SAVINGS AND LOAN ASSOCIATION: GENERAL CREDITOR'S PREFERENCE; WHEN:

General creditors of Savings and Loan Association being liquidated and dissolved entitled to have their claims, together with costs of proceedings, first satisfied before net proceeds are to be distributed to members pro rata according to participation value of each member's account.

FILED
34

September 11, 1953

Honorable Morris G. Gordon
Supervisor
Division of Savings and Loan
Administration
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department which reads in part as follows:

> "'In regard to Savings and Loan Associations, please advise if lenders to a savings and loan association would have a preferred claim on the assets of an association in liquidation.'"

The opinion request fails to state whether it has reference to creditors who are, or those who are not shareholders of the association, but it is assumed that the reference was intended to refer to creditors who were not shareholders. Therefore, our discussion will be limited to the proposition as to what right or preference, if any, such general creditors have to the assets of a defunct association over those who are shareholders of such association.

When the methods of liquidation and dissolution of an association are mentioned herein, we have reference to those methods provided by statute, and not to insolvency proceedings. We are not concerned with the methods provided by statute for liquidation and dissolution of an association as such matters are only incidental and of secondary importance to our remarks

herein, but we mention them for the reason that it is believed to be both necessary and proper to a discussion of the present inquiry. However, it is obvious that the rights of creditors to preferred claims against the assets of an association are the same regardless of which statutory method is followed.

Such methods might be described as: (1) voluntary and, (2) involuntary.

(1) The liquidation and dissolution may voluntarily be entered into when by a two-thirds vote of the members of the association, they adopt such a resolution. When their action has been approved by the State Supervisor of Savings and Loan, then the association may proceed to wind up its affairs. In that event, the directors shall be the trustees for purposes of liquidation and the procedure to be followed in such instance is provided by Sections 369.465 to 369.480, inclusive, RSMo 1949.

(2) By an involuntary liquidation and dissolution is meant that procedure provided by Sections 369.525 to 369.545, RSMo 1949, under the provisions of which the affairs of an association are wound up by the direction of the Supervisor of Savings and Loan Supervision when it appears to him that it is for the best interests of the shareholders that such action be taken.

Paragraph 4, Section 369.530 provides the duties of the supervisor in those instances and reads as follows:

> "4. If a reorganization plan, when submitted to the members as herein provided, is not approved by the required majority, the supervisor shall liquidate and dissolve such association and, after payment of all indebtedness, including expenses of liquidation and dissolution, shall make distribution to the members of the net proceeds pro rata to the participation value of their accounts."

This brings us to the point in our discussion as to what preference, if any, claims of creditors of such an association have against the assets of same when liquidation proceedings are in progress. In this connection we wish to repeat that regardless of which statutory method is followed that the procedure is not to be construed as a proceeding in insolvency.

The general rule prevailing in most jurisdictions regarding the liquidation and payment of claims of creditors of an association is stated in 12 C. J. S., page 538, and reads as follows:

> "* * *ordinarily, interested parties occupying the position of general creditors are entitled to be paid in preference to those whose claims are founded on the relation which they sustain to the association as members thereof. The receiver must consider not only the rights of claimants, as between such claimants and the association, but the respective rights of creditors as between themselves, and as among the creditors those holding security for their claims are entitled to priority out of the proceeds thereof."

The same general rule is also stated in the opinion of the case of Sanft v. Fair & Square Building & Loan Ass'n., 170 A. 697, at l. c. 698 the court said:

> "Moreover, the creditors of the association are first entitled to be paid before the stockholders. The testimony of the secretary discloses that there is not sufficient money on hand to pay the creditors. In Weinroth v. Homer B. & L. Ass'n, 310 Pa. 265, 165 A. 28, 29, it is stated: 'The fundamental principle is that a withdrawing shareholder is entitled only to his proportionate share of the profits of the association after the payment of creditors. He may not gain any preference by prosecuting his claim to judgment, but still retains his status as a shareholder, and execution upon the judgment will be restrained until there is sufficient surplus to pay it. U. S. B. & L. Ass'n v. Silverman, 85 Pa. 394; or until this proportionate share be determined, Christian's Appeal, 102 Pa. 184; Stone v. B. & L. Ass'n (302 Pa 544, 153 A. 758), supra; Sperling v. B. & L. Ass'n, 308 Pa.

> 143, 162 A. 201; Brown v. Victor B. Ass'n. 302 Pa. 254, 258, 153 A. 349.'"

In the case of Woerheide v. Johnston, reported in 81 Mo. App. 193, in which the right of an association to become indebted to anyone other than its own stockholders was involved, (before the enactment of statutes allowing associations to borrow money from persons other than shareholders) and the status of lenders to a borrowing association was discussed. In its opinion the court quoted with approval from the case of Towle v. American Building Loan & Inv. Society, 61 Fed. Rep. 446, at l.c. 198 the court said:

> "'The Towle v. American Building, Loan & Inv. Society, 61 Fed. Rep. 446, Grosscup, Judge, said, "the insolvency of such an institution is sui generis. There can be strictly speaking no insolvency for the only creditors are the stockholders by virtue of their stock." On the other hand the solution of this troublesome question came before the supreme court of Pennsylvania in Christian's Appeal in 102 Penn. 184, and that court while holding that a court of equity through its receiver was a proper tribunal to administer and adjust the affairs of an insolvent building association adjudged that an assignment for the benefit of creditors was a more direct course to pursue and that the equitable result could be as well attained in such an assignment as by a suit in equity, and further held that in such proceeding the claims of general creditors should first be paid in full, and the remainder distributed pro rata among those whose claims were based upon stock of the association.'"

Section 369.330, RSMo 1949, grants an association the power to borrow money under the restrictions imposed by that section, and it appears that the lender referred to is not a member of the association. From the import of the holding in the case last cited, a lender to the association would be a creditor of such borrowing association and would have preference to his claims against the association over those of shareholders.

Honorable Morris G. Gordon

In view of the foregoing and particularly in view of paragraph 4 of Section 369.530, RSMo 1949, it is our thought that the general creditors of a savings and loan association in process of liquidation and dissolution are to be given preference in the payment of their claims from the assets over those of shareholders of such association. To us it is clear that the general creditors must be first satisfied, including the costs of liquidation and dissolution before the net proceeds are to be distributed to the members pro rata up to the participation value of each member's account.

CONCLUSION

It is therefore the opinion of this department that when a savings and loan association is in process of liquidation and dissolution the general creditors of same are entitled to have their claims, together with the costs of such liquidation, first satisfied from the assets before the net proceeds are to be distributed to the members pro rata according to the participation value of each member's account.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General

PNC:hr