

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS.**

**SUPERIOR COURT**

**BEFORE THE COURT-APPOINTED REFEREE  
IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY  
DISPUTED CLAIMS DOCKET**

**In Re Liquidator Number: 2006-HICIL-22  
Proof of Claim Number: EMPL17440  
Claimant Name: HENRY P. LENZ**

**LIQUIDATOR'S WRITTEN SUBMISSION**

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, acting solely in his capacity as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), by and through counsel, hereby submits this written submission as directed by the Ruling of Referee Paula T. Rogers dated August 4, 2006.

Claimant, Henry P. Lenz ("Claimant"), submitted a Proof of Claim to Liquidator dated June 28, 2003 asserting a claim against Home for "[p]ayments . . . for deferred compensation agreement." (Case file tab 5, Response to POC Question 10.)

Pursuant to §§ 6b and 6c of the *Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company in Liquidation* (the "Procedures"), the Liquidator duly reviewed the claim submitted by Claimant and issued a Notice of Determination dated February 22, 2006 assigning Claimant's claim a "Class V Residual Classification under New Hampshire Revised Statute 402-C:44." (Case file tab 4.) Claimant took issue with Liquidator's determination and filed a "Request for Review." (Case file tab 3.) In reaffirming his determination, Liquidator stated:

Your POC was determined to fall within the class “V-Residual Classification” category which includes “All other claims including claims of any state or local government, not falling within other classes under this section. . . .” It was correctly determined that your claim could not be characterized as an “Administrative Cost” (Class I); “Policy Related Claim” i.e., a Home Insurance Company policy (Class II); “Claim of the Federal Government” (Class III); or “Wage” claim (Class IV). Hence the lowest possible priority for your claim was that which was assigned, namely, a Class V-Residual Classification. (Case file tab 2.)

Claimant objected to Liquidator’s Notice of Re-Determination by filing an Objection with the Court asserting that he was “very bitter about losing [his] \$689.72 monthly pension under [his] Deferred Compensation Plan” and that he felt he “should be Class I – Administrative Cost.” (Case file tab 1.)

The matter came on for a Structuring Conference before Referee Rogers on August 4, 2006. After giving due consideration to oral presentations of Claimant and Liquidator, Referee Rogers directed that the parties provide written submissions.

### **FACTUAL BACKGROUND**

Claimant was a long time executive officer of The Home Insurance Company and several subsidiary companies before his retirement on March 1, 1985. (Exhibits attached to Claimant’s August 5, 2006 Submission.) By Agreement dated June 19, 1982 (“Agreement”), Home contracted to pay Claimant, upon his termination of employment, sums held in a deferred compensation account ratably apportioned over ten (10) years. (Case file tab 5, Ex. 1, ¶3.A.) The Agreement further provided that Home would pay Claimant:

B. Monthly payments equal to the difference between (a) Lenz’s monthly retirement income as computed under “The Home Insurance Company Retirement Plan” (adjusted to reflect any elections thereunder) and based on his total salary, including

amounts paid to him on a then current basis and amounts deferred under this Agreement and (b) Lenz's monthly retirement income computed on the same basis under "The Home Insurance Company Retirement Plan" and based solely on that portion of his salary paid on a then current basis. Monthly payments under this subparagraph 3B shall commence with the first, and terminate with the last, monthly installment of retirement income payable to Lenz under "The Home Insurance Company Retirement Plan." (Case file tab 5, Ex. 1, ¶ 3B.)

Claimant acknowledges that Home's obligations under paragraph 3A of the Agreement were fully satisfied as of December 31, 1997. (Claimant's August 5, 2006 Submission.) The remainder of Home's obligations to Claimant, occasioned by the terms of paragraph 3B of the Agreement, forms the basis for Claimant's Proof of Claim. Having now conceded that his prior assertion for Class I priority entitlement was erroneous, Claimant asserts that his claim "should be considered Class II not Class V" because "annuity proceeds or investment values shall be treated as loss claims" and he believes the payments made to him by Home to constitute annuity proceeds owed under an annuity policy and thus entitled to Class II priority. (Claimant's August 5, 2006 Submission.)

### **ARGUMENT**

#### **CLAIMANT'S ATTEMPT TO CHARACTERIZE HIS CLAIM AS AN ANNUITY POLICY IS WITHOUT MERIT AND LIQUIDATOR IS BOUND BY N.H. REV. STAT. § 402-C:44 TO ASSIGN A CLASS V-RESIDUAL CLASSIFICATION TO CLAIMANT'S CLAIM**

N.H. Rev. Stat. § 402-C:44 governs the order in which an insolvent insurer must pay the claims of its creditors. Section 402-C:44 mandates that "every claim in each class shall be paid in full or adequate funds retained for the payment before the members of the next class receive any payment," and then defines and sets the class priorities as follows:

- I. ADMINISTRATION COSTS. The costs and expenses of administration. . . .

- II. POLICY RELATED CLAIMS. All claims by policyholders. . . . All claims under life insurance and **annuity policies**, whether for death proceeds, **annuity proceeds** or investment values, shall be treated as loss claims. . . . (Emphasis added.)
- III. CLAIMS OF THE FEDERAL GOVERNMENT.
- IV. WAGES. (a) Debts due to employees for services performed, not to exceed \$1,000 . . . earned within one year before the filing of the petition for liquidation. **Officers shall not be entitled to the benefit of this priority.** (Emphasis added.)
- V. RESIDUAL CLASSIFICATION. All other claims . . . not falling within other classes under this section.
- VI. JUDGMENTS.
- VII. INTEREST ON CLAIMS ALREADY PAID.
- VIII. MISCELLANEOUS SUBORDINATED CLAIMS.
- IX. PREFERRED OWNERSHIP CLAIMS.
- X. PROPRIETARY CLAIMS.

Claimant's attempt to characterize the 1982 Agreement such that it qualifies for Class II priority status as "annuity proceeds" is misplaced and legally unsupportable. While Liquidator is unaware of any New Hampshire case law on this issue, the Supreme Court of Iowa ruled – in a case remarkably similar to the claim before the Referee – that deferred compensation (akin to Claimant's present claim) payable by an insurance company (which subsequently was placed in insolvency proceedings) to executive officers of that insurance company was not subject to treatment as an annuity for priority determination purposes. *State of Iowa ex rel. William B. Hager, etc. v. Iowa National Mutual Insurance Company, et al.*, 430 N.W. 2d 420 (1988). (Copy annexed as Exhibit A).

In *Iowa National Mutual Insurance Company*, the Iowa Supreme Court considered the assertion of more than thirty senior executives of the involved carrier that their deferred compensation claims should be treated – for the purpose of priority classification – as “annuity policies or as annuity proceeds.” The Iowa priority statute at issue defined a Class 3 priority (*i.e.*, the class senior to that of general or residual creditors) as including “[c]laims under life insurance and annuity policies, whether for death proceeds, annuity proceeds, or investment values shall be treated as loss claims. . . .” (Iowa Code § 507C.42 (3) (1985)).

Not coincidentally, the New Hampshire priority statute, Rev. Stat. § 402-C:44 II, is identical to § 507C.42(3) of the Iowa insurer’s insolvency priority statute. As noted by the Iowa Supreme Court, “[s]ection 507C.42 is modeled after section 42 of the 1977 Insurers Supervision, Rehabilitation and Liquidation Model Act,” which at the time of the Iowa court determination had seen adoption of its priority provisions by approximately thirteen jurisdictions, including New Hampshire. *Iowa National*, 430 N.W.2d at 422.

In *Iowa National*, the executive employees asserted that the Iowa legislature used the terms “annuity” and “annuity policy” interchangeably thereby showing an intention to give the words the same meaning and thus arguing that their claims for deferred compensation should be given Class 3 priority. The Iowa Supreme Court rejected this argument:

The statute refers to annuities issued by the insurer in the ordinary course of business. We reach a similar conclusion with respect to the use of the words “annuity policies” or “annuity proceeds” in section 507C.42(3). The third priority class includes claims made under policies of insurance, third-party claims against insureds of the company under liability policies, and claims made against statutory guaranty plans for risks of the insolvent insurer. This strongly suggests that this particular priority status is aimed at the

insolvent insurance company's obligations to its insureds and not to employee claims.

430 N.W.2d at 422.

The *Iowa National* court addressed the legislative history of this section of the insurer's insolvency statute as well as the commentary to the Wisconsin Insurers Rehabilitation and Liquidation Act (Wis. Stat. 645.01-645.90 (1975)), which formed the basis for the Model Act (and thus applies equally to the New Hampshire priority statute). Having considered the foregoing, the court noted that "[i]n contrast to the type of claims included in the third priority status, i.e., those involving the company's obligation to its insureds [*akin to New Hampshire's Class II priority*], appellant's claims arise from their status as employees of the company." Employee claims were relegated to a lower priority status, similar to New Hampshire's Class IV classification, and similarly specified that "[o]fficers and directors are not entitled to the benefit of this priority." The *Iowa National* court concluded that it could discern no legislative intent to "accord any other priority status to excluded employee claims and therefore found that a general or residual creditor classification was appropriate under the circumstances. 430 N.W.2d at 423.

Claimant's position is identical to that of the executives who asserted an annuity level priority in the *Iowa National* litigation. As the Iowa Supreme Court held, "we are required to identify the category of claimants to which the legislature accorded third party priority status. If the legislature had intended to accord third priority status to amounts owed employees under deferred compensation plans we do not believe it would have required us to infer that intention from general language which appears to be directed at an entirely different group of claimants." 430 N.W.2d at 423. As such, "this strongly suggests that [Class 3] priority status is aimed at the insolvent insurance company's

obligations to its insureds and not to employee claims.” 430 N.W.2d at 422. In accord with the rationale articulated by the Iowa Supreme Court, Mr. Lenz’s claim for proceeds under his 1982 Agreement was properly classified as a Class V (general/residual) creditor claim.

### CONCLUSION

For the reasons set forth herein, Liquidator respectfully requests that the Referee: (1) dismiss Claimant’s Objections to Liquidator’s Notice of Re-Determination and (2) rule that Liquidator’s Re-Determination, as set forth in the notice of Re-Determination, be allowed as stated; and (3) grant such other and further relief as is deemed appropriate in the circumstances.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE  
COMMISSIONER OF THE STATE OF NEW  
HAMPSHIRE SOLELY IN HIS CAPACITY AS  
LIQUIDATOR OF THE HOME INSURANCE  
COMPANY

By his attorneys,

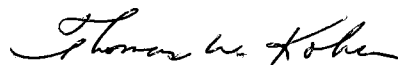


Jonathan Rosen, Esq. (N.H. Bar #16951)  
Thomas W. Kober, Esq. (*admitted pro hac vice*)  
The Home Insurance Company in Liquidation  
59 Maiden Lane  
New York, New York 10038  
(212) 530-4001

August 18, 2006

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Liquidator's Written Submission has been forwarded via First Class mail this 18th day of August, 2006 to Claimant at the address identified below.

A handwritten signature in cursive script, reading "Thomas W. Kober", is written above a horizontal line.

Thomas W. Kober

Henry P. Lenz  
25 E. Madison Avenue  
Florham Park, New Jersey 07932-2605





LEXSEE 430 NW2D 420

**STATE OF IOWA ex rel. WILLIAM B. HAGER, Commissioner of Insurance of the State of Iowa, Appellee, v. IOWA NATIONAL MUTUAL INSURANCE COMPANY, Defendant MARGARET L. ADAMS, NORBERT G. BRASSER, EUGENE J. CONNOR, DONLAD CUTLER, JAMES A. DUNN, FRANK ELIAS, GARY E. FISHER, GENE GALLAGHER, RAYMOND HIGGINS, DONALD J. KAMINS, DONALD A. KONSDORF, DUANE H. KURRELMEYER, RONALD E. McDONAUGHY, JOHN H. McCORMICK, JR., JOHN H. GILL, C.G. McLOUD, DARREL D. MESTDAH, WILLIAM MURRAY, ARTHUR POPE, EUGENE C. PUGH, RICHARD ROSE, FRED RUST, ARTHUR J. SCHMIT, WILLIAM W. TICE, ROBERT VAN AUKEN, ROBERT WIESE, M. LUCILLE GROBSTICK, WILLIAM J. ROGERS, JANE L. RICE, ALLAN W. THOMPSON, and JEROME R. WALSH, Appellants**

**No. 87-1099**

**Supreme Court of Iowa**

*430 N.W.2d 420; 1988 Iowa Sup. LEXIS 275*

**October 19, 1988, Filed**

**PRIOR HISTORY:** **[\*\*1]** On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge. Senior executives of insolvent insurance company who sought priority status for their deferred compensation benefits in statutory liquidation proceedings appeal from order classifying their claims as those of general creditors. The court of appeals reversed the district court's order and accorded priority status to the claimants.

**DISPOSITION:**

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED.

**COUNSEL:**

David A. Elderkin and Jolene J. Sobotka of Elderkin, Pirnie, Von Lackum & Elderkin, Cedar Rapids, and T. Scott Bannister and Mark S. Lagomarcino of Hanson, Bjork & Russell, Des Moines, for Appellants.

Philip Ostien of Davis, Grace, Harvey, Horvath, Gonnerman & Rouwenhorst, Des Moines, for Appellee.

**JUDGES:**

McGiverin, C.J., and Carter, Lavorato, Snell, and Andreasen, JJ.

**OPINIONBY:**

CARTER

**OPINION:**

[\*421] This appeal requires us to consider an issue of first impression involving the interpretation of *Iowa Code section 507C.42(3)* (1985). More than thirty senior executives of Iowa National Mutual Insurance Company, an insolvent mutual insurance company involved in statutory liquidation **[\*\*2]** proceedings, seek priority status under that statute for claims involving their deferred compensation benefits. They urge that their claims arise under "annuity policies" or as "annuity proceeds" as those terms are employed in section 507C.42(3).

The district court disagreed with these claimants' contention and accorded them the status of general creditors. On appeal, the court of appeals concluded that the claims in question did arise under "annuity policies" and accorded appellants the priority status which they requested. We granted further review of the court of appeals decision. On the controlling issue of statutory interpretation, we agree with the district court's assessment of appellants' claims and disagree with the conclusion of the court of appeals. Consequently, we vacate the deci-

sion of the court of appeals and affirm the judgment of the district court.

The claims at issue involve thirty-six employees or their survivors and aggregate more than \$ 1,900,000. The insurance commissioner, acting as statutory liquidator, classified all of these claims as general creditor claims which are assigned a fourth priority status. The deferred compensation claimants objected to this [\*\*3] classification on the ground that they should be accorded a third priority status senior to that of general creditors under the provisions of subsection 3 of section 507C.42. The deferred compensation claimants' objections were heard by the court as "disputed claims" pursuant to *Iowa Code section 507C.39* and, as previously stated, were disallowed.

The claims to which section 507C.42(3) grants third-priority status include the following:

*Class 3.* Claims under policies for losses incurred, including third-party claims, claims against the insurer for liability for bodily injury or for injury to or destruction of tangible property which are not under policies, and claims of a guaranty association or foreign guaranty association. Claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds, or investment values shall be treated as loss claims. That portion of a loss, indemnification for which is provided by other benefits or advantages recovered by the claimant, shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support or by way of succession at death or as proceeds [\*\*4] of life insurance, or as gratuities. A payment by an employer to an employee is not a gratuity.

All parties agree that the deferred compensation claimants' entitlement to third-priority status turns on whether their claims arise under "annuity policies" or as "annuity proceeds" as those terms are used in section 507C.42(3). The issue thus presented is one of statutory interpretation. The court of appeals assigned the claims third-priority status based on its belief that the generally accepted meaning of the term "annuity" is of broad generic application and includes any agreement which establishes a fixed sum payable at intervals or at some stated period.

In challenging the conclusions of the court of appeals the insurance commissioner argues that the deferred compensation payments in question do not fall within a generally recognized definition of the term "an-

nuity." We do not find it necessary to resolve this question in order to decide the appeal. We will assume, as did the district court, that the deferred compensation plans in question fall within a generally accepted definition of the term "annuity." Notwithstanding that assumption, we share the district court's conclusion that [\*\*5] the third-priority class as defined in section 507C.42(3) does not include claimants owed unpaid installments under the company's deferred compensation plan.

[\*422] Certain general principles of statutory interpretation are called into play in resolving the present dispute. In seeking legislative intent, the subject matter, effect, reason for the statute, and consequences of the proposed interpretations must all be considered. *In re Girdler*, 357 N.W.2d 595, 597 (Iowa 1984); *Newgirk v. Black*, 174 Iowa 636, 643, 156 N.W. 708, 710 (1916). In interpreting a statute for the first time, a court must attempt to discern in a general way its legislative purpose and then consider all parts of the legislation as an integrated whole in order to determine how each part was designed to accomplish this general purpose. *Hanover Ins. Co. v. Alamo Motel*, 264 N.W.2d 774, 778 (Iowa 1978). In this interpretative process, undue importance should not be accorded to single or isolated portions of the statute taken out of context. *Ferguson v. Brick*, 248 Iowa 839, 845, 82 N.W.2d 849, 853 (1957).

The insurance commissioner argues that it is significant that the statute upon which appellants rely refers [\*\*6] to "annuity policy" rather than "annuity." He suggests that an insurance company's liability on annuity policies would, under normal expectations, arise with respect to policies sold by the company in the ordinary course of business. The claimants respond by arguing that there is no legal difference in meaning between the terms "annuity" and "annuity policy" because an annuity policy is simply the written instrument creating an annuity.

Claimants urge that the legislature has used the terms "annuity" and "annuity policy" interchangeably, showing an intention to give the words the same meaning. In support of this contention, they point to *Iowa Code section 507B.2(3)*, which provides that, when used in chapter 507B, governing insurance trade practices, the terms insurance policy and insurance contract "shall mean any contract of insurance, indemnity, subscription, membership, suretyship, or annuity issued, proposed for issuance, or intended for issuance by any person."

We do not believe that section 507B.2(3) aids claimants' argument. That statute refers to annuities issued by the insurer in the ordinary course of business. We reach a similar conclusion with respect to the use of the [\*\*7] words "annuity policies" or "annuity proceeds" in section 507C.42(3). The third priority class

includes claims made under policies of insurance, third-party claims against insureds of the company under liability insurance policies, and claims made against statutory guaranty plans for risks of the insolvent insurer. This strongly suggests that this particular priority status is aimed at the insolvent insurance company's obligations to its insureds and not to employee claims. The Tennessee Supreme Court, interpreting the priority provisions of similar legislation, concluded that the purpose motivating the enactment of priority provisions for claims against insolvent insurers is to protect the typical insurance consumer. *Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1, 6 (Tenn. 1986).

Section 507C.42 is modeled after section 42 of the 1977 Insurers Supervision, Rehabilitation and Liquidation Model Act, promulgated by the National Association of Insurance Commissioners (NAIC). The priority provisions of the Model Act, with various alterations, have been adopted in approximately thirteen jurisdictions. n1 The Model Act, with some adaptations, was based on the Wisconsin Insurers Rehabilitation [\*\*8] and Liquidation Act ( *Wis. Stat. 645.01-645.90* (1975)). The official comments to the Wisconsin act give an explanation of the purposes behind the particular classification of claims selected by the drafters of that act. According to the comments accompanying section 645.68 of the Wisconsin act, governing priority of distribution, the system of priority was chosen "based on the relative social and economic importance [\*423] of the claims likely to be asserted against an insurer . . . to carry out sound public policy by minimizing the damage done to the insured community when an insurer fails."

n1 Conn. Gen. Stat. § 38-462 (1987); *Idaho Code* § 41-3342 (Supp. 1988); *Ind. Code* § 27-9-3-40 (1986); *Iowa Code* § 507C.42 (1985); *Ky. Rev. Stat. Ann.* § 304.33-430 (Baldwin 1987); *Minn. Stat.* § 60B.44 (1986 & West Supp. 1987); *Mont. Code Ann.* § 33-2-1371 (1987); *N.H. Rev. Stat. Ann.* § 402-C:44 (1983); *Ohio Rev. Code Ann.* § 3902.42 (Page Supp. 1987); *Pa. Stat. Ann. tit. 40*, § 221.44 (Purdon Supp. 1988); *S.C. Code Ann.* § 38-27-610 (Supp. 1987); *Utah Code Ann.* § 31A-27-335 (1986); *Wis. Stat.* § 645.68 (1985-86).

The deferred compensation claimants argue that their claims are of a social importance equal [\*\*9] to or exceeding those of claimants who bought insurance from the company. The legal issue presented in this case does not depend on this court's independent assessment of the relative priority of these societal interests. We are required to identify the category of claimants to which the legislature accorded third priority status. If the legislature had intended to accord third priority status to amounts owed employees under deferred compensation plans we do not believe it would have required us to infer that intention from general language which appears to be directed at an entirely different group of claimants.

In contrast to the type of claims included in the third priority status, *i.e.*, those involving the company's obligations to its insureds, appellants' claims arise from their status as employees of the company. Employee claims are included in the second priority class set forth in section 507C.42. That class includes:

Debts due to employees for services performed to the extent that they do not exceed one thousand dollars and represent payment for services performed within one year before the filing of the petition for liquidation. Officers and directors are not entitled [\*\*10] to the benefit of this priority. The priority is in lieu of other similar priority which may be authorized by law as to wages or compensation of employees.

All of the present claimants are officers of the company who are expressly excluded from this second priority status. We are unable to discern any intention in the statutory scheme to accord any other priority status to excluded employee claims. The district court correctly determined appellants' status to be that of general creditors. We vacate the judgment of the court of appeals and affirm the judgment of the district court.

DECISION OF COURT OF APPEALS  
VACATED; DISTRICT COURT JUDGMENT  
AFFIRMED.