

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

**In Re Liquidator Number: 2007-HICIL-33  
Proof of Claim Number: INSU703263  
Claimant Name: GREGORY LEVY, as  
Administrator of the Estate of  
HAROLD LEVY**

**THE LIQUIDATOR'S PRE-HEARING BRIEF**

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, acting solely in his capacity as Liquidator (the "Liquidator") of The Home Insurance Company ("Home"), by and through counsel, hereby submits this Pre-hearing Brief pursuant to §12 of the *Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company in Liquidation* (the "Procedures"), which provides that "In the case of a Disputed Claim that is a "Small Claim"... [n]o pre-hearing brief is required but will be accepted if filed."

Claimant, GREGORY LEVY, as Administrator of the Estate of HAROLD LEVY ("Claimant"), submitted a Proof of Claim ("POC") to the Liquidator dated June 8, 2004, asserting entitlement to \$18,784.90 due to the fact that "[W]e had a roof installed by Sears in 1994. There has been nothing but problems w/ water inside the walls...." (*Case file tab D, POC Question 5.*) Claimant's POC attempts to revive the causes of action asserted by Claimant's-decedent, Harold Levy, in his Summons and Verified Complaint served and filed in the Supreme Court of the State of New York, County of Erie, wherein Mr. Levy sued Sears Roebuck and Co. and Pegnato and Pegnato Roof Management, Inc. (*Case file tab H.*) The aforementioned complaint asserted claims for breach of warranty,

negligence and fraudulent misrepresentation on the part of defendants. *(Case file tab H.)* Home's involvement in the underlying proceeding was occasioned by an "additional Insured" endorsement written in favor of Sears, Roebuck and Co. ("Sears") on behalf of Home policyholder, Diamond Exteriors, Inc. ("Diamond") *(Case file tab E.)* Diamond had contracted with Sears to install the complained of roof on Mr. Levy's home.

Pursuant to §§6.b. and 6.c. of the Procedures, the Liquidator duly reviewed the claim submitted by Claimant and issued a Notice of Determination mailed September 24, 2007, disallowing Claimant's claim in its entirety while assigning it a Class II priority per NH RSA § 402C-C: 44(II). *(Case file tab C.)* The Liquidator's rationale for disallowance was clearly articulated in his explanatory preface to the NOD letter:

Explanation: Home issued a liability policy to Diamond Exteriors. Diamond contracted with Sears Roebuck to install a new roof on the Harold Levy's home. Mr. Levy sued Sears for damages allegedly caused by leaks from the new roof. Home defended Sears under the policy pursuant to an additional insured endorsement. The suit was dismissed. Because neither Mr. Levy nor his estate has a pending claim against Diamond Exteriors or Sears, this Proof of Claim has been disallowed.

Claimant filed a response to Liquidator's Notice of Determination by letter dated October 26, 2007 and said response, with attachments thereto, has been accepted as Claimant's formal Objection even though the submission was mischaracterized as an Request For Review (which would have been deemed as untimely per the "Procedures" §7.a.). *(Case file tabs B – B.5.)*

#### **STATEMENT OF FACTS**

The pertinent fact supporting the Liquidator's determination is simple. By Order dated September 21, 2006, the Hon. John A. Michalek, Justice of the Supreme Court for the State of New York, County of Erie, dismissed "on the merits" the lawsuit commenced

by Claimant's-decedent, Harold Levy, the operative facts of which formed the basis for Claimant's POC. (*Case file tab F.*) The dismissal was in response to the Order to Show Cause filed on behalf of Defendant, Sears Roebuck and Co., "pursuant to [NY] CPLR §1021 dismissing this matter on the merits based on the failure to effectuate a proper and necessary substitution upon the death of the plaintiff HAROLD LEVY more than two (2) years ago." (*Case file tab G.*)

### ARGUMENT

#### THE LIQUIDATOR'S DETERMINATION DISALLOWING CLAIMANT'S PROOF OF CLAIM WAS APPROPRIATE

Despite having been afforded the opportunity to do so, Levy has provided no proof to support an assertion that a viable cause of action remains open to him to revisit the prior court ruling that resolved his claim. No evidence has been presented to establish that a timely appeal of the dismissal was either perfected or even attempted by Claimant. Indeed, according to the sworn submission of Kathleen M. Reilly, Esq., given in support of Sears' Order to Show Cause seeking dismissal with prejudice of the Levy lawsuit, Ms. Reilly was advised by Levy's counsel that "Mr. Levy's family had not taken the steps necessary to appoint an administrator for the estate or substitute a successor or representative in the lawsuit. Furthermore, Mr. Gartner [Levy's counsel] confirmed that Mr. Levy's family did not intend to appoint an administrator for the estate even though they had been advised that they could not collect any settlement proceeds without doing so." (*Case file, tab G, Affidavit ¶ 11.*) Thereafter, the aforementioned Order to Show Cause was brought seeking a dismissal "on the merits" pursuant to NY CPLR §1021 which states:

If the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however, such dismissal shall not be on the merits unless the court shall so indicate (*emphasis added*) . . .

Justice Michalek's order was unequivocal whereby he "ORDERED, that the defendant SEARS ROEBUCK AND CO.'s motion seeking an Order dismissing this matter on the merits be and the same is hereby granted in all respects." (*Case file, tab F.*)

Levy presented a POC in the Home liquidation proceedings pursuant to RSA § 402-C:38 seeking recovery from Home based upon the same facts and circumstances that gave rise to the previously described litigation in New York State. The Liquidator, pursuant to his statutorily prescribed obligations, considered Levy's right to obtain recovery against Home's insured. After due consideration, the Liquidator properly disallowed Levy's claim based, *inter alia*, on the doctrine of res judicata because the claims raised and the relief sought in his POC were identical to those he previously raised and addressed and which were dismissed by the New York court. Critically, Claimant has not, and cannot, prove that any debt is "justly owing" to him as he has not been properly substituted as a representative of the estate of Mr. Levy. RSA §§ 402-C: 38(4); 40; 45.

Moreover, Levy's POC, while timely per RSA § 402-C: 38 and the Procedures, cannot serve to revive or cure causes of action that were dismissed under the applicable statutes relied upon by the New York court that reviewed his claims. While a claim that is "valid and unextinguished in its state of origin may be asserted" in the receivership proceedings, the converse is likewise true in that an invalid, extinguished cause of action cannot be validly asserted in the liquidation proceedings. Thus, the granting of an order of liquidation and setting of a bar date does not serve to revive otherwise extinguished

claims. *Academy Life Insurance Company v. Odiorne*, 165 Ariz. 188, 189 (1990). As such, the Liquidator asserts that as a matter of law, Claimant does not have a valid cause of action for which the Home Insurance Company in Liquidation could be responsible.

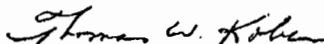
**CONCLUSION**

For the reasons set forth herein, the Liquidator respectfully requests that the Referee: (1) dismiss Claimant's Objection to the Liquidator's Notice of Determination; (2) rule that the Liquidator's recommended Determination, as set forth in the Notice of 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, as LIQUIDATOR OF  
THE HOME INSURANCE COMPANY,**

**By his attorneys,**



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**Jonathan Rosen, Esq. (N.H. Bar # 16951)  
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April 15, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Pre-Hearing Brief has been forwarded via First Class mail this 15<sup>th</sup> day of April, 2008 to Claimant at the address below.

*Thomas W. Kober*

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Thomas W. Kober

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