

UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

Advanced Property Services

Docket 96-001

Creditor Claim

Progressive Consumers Federal Credit Union

Decision and Order on Appeal

Decision

This matter comes before the National Credit Union Administration Board (Board) pursuant to 12 CFR 709.8 as an appeal of the determination by the Liquidating Agent of Progressive Consumers Federal Credit Union denying Advanced Property Services' claim in the amount of \$12,722.16.

Background

Progressive Consumers Federal Credit Union, located in Malden, Massachusetts, was placed into involuntary liquidation due to insolvency, effective January 31, 1994. Progressive Consumers FCU had been in conservatorship for two years prior to the liquidation. IAG FCU assumed some of the liabilities of Progressive Consumers FCU through a purchase and assumption agreement. Notice to creditors of the liquidation was published in the Boston Globe for three months in February, March and April of 1994 as required by Section 207(b)(3) of the FCU Act, 12 U.S.C. 1787(b)(3) and Section 709.4(b) of the NCUA Rules and Regulations, 12 C.F.R. 709.4(b). The last day for filing creditor claims, as noted in the published notice, was May 29, 1994. Advanced Property Services (hereinafter claimant) was not sent individual notice as the claimant did not appear on the books of the credit union. The claimant filed its original claim with the Liquidating Agent on June 28, 1995, thirteen months after the bar date for claims. On July 17, 1995, the Liquidating Agent denied the claim as untimely filed.

The claimant is a general contractor that performed various repairs and maintenance services. The claimant made its claim in the amount of \$12,722.16 for various repairs done on properties held by Progressive Consumers FCU and on the credit union itself. According to the inventory of repairs submitted to the Liquidating Agent, all of the repairs were made prior to the liquidation of the credit union on January 31, 1994. (The claimant also provided repair services on properties for IAG FCU after the liquidation of Progressive Consumers FCU and the purchase and assumption agreement. The present claim does not involve services performed for IAG FCU.) According to staff from the ALMC and the Office of General Counsel involved in the liquidation, the purchase and assumption agreement and its schedules did not identify whether the liabilities set forth by the claimant were assumed by IAG FCU. Individual bills are not normally made part of a purchase and assumption agreement.

Analysis of Facts and Applicable Statute and Regulation

Section 207(b) of the Federal Credit Union Act (12 U.S.C. 1787(b)) and Part 709 of the NCUA Rules and Regulations (12 C.F.R. 709) address NCUA determination of creditor claims in liquidated credit unions. Section 207(b)(3) requires the Liquidating Agent to:

(B)(i) promptly publish a notice to the credit union's creditors to present their claims, together with proof, to the liquidating agent by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and (ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause(i)....

(C) Mailing required.- The liquidating agent shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the credit union's books ...

Section 709.4(b) of the NCUA Rules and Regulations sets forth the same requirements. Notice of the liquidation was published as required. The claimant was not, however, mailed individual notice because it did not appear on the credit union's books at the time of the liquidation. The bar date for filing claims was May 19, 1994.

Section 207(b)(5)(C)(i) of the FCU Act states in part:

Except as provided in clause (ii), claims filed after the date specified in the notice published under paragraph (3)(B)(i) shall be disallowed

The claimant did not file his claim with the ALMC until June 25, 1995 and the ALMC denied it as untimely filed. According to a staff member at IAG FCU , the claimant had inquired with staff at IAG FCU concerning the outstanding bills for Progressive Consumers FCU after the its liquidation, but there is no documentation as to when that inquiry took place.

Section 207(b)(5)(C)(ii) of the FCU Act and Section 709.6(a)(2) of the NCUA Rules and Regulations provide a discretionary exception allowing the Liquidating Agent to consider an untimely claim. Section 207(b)(5)(C)(ii) of the FCU Act provides:

(ii) Certain exceptions.-Clause (I) shall not apply with respect to any claim filed by any claimant after the date specified in the notice published under paragraph (3)(B)(i) and such claim may be considered by the liquidating agent if- (I) the claimant did not receive notice of the appointment of the liquidating agent in time to file such claim before such date; and (II) the claim is filed in time to permit payment of such claim.

As noted, the claimant was not sent individual notice of the liquidation. It appears that the claimant may not have had notice of the liquidation in time to file its claim before the bar date. The claim was filed in time to permit its payment. Therefore, the two criteria of the exception have been met and the claim may be considered. A current staff member at IAG FCU (formerly a staff member at Progressive Consumers FCU) verified that the claimant did complete the work as set forth in the claim and that the bill for the work was never paid. The Board also takes particular note that the claim is based upon work performed, ordered or invoiced during the conservatorship, a time during which the credit union was in the control of NCUA or

a party acting on behalf of NCUA. Therefore, the claimant should have been provided individual notice. The NCUA Board, in exercising its discretionary authority, is of the opinion that the particular circumstances of this case warrant the payment of the claim.

Order

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

The Board reverses the Liquidating Agent's decision to deny Advanced Property Services claim in the amount of \$12,722.16 and grants the claimant's appeal. The ALMC shall pay claimant the amount of \$12,722.16.

The Board's decision constitutes a final agency determination.

So ORDERED this 25th day of January, 1996 by the National Credit Union Administration Board.

Becky Baker
Secretary of the Board