THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS **SUPERIOR COURT**

In the Matter of Liquidation
of the Home Insurance Company

No. 03-E-0106

CLAIMANT'S MOTION TO RECOMMIT
(Proof of Claim No. VEND700093-01)

Claimant Sheiness, Scott, Grossman & Cohn, LLP ("SSGC") files this Motion to Recommit, requesting that the Court review the decision of the Referee upholding the Liquidator's classification of SSGC's claim as a non-priority Class V claim, and respectfully states:

Introduction: SSGC's Claim and the Procedural Background to this Motion

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

[1] SSGC's invoices are attached to its Proof of Claim and are included in the Case File.

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. SSGC requested review pursuant to Paragraph 15 of the Court's Revised and Restated Order Establishing Procedures Regarding Claims Filed with the Home Insurance Company in Liquidation ("Procedures Order"). After submissions and oral argument, the Referee issued her ruling upholding the Liquidator's decision. *See* Ruling on Class Certification of Claim for Pre-Receivership Services Under RSA 402-C:44 ("Referee Ruling"), dated April 11, 2008.

5. SSGC files this Motion to Recommit pursuant to Paragraph 20 of the Procedures Order, respectfully requesting that the Court review and, upon review, reverse the Referee's ruling.

6. The sole issue raised in this proceeding 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. For the reasons stated herein, SSGC submits that the ruling of the Liquidator and Referee on this point are erroneous.

SSGC's Claim is an Administration Cost.

7. "Administration costs" are entitled to priority payment under N.H. Rev. Stat. §402-

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

[3] SSGC filed is claim as an administrative claim. *See* Proof of Claim at ¶10, CF001.

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 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."

8. 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.

9. 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.

10. 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).

11. 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.

12. 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.

The Referee's Reasoning and Ruling Are Erroneous

13. The Referee recognized that the statute does not by its terms distinguish between pre- and post-receivership attorney's fees and other costs of administration. But the Referee reasoned that this limit was nonetheless implicit: "Within the context of Chapter 402-C, the word 'administration' is most logically construed to refer to the administration of a liquidating estate." Referee Ruling at 2.

14. This construction is circular, driven by nothing more than the result itself. The decision to reject priority for pre-receivership attorney's fees and costs can only be justified by an argument that the statute implicitly says what its words do not – that is, that "administration" implies an unstated limit to costs incurred after the receivership order. But this narrow construction of "administration" is not found in the statute and is not compelled by its purpose. All companies, whether in or out of liquidation, have costs of "administration," and insurance companies have crucial needs of "administration" in the months leading up to a liquidation proceeding. If the legislature had meant to exclude pre-receivership administration costs, and thus to encourage attorneys and other professionals to cease working for insurance companies facing financial difficulties, it could easily have included such a limitation in the words of the statute.

15. The Referee also notes that the phrase "reasonable attorney's fees" is but one of several statutory examples of "costs and expenses of administration" and not a separate basis for priority treatment. That is true, but it is also significant that "attorney's fees" is listed separately and equally with "costs of preserving or recovering the assets of the insurer" and "compensation for all

services rendered in the liquidation." If attorney's fees were entitled to priority only to the extent they were necessary to preserve specific assets or to the extent they were incurred by the liquidator, they would necessarily be included in the other phrases and it would be superfluous to list them separately. *See supra* at ¶10.

16. Moreover, the Referee's ruling is contrary to the Supreme Court's decision in *Home Insurance Company*, discussed above. The Referee does not dispute the primary rationale given by the Court: that Section 402-C:44, unlike the Bankruptcy Code, is not limited to costs incurred after commencement of the liquidation proceeding. The Referee instead asserts that "SSGC overlooks the broader rationale the Court employed" in the Home decision, which, according to the Referee, was that the agreement in question brought a "net benefit to creditors of the estate." Referee Ruling at 2.

17. The Referee's attempt to distinguish the *Home* decision should be rejected for two reasons. First, the "broader rationale" on which the Referee relied is in fact an alternative or secondary rationale for the decision. The Court *first* ruled that the claims in question were entitled to priority because pre-petition costs of administration are included in the statute. The Court *then* introduced the alternative rationale:

> "Even if we were to assume that claims and rights to payment that arise pre-liquidation cannot constitute 'administration costs' under RSA 402-C:44, I, we are not persuaded that the proposed payments . . . arose pre-liquidation. . . ."

Home Insurance Company, 913 A.2d at 722 (emphasis added). It is thus clear from the languageof the *Home* decision that its primary ruling – that pre-receivership administration costs are entitled to priority – is not dependent on a showing of a "net benefit" to the receivership.

18. Second, the Referee's analysis would create a test that would be difficult if not

impossible to implement in practice. If a pre-receivership "cost of administration" is entitled to priority payment if, but only if, the administrative claimant provided a "net benefit" to the receivership estate, then the benefit created by each such claimant, rather than the reasonable and customary cost of the services rendered by the claimant, must be valued. In the case of attorneys, for example, that is a much more difficult task than reviewing the attorney's invoices to determine whether the attorney's charges were reasonable and customary for the work performed.

19. SSGC respectfully submits that the Receiver misread both the statute and the *Home* decision and that her ruling affirming the decision of the Liquidator should thus be reversed.

WHEREFORE, Claimant Sheiness, Scott, Grossman & Cohn, LLP requests that the Court review and, upon such review, reverse the ruling of the Referee and Liquidator and order that 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 Motion to Recommit has been served, both by United States mail and by email, where noted, on this the 21st day of April, 2008, on the following:

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