IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, Plaintiff	:	
v.	:	
Reliance Insurance Company, Defendant	:	No. 269 M.D. 2001

IN RE: Order Approving Referee Milspaw's Denial of Objection to Liquidator's Determination in re POC No. 1927912 Schneider Engineering, PLLC

ORDER

AND NOW, this 3rd day of August 2006, the Court has given consideration to the decision of Referee Milspaw denying the Objection of Schneider Engineering, PLLC, to the Liquidator's determination regarding Proof of Claim No. 1927912, the Court notes that no objection to the decision has been received, and does AFFIRM and ACCEPT the decision of Referee Milspaw attached hereto and marked as Exhibit A.

By the Court:

James Gardner Colins

JAMES GARDNER COLINS, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. DIANE KOKEN, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	
	:	**NO 269 M.D. 2001**
RELIANCE INSURANCE COMPANY	:	
IN RE: PROOF OF CLAIM NO.1927912	:	
SCHNEIDER ENGINEERING, PLLC	:	

REFEREE'S REPORT AND RECOMMENDATION

Objections of Schneider Engineering, PLLC (Schneider), to a notice of determination (NOD) from the Statutory Liquidator (Liquidator) of Reliance Insurance Company (Reliance) are before this Referee. Schneider has made a monetary claim against Reliance for services Schneider rendered to a law firm in defense of a Reliance insured. Schneider's claim has been assigned Proof of Claim No. 1927912. The Liquidator assigned Schneider's claim a priority level (e). Schneider contends that its claim should have a priority level of (b). This Referee recommends dismissing Schneider's objection to the Liquidator's assignment.

Facts and Procedural History

This Referee held a pre-hearing telephone conference with the parties on May 5, 2004. Robert N. Gawlas, Jr., Esq. represented the Liquidator. Steven Schneider represented Schneider without assistance of counsel. The parties agreed that there were no factual issues to be resolved and entered into a written Stipulation as to those facts. The stipulation includes the following:

> 1. Reliance Insurance Company ('Reliance") was place in Rehabilitation by Order of the Commonwealth Court of Pennsylvania dated May 29, 2001. Reliance was subsequently

EXHIBIT "A"

placed in Liquidation by order of the Commonwealth Court dated October 3, 2001.

2. Schneider's Proof of Claim concerns its May 18, 2001 invoice addressed to the Law Office of Hurwitz & Fine, P.C. in the total amount of Three Thousand Five Hundred Fifty-five Dollars seventy-seven ($3,555.77) cents for engineering services it rendered in the lawsuit captioned Tingue v. Town of Yorkshire.

3. Hurwitz & Fine, P.C. had been retained by Reliance to defend Reliance's insured, the Town of Yorkshire, pursuant to an insurance policy issued by Reliance.

4. Schneider was retained by Hurwitz & Fine, P.C. on or about April 11, 2001.

5. In particular, Schneider was retained by Hurwitz & Fine, P.C. for the purpose of analyzing the design, condition and signage in place on a roadway involved in the vehicular accident which was the subject of the lawsuit, and all of the services for which Schneider makes claim were performed on or before May 18, 2001.

6. The Liquidator issued her Notice of Determination on Schneider's Proof of Claim Number 1927912, with a mailing date of June 19, 2003.

7. Schneider's Objection to the Notice of Determination was in the form of an August 28, 2003 letter addressed to Reliance's Proof of Claim Department, postmarked September 2, 2003, which was received by the Liquidator on September 5, 2003.

Given the stipulation, there was no need for discovery or a hearing. The parties further agreed that the sole legal issue to be determined was whether Schneider's claim should be assigned a priority level (b), as Schneider contends, or a priority level (e), as the Liquidator contends.

Pursuant to this Referee's direction, Schneider provided a letter brief in support of its position dated June 4, 2004, and received June 7, 2004. That letter brief sets out the following facts:

> Schneider Engineering, PLLC has been working as an engineering firm hired by Hurwitz & Fine, P.C. who represented the Town of Yorkshire. The insurance company for the town was the Reliance Insurance Company. Our work was started on April 11, 2001 and completed on May 18, 2001. We were hired to protect Reliance Insurance Company against a traffic accident claim. We were not a claimant against the Reliance Insurance Company but were defending their assets.

The Liquidator makes two challenges to Schneider's objection. First, she contends that Schneider's objection was not filed within the requisite time, and, therefore, should not be considered. Second, she contends that Schneider has made a claim for pre-rehabilitation defense costs and that such costs are properly accorded a class (e) priority. It is not necessary to address the timeliness issue because the Liquidator's second contention is dispositive.

Discussion

Section 544 of the Insurance Department Act prescribes the level of claims filed against the estate of an insurance company in liquidation. *See* 40 P.S. Section 221.44(a)-(i). The statute establishes nine classes of claims, (a) through (i), and defines the types of claims that fall within each class. *See id.* The statute further establishes the priority of claims for purposes of payment from the estate. *See id.* The portions of the statute relevant to this issue follow:

> The order of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is herein set forth. Every claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment. No subclasses shall be established within any class. . . .
>
> (b) All claims under policies for losses wherever incurred, including third party claims, and all claims against the

> insurer for liability for bodily injury or for injury to or destruction of tangible property which are not under policies, shall have the next priority. All 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 any loss, indemnification for 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 of life insurance, or as gratuities. No payment made by an employer to his employee shall be treated as a gratuity. . . .
>
> (e) Claims under nonassessible policies for unearned premium or other premium refund and claims of general creditors.

On its face, Schneider's claim does not fit within class (b). It is not a claim "for liability for bodily injury or for injury to or destruction of tangible property." It is not a claim "under life insurance and annuity policies." Instead, Schneider wants to be paid for services it provided.

Schneider contends that its claim should be treated as a class (b) claim because it rendered the services in question to assist an insured defend against a claim, which would have been paid from Reliance assets if the plaintiff had prevailed. Our Commonwealth Court, however, has recently held that such defense costs are properly class (e) claims and are not class (b) claims. *Koken v. Reliance Insurance Co.: Objections of Loeb & Loeb, LLP*, No. 269 M.D. 2001 (Pa. Commw. Ct., April 21, 2005) (hereinafter, "*Loeb*").

In *Loeb*, a law firm objected to its claim for attorneys' fees in defense of a Reliance insured being assigned class (e) status. *See id.* Like Schneider, Loeb & Loeb argued that it's claim should be assigned class (b) status because it seeks payment for

services rendered in defense of an insured claim and its claim is, by extension, a claim under the insurance policy for "losses wherever incurred." *See id.* The Commonwealth Court, by Judge Colins, rejected that argument and held,

> "Loeb's claim for unpaid legal fees and costs is not a 'claim under policies for losses wherever incurred,' and therefore does not merit a priority classification of (b) under Section 544(b) of the Act. A plain reading of Section 544(b) indicates that the General Assembly intended to prioritize at that level, only claims for losses *under* a policy of insurance, not any separate loss arising from the insurer's contract with a law firm to provide services in defense of claims under such policy. . . . Loeb's claims for unpaid services are not the obligations of the insured, Groman, and therefore they are not losses under the policy of insurance issued to Groman."

Id. at 4-5. The court then dismissed the objection to the Liquidator's classification of the claim as priority level (e) as the claim of a general creditor. *Id.* at 5.

Judge Colins' opinion is consistent with *Greenfield v. Pennsylvania Insurance Guaranty Association*, 389 A.2d 638 (Pa. Super. 1978), in which the Superior Court rejected a lawyer's claim that he was entitled to payment from the Pennsylvania Insurance Guaranty Association (PIGA) for services rendered defending a claim against an insurance company that later became insolvent. The Court found that PIGA had been created to provide a means of payment, after an insurer became insolvent, of certain obligations of insured entities that were covered by the insolvent insurer's policies. The court then reasoned that it is not an insured's obligation to pay for legal services defending a claim and, because the insured had no obligation to pay the lawyer, the lawyer could not recover from PIGA. The Court also noted that the lawyer could recover from the insurance company's estate as a general creditor.

Judge Colins opinion is also consistent with opinions from other states. *See, e.g., Kelly, Walker & Liles v. McFarling*, 509 S.W.2d 659 (Tex. Civ. App. 1974)

(attorney's claim to be paid for work performed before insurance company placed into permanent receivership appropriately placed in class of general unsecured creditors); *State of North Carolina v. Interstate Casualty Insurance Co.*, 464 S.E.2d 73 (N.C. App. 1995) (attorneys considered "general unsecured creditors, class 5" regarding claims for fees in connection with defense of insureds before company placed into liquidation).

Recommendation

This Referee sees no difference between Schneider's claim as an expert hired by a law firm to assist defense of a Reliance insured and the claim of a law firm, such as Loeb & Loeb, hired to defend a Reliance insured. Accordingly, this Referee recommends that Schneider's objection be dismissed.

April 21, 2006

Luther E. Milspaw, Jr. Esquire
Referee
130 State Street
Harrisburg, PA 17108-0946

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v.	:	
	:	**NO 269 M.D. 2001**
RELIANCE INSURANCE COMPANY	:	
IN RE: PROOF OF CLAIM NO.1927912	:	
SCHNEIDER ENGINEERING, PLLC	:	

CERTIFICATE OF SERVICE

AND NOW, this 21st day of April, 2006, I hereby certify that on this day I served the foregoing Referee's Report and Recommendation, by depositing the same in the U.S. mail, First Class postage pre-paid, at Harrisburg, Pennsylvania addressed as follows:

Mr. Steven Schneider
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Luther E. Milspaw, Jr., Esquire
Referee