

UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION BOARD
ALEXANDRIA, VA.

In the Matter of

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX,

Docket No. 94-001

as claimants against
United Independent Federal Credit Union

Decision and Order on Appeal

Decision

Docket No. 94 001

This matter comes before the National Credit Union Administration Board ("Board") pursuant to 12 CFR §709.8(c)(1) as an administrative appeal of the initial determination by the Liquidating Agent of United Independent Federal Credit Union denying xxxxxxxxxxxxxxxxxxxxxxxxxxxx creditor claims.

CLAIMS

As stated in their November 4, 1993, appeal, the xxxxx, either jointly or individually, have assert the following claims¹:

A. Return of personal property seized at the time of conservatorship identified as:

1. xxxxxxxxxxxxxxxxxxx Bond;
2. xxxxx Bond;
3. Three envelopes containing cash;
4. Fourteen bearer municipal bonds with interest coupons; and
5. Certain items of jewelry.

B. Creditor claims for:

1. Legal fees;
2. Salaries and expenses; and
3. Hold placed on personal bank account of xxxxxxxxxxxx.

These claims arise from the actions of the Board placing United Independent Federal Credit Union ("United") into conservatorship and, subsequently, into liquidation pursuant to Sections 206(h)(1) and 207(a)(1) of the Federal Credit Union Act ("Act"), 12 U.S.C. §§1786 and 1787.²

Background

United was chartered in 1936. Its field of membership was limited to persons who were members of the United Independent Young Men's Benevolent Society, Inc. in New York, NY, and members of their immediate families and any association of such members. United shared office space with the accounting firm of xxxxxxxxxxxx,

owned by xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, and with various corporations in which the xxxxx had an interest. xxxxxxxxxxxx was a director of United as well as its treasurer/principal financial officer and credit committee chairman. xxxxxxxxxxxx was a credit committee member. Together, they exercised substantial control over the credit union and its lending function.

On November 29, 1990, the credit union was placed into conservatorship upon the Board's information and belief that officials of the credit union, principally xxxxxxxxxxxxxxxxxxxxxxxx, had engaged in a scheme to lend credit union funds to persons and entities outside United's field of membership; approved loans to fictitious borrowers; participated in a scheme to falsify loan documents provided to United in order to secure loan advances; and appropriated funds from these fraudulent transactions for their personal use or the use of corporations in which they had an ownership interest.³ The Order of Conservatorship explicitly notified United's board of directors and operating officials that, pursuant to §§ 206(h)(1) and 207(b)(2)(A), (B) and (D), the Conservator was immediately vested with all of the powers of the members, board of directors, officers and committees of United. The Order further directed the officials to cease all activity on behalf of United and informed them that further activity might subject them to civil and/or criminal liability.

On December 6, 1990, United filed an application for an order requiring the Board to show cause why it should not be enjoined from continuing the conservatorship.⁴ Thereafter, claimant xxxxxxxxxxxx moved to intervene in that action.⁵ The motion to intervene was denied and the matter was referred to a U.S. Magistrate. In re Conservatorship of United Independent Federal Credit Union, 768 F.Supp. 42 (E.D.N.Y. 1991). Prior to any final action on the challenge to the conservatorship, the NCUA Board revoked United's charter and ordered it into liquidation on July 31, 1991. This liquidation order was also challenged by United. By Stipulation and Order dated December 10, 1991, the challenge to the conservatorship was withdrawn and the challenge to the liquidation was dismissed without prejudice.

In addition to the conservatorship and liquidation actions, from which the instant matter arises, Claimants have also been involved in other litigation arising from activities related to United. On January 25, 1991, the U.S. Government commenced an *in rem* civil forfeiture proceeding against funds of the Claimants on deposit in certain bank accounts, not at issue here, as being traceable to alleged illegal activity. The Claimants' motion for release of the funds was denied. U.S. v. Certain Funds on Deposit, The Bank of New York, 769 F. Supp. 80 (E.D.N.Y. 1991). On February 4, 1991, a criminal complaint and warrant were issued for the arrest of xxxxxxxxxxxx and two other credit union officials alleging that they did knowingly and willfully combine, conspire and confederate to corruptly impede and endeavor to impede the functions of the NCUA in its role of conservator. In particular, these former officials, who had been relieved of their authority by the conservatorship, continued to purport to act in the credit union's name while attempting to arrange for the transfer of title of two bonds (xxxxxxxxxxxxx) from the credit union to xxxxxxxxxxxx. In July 1991, the criminal complaint was dismissed without prejudice. A criminal indictment setting forth similar charges was then issued. The criminal case is still pending. A civil forfeiture action was also initiated with respect to the monthly principal and interest on the xxxxxxxxxxxx bonds allegedly misappropriated and deposited by xxxxxxxxxxxx into investment accounts.

Although the Second Circuit Court of Appeals remanded the case to the District Court, the matter has not yet been finally resolved. U.S. v. Certain Funds on Deposit in Scudder Tax Free Investment Account and T. Rowe Price Money Fund Account, 998 F.2d 129 (2nd Cir. 1993).

On January 27, 1993, the Claimants' counsel submitted both shareholder claims⁶ and creditor claims. The creditor claims were for those items listed above under CLAIMS. By letter dated April 28, 1993, the liquidating agent, through counsel, denied the creditor claims as barred pursuant to §207(b)(5)(C)(i) for not being filed within the time period provided in the published notice of liquidation. The notice required claims to be filed within 90 days of August 31, 1991. In a follow up letter dated June 11, 1993, counsel for the liquidating agent informed the Claimants that the April 28, 1993, letter was the initial determination of the claims and that the denial was based on untimeliness. Claimants were further informed that they had 60 days to file an administrative appeal with the Board or file suit in U.S. district court. By agreement between respective counsels, Claimants time for filing an appeal was extended to November 5, 1993. The appeal was filed by letter dated November 4, 1993, pursuant to the procedures set forth in 12 CFR § 709.8(C)(1). The appeal only addresses the issue of timeliness because that was the basis for the denial. Claimants assert that the initial determination should be reversed and each claim should be considered on the merits.

Issues

The Board believes there are two issues to be addressed on this appeal. First, are the claims asserted by Claimants true creditor claims. Second, if they are true creditor claims, were they filed within the required time period.

Nature of claims

The first items enumerated in the appeal are claimed as personal property allegedly wrongfully seized at the time of the conservatorship. If the property was never the property of United, as Claimants aver, then these claims would not constitute creditor claims against the assets of United. Rather, they would constitute claims against the liquidating agent for return of the property. With the exception of the items of jewelry, the Board will not concede that the various bonds and cash are the rightful property of Claimants. Instead, the Board believes that these items may well constitute the assets of United or assets purchased with funds wrongfully obtained from United for which Claimants must establish a legal obligation owed to them on the part of United.

With respect to the claims for legal fees, salaries and expenses, these are items that would normally be classified as creditor claims and will be treated accordingly. The hold supposedly placed on xxxxxxxxxxxx personal bank account will also be treated as a creditor claim.

The Board will address the claims for legal fees, salaries and expenses first.

Creditor claims legal fees, salaries and expenses

The Board's power and authority as conservator or liquidating agent is set forth in §207(b) of the Act; the authority to determine claims and the procedures for such

determinations and their review are set forth in §5207(c)(3) through (7). Part 709 of the NCUA Rules and Regulations (12 CFR 709)⁷ also sets forth the rules and procedures for creditor claims in cases involving the involuntary liquidation of a federally insured credit union.

Both the Act and Part 709 require that a notice shall be published and sent to all creditors to present their claims by a certain date not less than 90 days after the publication of the notice. (§207(b)(3) and Section 709.4(b).) The liquidating agent is required to mail a similar notice to "any creditor shown on the credit union's books" (§207(b)(3)(C) and Section 709.4(b).) As provided in §207(b)(5)(C)(i), claims filed after the date specified in the notice "shall be disallowed and such disallowance shall be final."

Likewise, Section 709.6(a)(1) provides: "failure to submit a written claim within the time provided in the notice to creditors shall be deemed a waiver of said claim and claimant shall have no further rights or remedies with respect to such claim." The liquidating agent can, however, consider an untimely claim if two criteria are met: first, if the claimant did not receive notice of the appointment of the liquidating agent in time to file a claim before the required date and, second, the claim is filed in time to permit such payment. (§207(b)(5)(C)(ii) and Section 709.6(a)(2).)

Claimants make two assertions as to why there was an error in the initial determination. First, they argue NCUA is estopped from raising timeliness as an issue because in March 1991, NCUA represented to the U.S. District Court, in its brief in the challenge to the conservatorship, that it would consider returning seized personal property of the Claimants upon the submission of written documentation of ownership, and in so doing, NCUA set no time limit.⁸ That representation, however, as acknowledged by Claimants, related to the bonds, cash and jewelry taken at the time of the conservatorship.⁹ It did not apply to attorneys fees, salaries and expenses.

Second, Claimants argue that even if it were proper for NCUA to hold them to the time limits of §207(b)(5)(C)(i), it can not do so because it failed to comply with the notice requirements of §207(b)(3)(C). That section, however, requires notice to be sent to creditors shown on the credit union's books.

The notice regarding United's liquidation was published on August 29, 1991, September 26, 1991 and October 31, 1991, in the xxxxxxxxxxxxxxxxxxxxxxxxxx. As stated in the notice, creditor claims were due 90 days from August 31, 1991. The notice to creditors was not mailed to xxxxxxxxxxxxxxxxxxxxxxxxxx or their attorneys because they did not appear as creditors on United's books. Even had the Claimants been entitled to a mailed notice, failure to provide such would not be construed as prejudicial to their interests. The Claimants had actual notice, or at a minimum, constructive notice of the liquidation they challenged it in U.S. District Court. They also acknowledged receipt of the August 20, 1991, letter to shareholders of United informing them that the credit union had been placed into liquidation.¹⁰

In McLaughlin v. FDIC, 796 F.Supp. 47 (D. Mass. 1992), the court stated that a claimant's assertion that he or she was not made aware of the filing deadline, as distinct from an assertion that the claimant was not aware of the fact of

receivership, does not bring the claimant within the exception to filing' a claim within the 90 day notice period." As stated by the court:

By its terms, then, the exception only applies to claimants who do not receive notice of the fact of the appointment of a receiver. The exception makes no reference to claimants who are aware of the appointment of a receiver but who do not receive notice of the filing deadline. Therefore, a claimant's assertion that he or she was not made aware of the filing deadline, as distinct from an assertion that the claimant was not aware of the fact of the receivership, does not bring the claimant within the exception.

796 F. Supp at 49. Thus, the court concluded that the claimant could not assert her claim in any court. (See, also, Espinosa v. DeVasto, 818 F. Supp. 438 (D. Mass. 1993) at 443, "claimant who was aware of the FDIC's appointment as receiver, but unaware of the need to file an administrative claim, is without remedy even if the FDIC failed to comply with 12 U. S. C. s 1821 (d)(3)(C).")

In the matter now before the Board, the Claimants clearly knew of the liquidation but failed to file their claim within the required time. Therefore, they are not entitled to the exception provided in §207(b)(3)(C)(ii) and Section 709.6(b)(2). The determination of the liquidating agent to deny their claims for legal fees, salaries and expenses as untimely filed is upheld and the claims are disallowed.

With respect to the legal fees, there is an additional basis for disallowance. The Board notes, first, that a portion of the fees were incurred in civil and criminal actions involving Claimants personally, not by United, and therefore they do not represent legitimate creditor claims against United. Second, to the extent any of the remaining fees could be deemed as being incurred by Claimants on behalf of United, they would be disallowed notwithstanding the filing deadline as discussed below.¹²

The legal fees for which Claimants seek payment are for services rendered after United was placed into conservatorship, for services rendered to Claimants in personal civil and criminal actions and for services rendered in challenging the liquidation. Any fees incurred for challenging the liquidation are disallowed outright pursuant to Section 709.3: "No credit union funds shall be available to pay expenses incurred in bringing a legal action to challenge the Board's liquidation action." Fees incurred to challenge the conservatorship are also rejected. There is no statutory or common law right to fees for such action. The conservatorship order put the Claimants on notice that pursuant to §207(b)(2) the conservator succeeded to "all rights, titles, powers, and privileges of the credit union, and of any member, accountholder, officer, or director of such credit union with respect to the credit union and the assets of the credit union..." (§207(b)(2)(A)(i)) and had the authority to operate United "with all the powers of the members or shareholders, the directors, and the officers..." (§207(b)(2)(B)). (This authority also applies to the Board as liquidating agent.) The Claimants therefore had no authority to commit United's assets to the hiring of counsel. As to the question of how is the statutory right to challenge the conservatorship or liquidation to be exercised if funds are not available to hire counsel, the court in Federal Savings and Loan Insurance Corporation v. Angell, Holmes & Lea, 838 F.2d 395 (9th Cir. 1988) provided the

answer: "The answer is clear: counsel will be paid by court order if the challenge is successful." *Id.*, at 397.

As to the legal fees incurred by the Claimants in the personal civil and criminal actions, these fees are just that, personal, not obligations of United and not claims against the assets of United. However, the Board will briefly address the Claimants' position. In their affidavits, Claimants cite their counsels' opinions that NCUA as conservator need not approve legal representation as a condition for reimbursement of legal fees and 12 CFR §701.33 as the legal basis for indemnification. Claimants counsels were incorrect. As previously discussed, the conservator succeeded to the rights of United and its members, directors, officials and employees and therefore was the only party who could commit United's assets. In addition, Section 701.33 (c) is permissive only. It provides that a "Federal credit union may indemnify its officials and current and former employees for expenses reasonably incurred in connection with judicial or administrative proceedings to which they are or may become parties by reason of the performance of their official duties." (Section 701.33(c)(1), emphasis added.) Indemnification must be consistent with either the provisions of the Model Business Corporation Act or with the standards applicable to credit unions generally in the state where the credit union is located and may be provided for by charter or bylaw amendment, contract or board resolution. The Claimants submitted no evidence that United had adopted a policy of indemnification or if they had adopted such a policy, whether the Model Business Corporation Act or state standards apply. According to the Model Business Corporation Act, indemnification may only be provided if, among other things, the official conducted himself in good faith, in the corporation's best interests, and in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful. ¹³ In light of the Claimants' fraudulent scheme to defraud United and the alleged criminal activity of xxxxxxxxxx, the Claimants would not be entitled to attorneys fees. Even should the Claimants be vindicated in their civil and criminal proceedings, indemnification would not be available by operation of law. It would require action by the Board as liquidating agent of United. As previously noted, United's directors and officers have no authority to act on behalf of United.

The last item listed as a creditor claim relates to a hold placed on xxxxxxxxxx personal account at Manufacturers Hanover Bank for xxxxxx. According to the initial claim, in August 1990, xxxxxxxxxx obtained a loan from United. Part of the loan proceeds were issued by a credit union check (drawn on United's account at Manufacturers and dated August 1, 1990) that was remitted in payment of a life insurance premium for xxxxxxxxxx. The check was made payable to xxxxx xxxx and was endorsed by xxxxxxxxxxxxxx, president of United. The insurance company deposited the check on November 13, 1990 (before the conservatorship) and the check was presented for payment and honored by Manufacturers on March 19, 1991 (after the conservatorship). Claimant states that at the direction of NCUA, a hold was placed in the amount of xxxxxx on his personal account at Manufacturers, twice the amount of the check, because NCUA believed the check was drawn after the conservatorship.

The initial denial letter states that NCUA was unaware of any hold on a personal account and asks for more detail regarding the account involved. In his affidavit, xxxxxxxxxx annexes correspondence from the NCUA to Manufacturers and a letter

from Security Mutual Life Insurance of New York concerning the matter. The letter to Manufacturers submitted by xxxxxxxx does not impose a hold on his account. Instead, it informs the bank that the check should not have been honored due to an unauthorized signature, it was stale and it did not have the two signatures required. By separate affidavit, NCUA requested that the bank recredit United's account.

If in fact, xxxxxxxxxx obtained a loan and had a portion of the proceeds issued by a credit union check for which he did not receive credit, he would have a legitimate creditor claim. Assuming that to be the case ¹⁴, his claim is barred by operation of §207(b)(5)(C)(i) and the initial determination of the liquidating agent is upheld.

Claims for return of personal property

The next category of claims relates to property claimed to be the personal property of the Claimants. As previously noted, these claims were originally asserted as creditor claims and the liquidating agent denied them as such. In their appeal, Claimants treat these items separately from the creditor claims.

Jewelry. The Board is willing to accept the affidavits filed by xxxxxxxxxxxxxxxxxxxx submitted in support of the Claimants contention that this property belonged to Claimants' deceased mother, xxxxxxxx. No claims, other than those of xxxxxxxxxxxxxxxxxxxx, have been made for the jewelry. The Board directs the liquidating agent to return the jewelry to the Claimants.

Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx bonds. The Claimants appeal the denial of their claim for two bonds and the interest earned thereon. These items are the subject of, or closely tied to the subject of, current litigation, see, U.S. v. Certain Funds on Deposit in Scudder Tax Free Investment Account and T. Rowe Price Money Market Account, supra, and the Board declines to interfere with that action. The completion of pending criminal and civil forfeiture proceedings should determine ownership rights and may render this matter moot. Accordingly, the Board will let stand the liquidating agent's determination until such time as a final judicial determination on ownership is rendered. For purposes of this appeal then, the Claimants claim is denied.

Three envelopes containing cash. The Claimants appeal the denial of their claim for cash in the amount of xxxxx that was contained in two Manufacturers Hanover bags and one bag labeled A.F.S. Service Corporation. The liquidating agent's initial denial notes that the creditor claim does not indicate which of the xxxxx claims title to the cash. The letter further states that without waiving the denial as untimely, a request for release would be considered "upon receipt of an affidavit from the individual asserting ownership which documents the source of the funds." Only xxxxxxxxxx claims ownership of the cash, asserting that it was accumulated from his earnings as a CPA and earnings from investments for the purpose of taking an extended vacation.

As the Claimant xxxxxxxxxx originally asserted this claim as creditor claim, it can not be said that the liquidating agent's denial was of obvious error. However, a review of the claim at this juncture leads the Board to conclude that it is not properly a creditor claim and will treat it accordingly. In order to succeed on this matter, Claimant xxxxxxxxxx must establish ownership other than by his own assertion. Given xxxxxxxxxx participation in a major scheme to defraud the credit union, the

Board is unwilling to accept his affidavit as the sole basis for the release of the funds.

Bearer bonds. The Claimants appeal the denial of a claim to 14 municipal bearer bonds and their coupons issued by six different municipal authorities seized from United. The face value of the bearer bonds is xxxxxx. No other party has claimed these bonds. The initial denial letter states that without waiving the denial as untimely, a request for release would be considered "upon receipt of an affidavit from the individual concerned documenting ownership." xxxxxxxxx states that the bonds are his personal property, seized from his personal files. He notes that the bonds and coupons are not listed in any United or NCUA records as a United asset. He also attaches documentation addressing ownership of the bonds and coupons. The documentation consists of barely legible copies of purchase confirmations for the various bonds in his name. Again, because the Board believes xxxxxxxxx was involved in a major scheme to defraud the credit union, it attaches no credibility to his affidavit. In addition, while the documentation indicates that the bonds were bought for xxxxxxxxx account, there is insufficient evidence to determine whether the bonds were actually purchased with his own personal funds or whether he used the proceeds of fraudulently obtained loans from United or other unlawfully obtained assets of United. Therefore, the Board finds the evidence submitted insufficient to establish ownership. xxxxxxx will have to provide other more convincing evidence to establish his ownership rights.

Order

For the reasons set forth above, it is ORDERED as follows:

The liquidating agent's denial of claims for salaries and expenses, legal fees and the hold on xxxxxxxxx account on the basis that the claims were not filed within the required period of time is hereby upheld and the claims are disallowed, and FURTHER, that the claims for attorneys fees are disallowed as unauthorized and not a valid claim against the assets of United Independent Federal Credit Union;

The liquidating agent's determination regarding the certain items of jewelry identified as seized by the conservator to the Claimants is reversed and the liquidating agent shall release said jewelry to the Claimants;

The liquidating agent's determination to deny claims for the return of the xxxxxxx xxxxx bonds shall remain in effect until such time as pending litigation to resolve ownership is resolved and, therefore, the claim for the return of the bonds is denied;

The liquidating agent's denial of the claims for the cash and bearer bonds as untimely filed creditor claims is in error and therefore vacated. The matter is hereby remanded to the liquidating agent to determine to its satisfaction whether Claimants can establish ownership of these items consistent with the Board's discussion herein.

So Ordered this 23rd day of June, 1994, by the National Credit Union Administration Board.

Becky Baker

¹ As noted in the appeal, the xxxxxx original claim dated January 27, 1993, listed all of the claims as creditor claims.

² Hereinafter, references to provisions of Sections 206 and 207 of the Act correspond to provisions in 12 U.S.C. §§1786 and 1787.

³ Order of Conservatorship, Docket #901101, dated November 5, 1990, served November 29, 1990.

⁴ See, xxx, Memorandum of Law, on behalf of xxxxxx, at p.2, Feb. 20, 1991.

⁵ See, Id., Memorandum of Law in Support of Intervention by xxxxxxxxxxxxxxxx, Feb. 20, 1991.

⁶ The shareholder claims are not at issue in this appeal.

⁷ Hereinafter, the provisions of Part 709 will be simply referred to by section number, e.g., Section 709.1 (a).

⁸ Letter of Appeal, p.6.

⁹ Id.

¹⁰ Original claim letter dated January 27, 1993.

¹¹ The exception referred to in the McLaughlin case is found in 12 U.S.C. §1821(d)(5)(C) - the FDIC's equivalent to the exception noted above in §207(b)(5)(C) and Section 709.6.

¹² Due to the fact that all of the fees are disallowed, the Board finds there is no reason to separately identify fees incurred in challenging the conservatorship and liquidation.

¹³ See Section 8.51 of the Model Business Corporation Act.

¹⁴ Based on the Board's belief that the Claimants were involved in fraudulent loan transactions and overall self dealing in the operations of United, the Board is not convinced that xxxxxxxxxxxx did in fact obtain a loan that was the basis for the issuance of United's check.