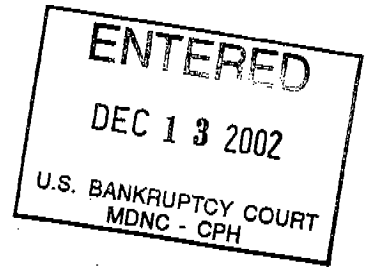


UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
DURHAM DIVISION



IN RE: )  
The Boling Group, L.L.C., ) Case No. 01-81304C-11D  
 )  
Debtor. )

ORDER

This case came before the court on July 25, 2002, for hearing upon the Motion for Payment of Administrative Expenses filed by Great-West Life & Annuity Insurance Company ("Great-West") and the Objection thereto filed by The Boling Group, L.L.C. ("Debtor"). Having considered the evidence offered by the parties and the arguments of counsel, the court makes the following findings of fact and conclusions of law:

1. The court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§151, 157, and 1334, and the General Order of Reference entered August 3, 1984 by the United States District Court for the Middle District of North Carolina. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (B) which may be determined by this court.

2. On or about May 7, 2001, Debtor filed its voluntary petition with the court pursuant to Chapter 11 of the United States Bankruptcy Code.

3. During the pendency of its Chapter 11 case, the Debtor acted as a debtor-in-possession. On August 20, 2001, the Debtor closed the sale of substantially all of its assets and operations

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to a third party buyer. Effective with the closing of the sale, the Debtor ceased business operations and terminated the employment of its employees. On January 25, 2002 the court confirmed the Debtor's First Amended Plan of Liquidation.

4. Great-West and the Debtor entered into an agreement effective January 1, 2000 ("Contract") under which Debtor established an employee welfare benefit plan ("Plan"). The Contract consists of the Services Contract (Great-West Exhibit B, Services Contract, pp. 1-12) and the Stop-Loss Contract (Great-West Exhibit B, Stop-Loss Contract, pp. 1-11). The Contract was in existence as of the petition date, and the Debtor continued to make monthly payments and receive the benefits of the contract post-petition until the contract was terminated at the request of the Debtor.

5. The Debtor agreed to self-fund the primary health benefits under the Plan, and Great-West agreed to provide certain non-discretionary administrative services in exchange for the payment of administrative fees. Other benefits were provided on an insured basis in exchange for the payment of premiums, including life and accidental death and dismemberment and stop-loss insurance.

6. The Contract is a Simple Funding Plan ("SFP") as opposed to a Preferred Funding Plan ("PFP"). Under a PFP, premiums are charged for the agreed stop-loss coverage and a separate account is maintained by the customer to fund the self-insured amount below

the stop-loss level. The customer reimburses Great-West for these claims payments, up to the applicable stop-loss or "attachment" level. Great-West administers the claims, receiving an administrative fee in addition to the premium, and pays the claims of the insured employees from the self-insured funds of the customer up to the stop-loss dollar amount. Any amounts incurred for claims of the insured-employees over and above the stop-loss dollar amount are paid by Great-West.

7. Under a SFP, the customer pays to Great-West a monthly contractual amount ('Monthly Contractual Amount'). The Monthly Contractual Amount consists of three components: (a) the administrative fee for processing the Contract and serving as a claims administrator; (b) the premium payment for coverage in excess of the stop-loss or 'attachment" level; and (c) the amount negotiated between the parties to fund completely the amount below the stop-loss or "attachment" level. No separate funding from the customer is required for actual claims incurred because the third component of the Monthly Contractual Amount represents the maximum liability of the customer for claims; however, the customer is responsible for maintaining an account for the deposit of the Monthly Contractual Amount by the customer. (Great-West Ex. B., Services Contract, Article 3, pp. 3-4 and Stop-Loss Contract, Article 2, pp. 5-6). Under the SFP, as with the PFP, Great-West is responsible for all losses over and above the stop-loss dollar amount.

8. Under the Contract, the Monthly Contractual Amount is due on the first day of each contract month with a grace period of 31 days while the Contract remains in force. (Great-West Exhibit B, Services Contract, Article 2, p. 3 and Stop-Loss Contract, Article 5, p. 6).

9. Another feature of the SFP' is that payment by the customer of the Monthly Contractual Amounts due for the first two months of the initial contract is deferred until the termination of the contract. The customer therefore is required to maintain its bank account for two months after the contract's termination to receive the two deferred payments. (Great-West Ex. B, Services Contract, Article 3, p. 3). The manner in which the amount of the two deferred payments is calculated is provided for in the Contract. (Great West Ex. B, Stop-Loss Contract, Article 1, Item (12), p. 4).

10. During January and February, which were the first two months of the Contract, the Debtor became obligated to pay the Monthly Contract Amount for each of those months, although such payments were deferred and did not have to be made until after the termination of the Contract. (Great-West Ex. B Stop-Loss Contract, Article 9, Item (1), p. 9).

11. Another feature of the SPF is a Payable Experience Surplus provision under which the customer may receive a refund. At the end of the contractual year, the claims actually paid under the Contract are reconciled with the amount paid by the customer to

fund up to the stop-loss or attachment level, and to the extent that the claims paid by Great-West for the customer are less than the amount of money paid by the customer to fund up to the stop-loss or "attachment" level, then the customer receives the balance, less any amount which may be due from a deficit in the prior year. The Payable Experience Surplus is payable in three (3) annual installments. (Great-West Ex. B, Services Contract, Article 3, Item (3) p. 4 and Stop-Loss Contract, Article 1, Item (13), pp. 4-5) .

12. Under the SFP, employees have fifteen (15) months from the **date a claim is incurred to submit** claims for payment by Great-West. However, if payment of the Monthly Contractual Amount is not made within the grace period, then Great-West is under no further obligation to process or pay any insurance claims of the employees. (Great-West Ex. B, Services Contract, Article 7, p. 6 and Stop-Loss Contract, Article 8, p. 8).

13. In a letter dated August 1, 2001 from the Debtor to Great-West, David Frohnaple, an officer of the Debtor, requested termination of the Contract. The letter was not received by Great-West until August 29, 2001. Although the Contract calls for thirty-one days written notice in order to terminate the Contract, Great-West terminated the Contract effective September 1, 2000.

14. The Debtor failed to pay the administrative fee for August of 2001 in the amount of \$11,763.84 and the claims funding for August of 2001 in the amount of \$11,763.84. However, according

to the accounting of Great-West, the Debtor was entitled to a Payable Experience Surplus credit in the amount of \$1,465.12 as of August of 2001.

15. Pursuant to the terms of the Contract, the deferred Monthly Contractual Amounts for January and February of 2000, were payable in September and October of 2001, following the termination of the Contract. (Great-West Ex. B, Stop-Loss Contract, Article 9, Item (1), p. 9). According to the calculations of Great-West, the Debtor owed \$9,898.20 the administrative fees and premium for the coverage above the stop-loss level for each of January and February of 2000, for a total of \$19,796.40. The amounts owed by the Debtor for the claims funding portion of the Monthly Contractual Amounts for January and February of 2000 were \$10,079.09 and \$10,642.46, respectively. These amounts were not paid by the Debtor following the termination of the Contract.

16. Great-West suspended the processing of claims upon receiving the Debtor's notice of termination, effective September 1, 2001, upon the basis that it had not been paid the claims funding and administrative fees for August 2001 nor the deferred payments for January and February of 2000. According to the exhibits attached to the Application and offered at the hearing, Great-West paid a total of \$2,634.00 in processed claims after July 2001, which claims had been submitted prior to the termination date. Great-West confirmed its position at the hearing that under the Contract, Great-West was not required to (and would not)

process or pay any further claims arising under the Contract unless it was paid the full \$61,459.13 claimed as an administrative expense.

17. Great-West seeks to recover payment of \$61,459.13 from the estate as administrative expenses pursuant to 11 U.S.C. § 503 (a) and (b) (1) (A), consisting of the following components:

a. August 2001 Claims Funding in the amount of \$10,642.46, plus August 2001 Administrative Fees in the amount of \$11,763.84, less a credit for one-third of the 2000 Claims Funding Surplus in the amount of \$1,465.12, for a net amount of \$20,941.18.

b. January-February 2000 Claims Funding in the amount of \$20,721.55, plus January-February 2000 Administrative Fees in the amount of \$19,796.40, for a total amount of \$40,517.95.

18. For a claim to qualify as an administrative expense, the claim must arise out of a post-petition transaction between the creditor and the debtor-in-possession and consideration supporting claimant's right to payment must be supplied to and be beneficial to the debtor-in-possession in the operation of the business or the preservation of the estate. See, In re Merry-Go-Round Enterprises, Inc., 180 F. 3d 149, 157 (4th Cir. 1999); In re Stewart Foods, Inc., 64 F.3d 141 (4th Cir., 1995). An entity asserting entitlement to an administrative expense claim has the burden to establish that (1) the claim arises from a transaction with the debtor-in-possession, and (2) the goods or services supplied actually benefitted the bankruptcy estate. See, Toma Steel Supply,

Inc. v. TransAmerican Natural Gas Corp. (In Re: TransAmerican Natural Gas Corp.), 978 F.2d 1409 (5th Cir. 1992). The burden of proof is on the claimant to establish by a preponderance of the evidence its entitlement to an administrative expense award under 11 U.S.C. §503(b). In re Merry-Go-Round Enterprises, Inc., 180 F.3d at 157. And, unlike proofs of claim filed under § 502, there is no presumption of validity for a request for an administrative expense allowance under § 503. See In re Fulwood Enterprises, Inc., 149 B.R. 712, 715 (Bankr. M.D. Fla. 1993). With administrative expense claims under § 503, the court's inquiry should center upon whether the estate has received an actual benefit, as opposed to the loss that the creditor might experience. See Ford Motor Credit Co. v. Dobbins, 35 F.3d 860 (4th Cir. 1994).

19. The portion of Great-West's application involving the Monthly Contractual Amounts for January and February of 2000, which accounts for \$40,517.95 of the Great-West application, does not qualify for allowance under § 503. As noted above, an expense is administrative only if it arises out of a post-petition transaction between the creditor and the DIP or the Trustee, and only to the extent that the consideration supporting the claimant's right was both supplied to and beneficial to the debtor in the operation of the business or the preservation of the estate. The \$40,517.95 claimed for January and February satisfies none of these requirements. Under the Contract, the Debtor's liability to pay a Monthly Contractual Amount for those months became fixed once the



Contract had been in effect for two months, which occurred more than a year before the Debtor filed the Chapter 11 petition. The deferred payments for January and February thus arose out of a pre-petition transaction that occurred before The Boling Group, L.L.C. became a Chapter 11 debtor-in-possession. The consideration supplied by Great-West with respect to the January and February payments was administrative services involving the processing of claims during January and February and providing the insurance coverage afforded under the Contract during January and February. Such consideration, having been supplied more than a year before the Chapter 11 case was filed, provided no benefit to the bankruptcy estate or to The Boling Group as debtor-in-possession.

20. It is true that the payments for January and February were deferred and did not become due until after the Contract was terminated on September 1, 2001. However, it is well established that a debt is not entitled to administrative expense priority simply because the right to payment arises after the debtor-in-possession has begun managing the estate under Chapter 11. See re Sunarhauserman, Inc., 126 F.3d 811, 818 (6th Cir. 1997) (proper standard for determining administrative priority-of a claim "looks to when the acts giving rise to a liability took place, not when they accrued"). In accord In re Jartran, Inc., 732 F.2d 584 (7th Cir. 1984); In re Mammoth Mart, Inc., 536 F.2d 954 (1st Cir. 1976). It is only when the actions of the debtor-in-possession, considered apart from any obligation of the pre-petition debtor, give rise to

a legal liability that the claimant is entitled to the priority of a cost of administration under § 503. See In re Mammoth Mart, Inc., 536 F.2d at 955. In the present case, the obligation to make the payments for January and February of 2000, having arisen and become fixed pre-petition, was not the result of any actions on the part of The Boling Group, L.L.C., as debtor-in-possession. Further, such pre-petition obligations were not converted to allowable costs of administration as a consequence of not coming due until the contract was terminated. In rejecting the argument that lump sum payments provided in a pre-petition employment contract were an administrative expense because they became due upon the termination of the claimants' employment, which occurred post-petition, the court in In re Commercial Financial Services, Inc., 246 F.3d 1291, 1295 (10th Cir. 2001), stated: 'Further, it is not determinative that payment of the lump sum was contingent upon appellants' termination, an event that occurred post-petition.'

21. A different result is required with respect to the portion of the Great-West application involving the two components of the August payment that was not paid by the Debtor (i.e., the claims funding amount of \$10,642.46 and the administrative fee of \$11,761.84). After the Chapter 11 case was filed, the Debtor chose to keep the Contract in force and to provide the benefits afforded under the Contract for its employees. It is undisputed that the Contract remained in effect throughout August and was not terminated by Great-West until September 1, at the request of the

Debtor. The claim for the August administrative fees and claims funding thus **arose** out of a post-petition transaction between Great-West and The Boling Group as debtor-in-possession, and such amounts constitute obligations that were incurred by a debtor-in-possession in the post-petition operation of its business. Even so, the Debtor argues that no COA claim should be allowed because the Contract was rejected pursuant to § 365. Alternatively, the Debtor questions the extent to which the estate was benefitted by having the Contract in force during August. Both of Debtor's arguments are rejected.

22. In support of its rejection argument, Debtor asserts that the Great-West Contract was an executory contract that was rejected pursuant to § 365 when Debtor's plan was confirmed on January 25, 2002. Even if the court accepts Debtor's assertion that rejection of the Contract occurred when Debtor's plan was confirmed, it does not follow that Great-West is not entitled to an administrative expense claim based upon the health care benefits that it provided prior to the asserted rejection of the Contract. If, during the period prior to assumption or rejection of an executory contract, the debtor elects to enforce the contract and receive the benefits provided under the contract, the value of the contractual benefits received under the executory contract constitute an administrative expense under § 503 even if the contract ultimately is rejected pursuant to § 365. See In re Resource Technology Corp., 254 B.R. 215, 221 (Bankr. N.D. Ill. 2000); In re Continental Energy Assocs.

L.P., 178 B.R. 405; 408 (Bankr. M.D. Pa. 1995) (collecting authorities). Thus, having received the benefit of the Contract during August of 2001, the Debtor could not eliminate Great-West's resultant administrative claim by rejecting the contract in January of 2002.

23. It is generally recognized that the cost of insurance coverage provided to the debtor during the Chapter 11 case is beneficial to the estate and is an allowable administrative expense'. See In re Mel-Hart, Products, Inc., 136 B.R. 197199 (Bankr. W.D. Ark. 1991); In re Packard Properties, Ltd., 118 B.R. 61, 64 (Bankr. N.D. Tex. 1990). In the present case, the court is satisfied that the Debtor and the estate were benefitted from the insurance-type benefits provided under the Contract during August and that the unpaid portion of the "premium" payable for such protection is an allowable administrative expense under § 503. Debtor's principal goal in this case was to sell its business as a going-concern and thereby obtain an increased sales price for the estate. In order to maintain the Debtor's business as a going concern pending a sale, it was necessary to continue the operation of the business which, of course, involved keeping Debtor's work force employed and on the job. In order to keep the employees in place, it was necessary to provide them with health care insurance. Debtor chose to do so by keeping the Great-West Contract in effect until the sale of the business could be completed, which occurred at the end of August. There is no allegation or evidence that

Great-West failed to perform any of its obligations under the Contract during August. It was only after September 1, that Great-West ceased processing and paying claims. Throughout August, the Contract remained in effect and Great-West remained obligated to provide the claims servicing and insurance coverage provided under the Contract. Under the Contract, all three components of the Monthly Contractual Amount are due for each month that the Contract is in effect. Where, **as** in the present case, a debtor accepts the benefits of an executory contract prior to acceptance or rejection, the cost of the benefits generally will be measured by reference to the contract which presumably has been negotiated at arm's length. See In re Continental Energy Assocs. L.P., 178 B.R. at 408. See also In re Beverage Canners Intern. Corp., 255 B.R. 89, 93 (Bankr. S.D. Fla. 2000) ("Presumptively, the value of consideration received under an executory contract is the amount set forth in such contract."). There is no reason in the present case to measure the benefit received from the Contract remaining in effect other than by the monthly payment specified in the Contract. The fact that Great-West was called upon to process and pay only \$2,634.00 of claims during August should not operate as a limit on the amount of its administrative expense claim because throughout August Great-West provided for Debtor's employees the full amount of the coverage and protection provided in the Contract and earned the full amount of the premium. The ability of the insurer who provides fire insurance on a Chapter 11 debtor's assets to claim an

administrative expense, is not lost because no fire occurs during the policy period. Likewise, the amount of Great-West's COA claim for providing full health care-benefits throughout August is not limited to the amount actually paid out for claims.

Based upon the foregoing, the Court concludes that Great-West should be allowed an administrative expense claim under § 503 in the amount of \$20,941.18, representing the amount due with respect to the August Monthly Contractual Amount less the \$1,465.12 credit for the 2000 Claims Funding Surplus.

IT IS SO ORDERED.

This 13th day of December, 2002.

*William L. Stocks*

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WILLIAM L. STOCKS  
United States Bankruptcy Judge