

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: 2007-HICIL-31
Proof of Claim Number: VEND700093-01
Claimant Name: Sheiness, Scott, Grossman & Cohn, LLP

CLAIMANT'S SECTION 15 SUBMISSION

_____ Claimant Sheiness, Scott, Grossman & Cohn, LLP (“SSGC”) files this submission in support of its Proof of Claim, pursuant to Paragraph 15 of the Court’s Revised and Restated Order Establishing Procedures Regarding Claims Filed with the Home Insurance Company in Liquidation, and respectfully states:

Introduction: SSGC’s Claim and The Issue in Dispute

_____ 1. SSGC is a law firm that defended The Home Insurance Company in the Chapter 11 bankruptcy case of J. T. Thorpe Company in the period from October 2002 to January 2003, shortly before Home was placed in receivership. Through a Chapter 11 plan, Thorpe sought to liquidate and impose on Home and a number of other insurers many millions of dollars in liability for asbestos claims. A settlement agreement was ultimately reached that was accepted by Home and most of the other insurers. *See In re J T Thorpe Co.*, 308 B.R. 782 (Bkr. S.D.Tex. 2003), *aff’d*, 2004 W.L. 7202623 (S.D. Tex. 2004).

2. SSGC did a great deal of work for Home – roughly 487 hours of attorney and para-legal time are reflected in its invoices, all of which was done under pressure in a short time period

and much of which was worked overtime during the 2002 holiday season.¹ The value of this work and the reasonableness of the fees has not been contested. In fact, the Liquidator allowed SSGC's claim in full, finding that "the services provided were reasonable and necessary for the defense of Home."²

3. But while the Liquidator allowed SSGC's claim, he assigned it to Class V priority, meaning it was allowed only as a "residual claim" that as a practical matter will never be paid. The Liquidator did not explain why he rejected SSGC's request that its claim be paid as a "cost of administration" pursuant to N.H. Rev. Stat. §402-C:44.³

4. The sole issue in this proceeding, therefore, is a legal one: whether SSGC's claim for legal fees incurred in the defense of Home, during several months prior to the appointment of the Liquidator, are entitled to priority payment as an administration cost.

SSGC's Claim is an Administration Cost.

5. "Administration costs" are entitled to priority payment under N.H. Rev. Stat. §402-C:44. The statute defines this term as follows:

"I. ADMINISTRATION COSTS. The costs and expenses of administration, including but not limited to the following: the actual and necessary costs of preserving or recovering the assets of the insurer; compensation for all services rendered in the liquidation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorney's fees."

"Administration costs" under this statute is a broad concept – it is not limited to the cost of services

¹ SSGC's invoices are attached to its Proof of Claim and are included in the Case File, hence they are not being submitted again with this Submission.

² Notice of Determination, May 11, 2006, at CF0020.

³ SSGC filed its claim as an administrative claim. See Proof of Claim at ¶10, CF001.

rendered to the Liquidator, but instead includes all costs and expenses “of administration,” specifically listing both the costs of “preserving or recovering assets of the insurer” and “attorney’s fees.”

6. This statute has been interpreted by the New Hampshire Supreme Court in an appeal arising from the Home liquidation, *In the Matter of the Liquidation of the Home Insurance Company*, 913 A.2d 712, 721-22 (N.H. 2006). The *Home* decision addressed an unusual claim for priority treatment – a claim by a reinsurer for reimbursement of claim payments. Though such payments are not “administrative” in the usual sense of the word, the Court held that they were “administration costs” under Section 402-C:44 because they preserved certain rights and claims that Home was entitled to assert against other reinsurers.

7. Significantly, the Court rejected the Liquidator’s argument that “administration costs” under Section 402-C:44 should be treated like administrative expenses in a bankruptcy case and thus limited to costs *of administration* that are incurred *by the Liquidator*. The Court explained:

“In arguing that the proposed payments . . . cannot be qualified as ‘administration costs’ because they arose from pre-liquidation transactions, the ACE Companies rely upon a line of bankruptcy cases holding that ‘administration costs’ include only rights to payment that arise post-liquidation, and exclude claims that arise pre-liquidation. . . .

“A comparison of the language of the respective statutes [Bankruptcy Code §503(b) and N.H. Rev. Stat. §402-C:44] reveals that they differ in terms of what is meant by ‘administrative costs and expenses.’ Unlike the bankruptcy statute, which contains a specific list of items that constitute administrative expenses, RSA 402-C:44, I, defines administration costs more generally by including ‘the actual and necessary costs of preserving or recovering the assets of the insurer.’ This definition encompasses a much broader category of items and transactions than is found in the bankruptcy code.”

913 A.2d at 483-84.

8. If anything, a claim for pre-liquidation attorney's fees is more clearly included within Section 402-C:44 than the payment claims addressed in *Home*. The statute separately lists "reasonable attorney's fees" as one type of administration cost. This is significant because the statute also lists, as another type of administration cost, "compensation for all services rendered in the liquidation." If attorney's fees were entitled to priority only if earned for services rendered to the Liquidator, such fees would be included within the broader phrase – "all services rendered in the liquidation" – and there would be no reason to list them separately. A statute should never be construed to leave words that are redundant or superfluous. *E.g., In re Malouin*, 926 A.2d 295, 301 (N.H. 2007).

9. From a practical standpoint, it is not surprising that the statute would provide for payment of all attorney's fees, whether incurred before or during the liquidation, as a priority administration cost. If attorney's fees incurred pre-liquidation were not paid as administration costs, attorneys would have little incentive to do what SSGC did – that is, to perform an enormous amount of work defending an insurer in a period of financial difficulties with the prospect of a liquidation looming.

10. Section 402-C:44 is a practical statute, defining "administration costs" in a broad fashion that includes all reasonable attorney's fees. Such an approach is a reasonable one and facilitates administration of insurance companies that may be in financial difficulty.

Post-Script: SSGC may request permission for an additional submission.

11. SSGC's ability to present its claim in this proceeding has been hampered by the lack of any substantive response from the Liquidator regarding the reasons for his denial of SSGC's request for priority treatment. The Notice of Determination did not explain why SSGC's attorney's

fees were not allowed as a cost of administration. SSGC's request for review, timely filed in June 2006, was never acted upon. Likewise, no response was given to many telephone calls and emails from the undersigned member of SSGC, nor has the Liquidator's counsel in this appeal provided any rationale to this point. It is therefore possible that the Liquidator may assert grounds, in its response to this Submission or at the oral hearing on SSGC's claim, that for the first time assert factual issues that SSGC has not addressed or legal issues it has not briefed. If that is the case, SSGC will respectfully request an opportunity to supplement the record with an affidavit or other factual materials or with a supplemental brief.

WHEREFORE, Claimant Sheiness, Scott, Grossman & Cohn, LLP requests that upon hearing of this appeal, SSGC's claim be allowed as an administration cost and be paid as a priority claim in accordance with N.H. Rev. Stat. §402-C:44.

Respectfully submitted,

SHEINESS, SCOTT, GROSSMAN
& COHN, L.L.P.

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Claimant's Section 15 Submission has been served, by email, on this the 18th day of January, 2008, on the following:

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