under the settlement, with \$165,00 due at the time the settlement agreement was executed, \$115,000 within 60 days of execution, and the remaining balance within 120 days of execution. (Board order, dated October 4, 1994). Schlosser and the District executed a formal settlement agreement effective November 4, 1994, which provides in relevant part:

Now Therefore, in consideration of the foregoing and for other good and

valuable consideration, the sufficiency of which is hereby acknowledged, in compromise, settlement and release of the claims (CAB Nos. D-905, D-906, D-907, D-908 and D-911), the parties agree as follows:

1. W.M. Schlosser Company, Inc. agrees to accept and the District agrees to pay three hundred ninety-five thousand dollars (\$395,000) as full settlement of the claims of W.M. Schlosser Company, Inc. (CAB Nos. D-905, D-906, D-907, D-908 and D-911). Such payment is to be made by check to W.M. Schlosser Company Inc. in the amount of \$165,000 upon execution of this document with the remaining balance to be paid within 120 days of the execution of this agreement in two (2) payments of \$115,000 each. The first payment of \$115,000 is due 60 days from the date of execution of this agreement. Such payment is to be made by mailing a check drawn to the order of W.M. Schlosser Company, Inc.

2. Upon payment to W.M. Schlosser Company, Inc. of the \$395,000 by the District, W.M. Schlosser and the District hereby release and forever discharge one another and their respective heirs, relatives, predecessors, successors . . . from any and all causes of action . . . which W.M. Schlosser and the District, their heirs, relatives, predecessors, successors . . . may have now or hereafter against one another pertaining to, arising from or relating to the appeals (CAB Nos. D-905, D-906, D-907, D-908, and D-911) and/or any and all matters or actions of either party relating to the claims at issue in CAB Nos. D-905, D-906, D-907, D-908 and D-911.

. . . .

4. The payment of any monies between the District and W.M. Schlosser and Company, Inc., or any amount thereof is not to be construed as the admission of liability on the part of either party but merely as a compromise of the claims (CAB Nos. D-905, D-906, D-907, D-908, and D-911) in such manner so as to avoid litigation, arbitration or any further negotiation o[r] discussion of the claims of W.M. Schlosser and Company, Inc.

5. Upon payment of the \$395,000 in full by the District to W.M. Schlosser and Company, Inc., W.M. Schlosser and Company, Inc. agree[s] to file a motion with the Board requesting dismissal of CAB Nos. D-905, D-906, D-907, D-908 and D-911, with prejudice.

6. In the event the District fails to make full payment to W.M. Schlosser and Company, Inc. of the \$395,000 within 120 calendar days of execution of this Agreement interest shall accrue on the remaining balance at the statutory rate of interest until paid.

7. This Agreement contains the entire agreement between the parties

hereto and the terms of the Agreement are contractual and not mere recital. This Agreement may be amended only by written instrument executed by the parties. The parties have carefully read and understand the contents of this Agreement and signed the same of their own free will and after consulting with their attorneys, and it is the intention of the parties to be legally bound hereby. No other prior contemporaneous agreements, oral or written, respecting or relating to the subject matter of the Agreement shall be deemed to exist in any way or bind any of the parties.

8. Both W.M. Schlosser and Company, Inc. and the District shall bear their own costs with respect to the negotiation and drafting of this Agreement and with respect to all acts required by the terms hereof to be undertaken and performed by them respectively.

. . . .

11. Each of the undersigned warrants that he or she is an authorized representative of the party designated, is authorized to bind such party, and accepts this Agreement on that party's behalf.

Andrew Schlosser signed the settlement agreement on behalf of Schlosser and J.W. Lanum (a DPAH contracting officer) signed on behalf of the District of Columbia government.

In a status conference on December 12, 1994, Schlosser reported that it had received no payment from the District although the settlement agreement had been executed a month earlier. In a status report filed by the District on December 16, 1994, captioned "CAB No. D-903, etc.", the District stated:

The Office of the Contracting Officer has reported to counsel that the settlement agreement in D-905, etc. has been forwarded to the Office of the Comptroller and that the first One Hundred and Thirty-five Thousand Dollars (\$135,000) in payment has been escrowed. However, it has been reported back to the Office of Contracting Officer and Civil Division of the Corporation Counsel's Office that no payments will be forthcoming, except on matters involving health and public safety, before the end of the year. There is no further information from the Comptroller as to when judgments or settlements will be paid or when funds will be released.

The District has never made the payments called for under the Schlosser-District settlement agreement. It is clear from a review of the pleadings in CAB Nos. D-0903 through D-0911 that counsel for the District generally referred to the consolidated cases using the first appeal number of the series. Thus, CAB No. D-0903 was the lead appeal number in the series prior to the Board's summary judgment decision in September 1994, and CAB No. D-0905 became the lead appeal number in the series thereafter.

There had been a history of problems within DPAH and those difficulties prompted legislative and court action. Effective March 1995, Council legislation created DCHA, abolished DPAH, and transferred DPAH functions and assets to DCHA. Although DCHA was created as an instrumentality of the District government, it was to have a legal existence separate from the District government. Meanwhile, to resolve a court action pending in Superior Court in *Pearson, et al. v. Kelly*, the District entered into a consent order in May 1995, which appointed a receiver to exercise all powers assigned to the newly created DCHA and its predecessor DPAH.

Like the underlying 1992 appeals involved in this case, there were a variety of claims that had been asserted against the District and DPAH prior to the creation of DCHA and the receivership. The *Pearson* consent order stated that DCHA would pay settlements and judgments “arising out of claims or actions based upon acts of the employees or agents of DPAH or its successor agency committed during the term of receivership” but the consent order said nothing explicitly about pre-receivership claims. The District and the DCHA receiver could not agree on who was responsible for paying pre-receivership claims. That issue arose in a number of cases filed with the Board as well as in other types of cases filed before other tribunals. While the issue was being litigated in the Court of Appeals, the District and DCHA entered into an agreement in 1999 to resolve this intra-governmental dispute. The 1999 agreement provides in relevant part:

The District of Columbia (“District”) and the D.C. Housing Authority (“DCHA”) hereby agree as follows:

1. It is in the public interest to resolve their respective responsibilities for “pre-receivership” and “post-receivership” claims (as defined below in paragraph 2.). All pre-receivership claims which have been presented in writing to DCHA (or to its predecessor agencies) are listed on Attachment A.

2. For purposes of this Agreement, “pre-receivership claims” are (i) contract claims arising from causes of action that occurred prior to May 19, 1995 under contracts entered into by the Department of Public and Assisted Housing (“DPAH”) or the Department of Housing and Community Development (“DHCD”); (ii) employment actions occurring prior to May 19, 1995, concerning DPAH or DHCD employees and (iii) injuries occurring prior to May 19, 1995, from tortious acts or omissions of DPAH or DHCD employees or agents. The “post-receivership claims” are contract, employment, and tort claims against DPAH or DCHA arising on or after May 19, 1995.

3. The District and DCHA accordingly agree that - -

a. In settlement of the parties dispute over who should pay the pre-

receivership claims - - which they recognize may exceed [redacted amount] million (including accrued interest) - - DCHA will pay the District [redacted amount] million ex gratia to avoid further litigation costs by DCHA associated with outstanding pre-receivership claims. This payment shall be made by check payable to the D.C. Treasurer and delivered to the Office of the Corporation Counsel ("OCC"). At the District's option, the payment shall be either 1) in two amounts, one in FY 1999 and one in FY 2000, or 2) paid in one amount into a special fund designated by the District. The payment, or if the District so elects, the first payment, shall be made upon delivery of the quitclaim deed for the public housing properties described below in paragraph 3.f.1. If the District elects two payments, the second payment shall be made by November 1, 1999.

b. The District will assume sole responsibility for liability arising from (i) the pre-receivership cases listed in Attachment A, (ii) pre-receivership claims, not appearing on Attachment A, which have not been presented in writing to DCHA, DHCD, or to DPAH prior to the date of this agreement; and (iii) pre-receivership claims (that is, claims arising before the entry on May 19, 1995 of the order in *Pearson v. Kelley*, No. 92-CV-14030 (D.C. Super. Ct., Graae, J.), not appearing on Attachment A, which arise out of the cases listed in Attachment B. DCHA warrants that all contract and employment claims filed with DPAH or DCHA on or before May 19, 1995 have been preserved by DCHA and will be made available to the District upon request. Notwithstanding any other provision of this agreement, the District shall not be liable for any liability resulting from DCHA's refusal to reinstate any employee pursuant to an administrative or court order, but the District shall be liable for back pay for pre-receivership employment claims as defined in paragraph 2(ii) above.

c. DCHA will assume sole responsibility for post-receivership claims (that is, claims arising after the entry on May 19, 1995 of the order in *Pearson v. Kelly*, No 92-CV-14030 (D.C. Super. Ct., Graae J.)), and for all pre-receivership claims presented in writing to DCHA or to DPAH, prior to the date of this Agreement, but not appearing on Attachment A, except (iii) all pre-receivership claims arising out of the cases listed in Attachment B. DCHA shall be responsible for any liability arising out of its refusal to reinstate an employee pursuant to an administrative or court order.

d. In all forums, administrative and judicial, the District's and DCHA's legal positions will be consistent with this agreement. The parties promptly will file praecipes, motions, or other documents, including withdrawals of oppositions, as appropriate, in pending proceedings, in order to effectuate the purpose of this agreement. DCHA will cooperate with and support the District's litigation by making available for the District all documents and witnesses (pre-trial and at trial) the District may need in all cases involving DCHA or DPAH.

Corporation Counsel signed the agreement on behalf of the District and the court-appointed receiver, David Gilmore, signed on behalf of DCHA.

Attachment A of the Agreement lists categories of “Contract Claims – in Litigation”, “Contract Claims – Not in Litigation”, “Contract Claims – Status Unknown”, and several other categories not pertinent here. Under “Contract Claims – in Litigation” are the following:

- |     |           |                                      |
|-----|-----------|--------------------------------------|
| 1.  | Schlosser | \$382,526 plus interest from 5/1/91  |
| 2.  | Schlosser | \$644,373 plus interest from 8/22/91 |
| ... |           |                                      |
| 4.  | Schlosser | \$1,400,000                          |
| ... |           |                                      |
| 17. | Schlosser | \$18,533 claim                       |
| 18. | Schlosser | \$7,920 claim                        |
| 19. | Schlosser | \$39,837 claim                       |
| 20. | Schlosser | \$174,946 claim                      |
| 21. | Schlosser | \$27,754 claim                       |
| ... |           |                                      |

Item 2 from Attachment A appears to refer to CAB No. D-0903, showing the liability amount we determined in our summary judgment decision of September 13, 1994, and the interest date matching the date that Schlosser filed its claim with the former Director of the Department of Administrative Services (which is the date for calculating when interest begins to accrue). The other items do not relate to any of the other consolidated appeals at issue.

Attachment B of the Agreement consists of 17 pages listing 634 claims, entitled “Lawsuits Selected Under Search Criteria (Listed by Date Served),” where the search criteria were for lawsuits involving DPAH and DCHA. Attachment B is in tabular form with columns for “File name”, “CA [civil action or case number] Number”, “Court”, “Date Served”, “Section” [presumably the section of the Office of Corporation Counsel to which the case was assigned], “Attorney”, “Matter Type”, “Agency”, “Dispdte”, “DatePaid”, “Amount paid”, “Disposition”, “Description”, and “Location”. Two of the Schlosser cases, CAB Nos. D-0903 and D-0905 appear on pages 4 and 5 of Attachment B. Page 4 shows the following entry:

File Name: W.M.Schlosser, CA Number: CAB D-903, Court: CAB, Date Served: 7/02/93, Section: Special Li[tigation], Attorney: Finch, Art 23, Matter Type: Contract Breach, Agency: Housing-DP, DispDate: [blank], DatePaid: [blank], Amount paid: 0, Disposition: [blank], Description: CAB No. 4641-72-A1-86 [which is the contract number, not the CAB case number], Location: [blank].

Page 5 shows the following entry:

File Name: Schlosser, CA Number: CAB D-905, Court: CAB, Date Served: 7/03/94, Section: Special Li[tigation], Attorney: Finch, Art 22, Matter Type: Contract Award, Agency: Housing-DP, DispDate: [blank], DatePaid: [blank], Amount paid: 0, Disposition: [blank], Description: [blank], Location: [blank].

With apparently no prospects for receiving payment under the Schlosser-District settlement agreement, Schlosser filed the new appeal in CAB No. D-1122, claiming breach of the settlement agreement, and seeking the payment of the principal amount plus interest due under the agreement. Thereafter, the District paid Schlosser an amount to resolve the amount originally claimed under CAB No. D-0905, which totals less than approximately five percent of the \$395,000 amount specified in the settlement agreement. According to the District, it was not obligated to pay the remaining amount of the settlement agreement because it was not obligated under the District-DCHA agreement to pay the underlying claims in CAB Nos. D-0906, D-0907, D-0908, and D-0911. The District moved to dismiss itself from the appeal on the ground that DCHA is responsible for paying the remaining unpaid amount provided in the Schlosser-District settlement agreement. DCHA opposes the District's motion and argues that the District is responsible for the entire payment under the settlement agreement.

## **DISCUSSION**

Both the District and DCHA agree that the Board has jurisdiction to resolve the matter.

The District argues that the express language of the District-DCHA agreement requires DCHA to pay the settlement amounts covering the underlying claims arising from CAB Nos. D-0906, D-0907, D-0908, and D-0911. Under paragraph (c) of the agreement, DCHA is responsible for all pre-receivership claims not appearing on Attachment A or Attachment B. Because those appeal numbers do not appear on either Attachment, the District urges that DCHA is responsible for amounts representing the settlement of those underlying claims.

DCHA agrees that all of the underlying appeals, including D-0903 and D-0905, were pre-receivership claims as defined by the District-DCHA agreement. However, DCHA points out that the District negotiated and executed a settlement agreement resolving the claims before DCHA was created. In addition, DCHA argues that D-0906, D-0907, D-0908, and D-0911 "arise out of" D-0903 because all of the appeals were consolidated by the Board under D-0903. Finally, DCHA argues that the purpose of the District-DCHA agreement, and schedules of Attachment A and B listing the claims and case numbers, was to make DCHA responsible for claims for which it had notice but the District did not have notice. Here, the District clearly had notice of D-0906, D-0907, D-0908, and D-0911 because it handled the original appeals from the initial filing to settlement.

We conclude that the District is responsible for the balance of the principal plus interest due under the Schlosser-District settlement agreement. That settlement agreement superseded and extinguished the original DPAH contract claims, and the Schlosser-District settlement agreement does not constitute a "pre-receivership claim" as defined in the District-DCHA agreement. The District-



DCHA agreement defines “pre-receivership claims” in relevant part as “contract claims arising from causes of action that occurred prior to May 19, 1995 under contracts entered into by [DPAH] or the Department of Housing and Community Development . . . .” The contract claim here is a claim that the District breached its settlement agreement with Schlosser. Although at one time the individual claims in CAB Nos. D-0905, D-0906, D-0907, D-0908, and D-0911 were contract claims which had been submitted through the disputes process, including by appeal to the Board in 1992, those individual claims were superseded by the Schlosser-District settlement agreement. When Schlosser and the District executed the settlement agreement, the individual claims in the appeals were extinguished. The District government, and only the District government, not DCHA or the receiver, was the party who became liable under the terms of the settlement agreement to pay the settlement amount.

Even if we were to conclude that the Schlosser-District settlement agreement somehow fit within the definition of “pre-receivership claim”, we would nevertheless conclude that the reference to D-0905 in Attachment B was intended by the parties to embrace the Schlosser-District settlement agreement which superseded not only CAB No. D-0905 but also the appeals in CAB Nos. D-0906, D-0907, D-0908, and D-0911 which had been consolidated under D-0905 once the Board had resolved the former lead case of CAB No. D-0903. The District itself repeatedly referred to all of the remaining appeal cases under the label “D-905, etc” and clearly had knowledge of these cases since the Corporation Counsel had represented the District in these cases from the initial filings in 1992 through the settlement agreement in 1994 and thereafter when the Board asked for status of the District’s payment pursuant to the settlement agreement with Schlosser. Under the circumstances, it would be inequitable for the District to thrust the Schlosser-District settlement liability onto DCHA simply because D-0906, D-0907, D-0908, and D-0911 were omitted from Attachment B of the District-DCHA agreement. In our view, these cases did not have to be listed at all in the District-DCHA agreement because the Schlosser-District settlement agreement does not constitute a “pre-receivership claim” under the District-DCHA agreement.

### CONCLUSION

We conclude that the District, not DCHA, is responsible for making payment to Schlosser for the remaining amounts due under the 1994 Schlosser-District settlement agreement. Accordingly, the District shall pay Schlosser \$395,000, less the amount the District has already paid Schlosser for CAB No. D-0905, plus interest as provided in the Schlosser-District settlement agreement.

**SO ORDERED.**

DATED: August 29, 2003

/s/ Jonathan D. Zischkau  
JONATHAN D. ZISCHKAU  
Chief Administrative Judge

CONCURRING:

/s/ Matthew S. Watson  
MATTHEW S. WATSON  
Administrative Judge