

THE STATE OF NEW HAMPSHIRE

2004 OCT 15 P 4: 01

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 04-E-0208

VENISE THERESA GONYA, as representative of the Estate of Joseph E. Gonya, deceased, individually and on behalf of all others similarly situated and

ROXANE S. SCAIFE, as representative of the Estate of Arnold L. Stone, deceased, individually and on behalf of all others similarly situated

v.

ROGER A. SEVIGNY, Commissioner of the State of New Hampshire Insurance Department, in his official capacity as Insurance Commissioner and liquidator of

The Home Insurance Company

APPENDIX TO COMMISSIONER'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER
OF THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT, IN HIS
OFFICIAL CAPACITY AS INSURANCE
COMMISSIONER AND LIQUIDATOR
OF THE HOME INSURANCE COMPANY

By his attorneys,

KELLY A. AYOTTE
ATTORNEY GENERAL

Date: 10/15/04



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Certificate of Service

I hereby certify that a copy of the foregoing was sent this ~~15th~~ day, of October 2004, first class, postage prepaid to Thomas R. Watson, Esq. and Jennifer A. Lemire, Esq., Watson & Lemire, P.A., 75 Congress Street, Suite 211, Portsmouth, NH 03801 and Alan Rich, Esq. and Stephen Blackburn, Esq., Baron & Budd, P.C., 3102 Oak Lawn Avenue, Suite 1100, Dallas, TX 75219-4281.



Suzanne M. Gorman

402-C:40 Special Provisions for Third Party Claims.

I. **THIRD PARTY'S CLAIM.** Whenever any third party asserts a cause of action against an insured of an insurer in liquidation, the third party may

file a claim with the liquidator. The filing of the claim shall release the insured's liability to the third party on that cause of action in the amount of the applicable policy limit, but the liquidator shall also insert in any form used for the filing of third party claims appropriate language to constitute such a release. The release shall be void if the insurance coverage is avoided by the liquidator.

II. **INSURED'S CLAIM.** Whether or not the third party files a claim, the insured may file a claim on his own behalf in the liquidation. If the insured fails to file a claim by the date for filing claims specified in the order of liquidation or within 60 days after mailing of the notice required by subparagraph (b) of RSA 402-C:26, I, whichever is later, he is an unexcused late filer.

III. **PROCEDURE FOR INSURED'S CLAIM.** The liquidator shall make his recommendations to the court under RSA 402-C:45 for the allowance of an insured's claim under paragraph II after consideration of the probable outcome of any pending action against the insured on which the claim is based, the probable damages recoverable in the action and the probable costs and expenses of defense. After allowance by the court, the liquidator shall withhold any dividends payable on the claim, pending the outcome of litigation and negotiation with the insured. Whenever it seems appropriate, he shall reconsider the claim on the basis of additional information and amend his recommendations to the court. The insured shall be afforded the same notice and opportunity to be heard on all changes in the recommendation as in its initial determination. The court may amend its allowance as it thinks appropriate. As claims against the insured are settled or barred, the insured shall be paid from the amount withheld the same percentage dividend as was paid on other claims of like priority, based on the lesser of a) the amount actually recovered from the insured by action or paid by agreement plus the reasonable costs and expenses of defense, or b) the amount allowed on the claims by the court. After all claims are settled or barred any sum remaining from the amount withheld shall revert to the undistributed assets of the insurer. Delay in final payment under this section shall not be a reason for unreasonable delay of final distribution and discharge of the liquidator.

IV. **MULTIPLE CLAIMS.** If several claims founded upon one policy are filed, whether by third parties or as claims by the insured under this section, and the aggregate allowed amount of the claims to which the same limit of liability in the policy is applicable exceeds that limit, each claim as allowed shall be reduced in the same proportion so that the total equals the policy limit. Claims by the insured shall be evaluated as in paragraph III. If any insured's claim is subsequently reduced under paragraph III, the amount thus freed shall be apportioned ratably among the claims which have been reduced under this section.

HISTORY

Source. 1969, 272:1, eff. June 23, 1969.

CROSS REFERENCES

Secured creditors' claims, see RSA 402-C:43.

Surety claims, see RSA 402-C:42.

402-C:38 Proof of Claim.

I. CONTENTS OF PROOF OF CLAIM.

(a) Proof of claim shall consist of a verified statement that includes all of the following that are applicable:

1. The particulars of the claim, including the consideration given for it.
2. The identity and amount of the security on the claim.
3. The payments made on the debt, if any.
4. That the sum claimed is justly owing and that there is no setoff, counterclaim or defense to the claim.
5. Any right of priority of payment or other specific right asserted by the claimant.
6. A copy of any written instrument which is the foundation of the claim.
7. In the case of any third party claim based on a liability policy issued by the insurer, a conditional release of the insured pursuant to RSA 402-C:40, I.
8. The name and address of the claimant and the attorney who represents him, if any.

(b) No claim need be considered or allowed if it does not contain all the information under subparagraph (a) which may be applicable. The liquidator may require that a prescribed form be used and may require that other information and documents be included.

II. SUPPLEMENTARY INFORMATION. At any time the liquidator may request the claimant to present information or evidence supplementary to that required under paragraph I, and may take testimony under oath, require production of affidavits or depositions or otherwise obtain additional information or evidence.

III. CONCLUSIVENESS OF JUDGMENTS. No judgment or order against an insured or the insurer entered after the filing of a successful petition for liquidation and no judgment or order against an insured or the insurer entered at any time by default or by collusion need be considered as evidence of liability or of quantum of damages. No judgment or order against an insured or the insurer entered within 4 months before the filing of the petition need be considered as evidence of liability or of the quantum of damages.

HISTORY

Source. 1969, 272:1, eff. June 23, 1969.

645.64. Special provisions for third party claims

(1) **Third party's claim.** Whenever any third party asserts a cause of action against an insured of an insurer in liquidation, the third party may file a claim with the liquidator. The filing of the claim shall release the insured's liability to the third party on that cause of action in the amount of the applicable policy

limit, but the liquidator shall also insert in any form used for the filing of third party claims appropriate language to constitute such a release. The release shall be void if the insurance coverage is avoided by the liquidator.

(2) **Insured's claim.** Whether or not the 3rd party files a claim, the insured may file a claim on his or her own behalf in the liquidation. If the insured fails to file a claim by the date for filing claims specified in the order of liquidation or within 60 days after mailing of the notice required by s. 645.47(1)(b), whichever is later, the insured is an unexcused late filer.

(3) **Procedure for insured's claim.** The liquidator shall make recommendations to the court under s. 645.71 for the allowance of an insured's claim under sub. (2) after consideration of the probable outcome of any pending action against the insured on which the claim is based, the probable damages recoverable in the action and the probable costs and expenses of defense. After allowance by the court, the liquidator shall withhold any dividends payable on the claim, pending the outcome of litigation and negotiation with the insured. Whenever it seems appropriate, the liquidator shall reconsider the claim on the basis of additional information and amend the recommendations to the court. The insured shall be afforded the same notice and opportunity to be heard on all changes in the recommendation as in its initial determination. The court may amend its allowance as it thinks appropriate. As claims against the insured are settled or barred, the insured shall be paid from the amount withheld the same percentage dividend as was paid on other claims of like priority, based on the lesser of a) the amount actually recovered from the insured by action or paid by agreement plus the reasonable costs and expenses of defense, or b) the amount allowed on the claims by the court. After all claims are settled or barred, any sum remaining from the amount withheld shall revert to the undistributed assets of the insurer. Delay in final payment under this subsection shall not be a reason for unreasonable delay of final distribution and discharge of the liquidator.

(4) **Multiple claims.** If several claims founded upon one policy are filed, whether by third parties or as claims by the insured under this section, and the aggregate allowed amount of the claims to which the same limit of liability in the policy is applicable exceeds that limit, each claim as allowed shall be reduced in the same proportion so that the total equals the policy limit. Claims by the insured shall be evaluated as in sub. (3). If any insured's claim is subsequently reduced under sub. (3), the amount thus freed shall be apportioned ratably among the claims which have been reduced under this subsection.

ally and superficially contingent, if contingent at all, and should be treated as if it were an ordinary claim. This technical contingency conceals the underlying reality of present insurer liability. Wisconsin, with its direct action statute, has already recognized that reality for automobile liability insurance. That notion is further implemented in this provision. Second, unliquidated or undetermined claims are often miscalled "contingent" claims in the statutes, and either denied or relegated to an inferior place in the hierarchy of claims. This is unjustified, and perhaps has its historical origin in the misnaming of such claims as contingent. Unliquidated and undetermined claims should be regarded as absolute and unqualified claims.

645.63 SPECIAL CLAIMS. (1) CLAIMS CONTINGENT ON JUDGMENTS. The claim of a third party which is contingent only on his first obtaining a judgment against the insured shall be considered and allowed as if there were no such contingency.

(2) CLAIMS UNDER TERMINATED POLICIES. Any claim that would have become absolute if there had been no termination of coverage under s. 645.43, and which was not covered by insurance acquired to replace the terminated coverage, shall be allowed as if the coverage had remained in effect, unless at least 10 days before the insured event occurred either the claimant had actual notice of the termination or notice was mailed to him as prescribed by s. 645.47 (1) or 645.48 (1). If allowed the claim shall share in distributions under s. 645.68 (8).

(3) OTHER CONTINGENT CLAIMS. A claim may be allowed even if contingent, if it is filed in accordance with s. 645.61 (2). It may be allowed and may participate in all dividends declared after it is filed, to the extent that it does not prejudice the orderly administration of the liquidation.

(4) IMMATURE CLAIMS. Claims that are due except for the passage of time shall be treated as absolute claims are treated, except that where justice requires the court may order them discounted at the legal rate of interest.

(5) CLAIM UNDER SECURITY FUNDS. The state treasurer in his capacity as custodian of the workmen's compensation security funds under s. 102.65 may file a claim with the liquidator for all sums paid or to be paid from those funds.

645.64 Introductory comment: Third party claims raise tortuous and difficult problems, and this section has surely not completely solved them. The goal was to devise a more subtle and discriminating method of handling third party claims than now exists, which would both do greater equity and also encourage quick termination of the liquidation. This section enacts a system that goes a long way in that direction.

This section provides for the third party claimant to make a choice between pursuing his claim against the insured and presenting his claim in the liquidation. At first blush it would seem harsh and unnecessary to force such a choice. But this is not the case. Before he has to choose, the claimant has every opportunity to determine whether the insured is individually financially responsible. If he is, the claimant can proceed against him, rather than take his chances in the liquidation. If the insured is judgment proof or of doubtful solvency, the claimant can claim in the liquidation. So long as the choice is made before the deadline for filing, the claimant will participate in the liquidation at the appropriate level of priority. He may wait longer to elect if he wishes, but will then be a late filer. He would still have the possibility of participating, though on a lower priority level. See comment on s. 645.61 (2) and (3).

645.64 SPECIAL PROVISIONS FOR THIRD PARTY CLAIMS. (1) THIRD PARTY'S CLAIM. Whenever any third party asserts a cause of action against an insured of an insurer in liquidation, the third party may file

a claim with the liquidator. The filing of the claim shall release the insured's liability to the third party on that cause of action in the amount of the applicable policy limit, but the liquidator shall also insert in any form used for the filing of third party claims appropriate language to constitute such a release. The release shall be void if the insurance coverage is avoided by the liquidator.

Comment on sub. (1): By putting pressure on the third party to release the insured to the extent of the applicable policy limit if he wishes to make a claim in the proceeding, the liquidation can at least help make the insurance fund do the job of protecting the policyholder. It is unfortunate that the innocent third party must relinquish his right against the insured in order to claim in the liquidation but in no other way is it possible to settle the matter expeditiously, efficiently and equitably. The notion that the election is valid only if there is effective insurance does elementary justice.

(2) **INSURED'S CLAIM.** Whether or not the third party files a claim, the insured may file a claim on his own behalf in the liquidation. If the insured fails to file a claim by the date for filing claims specified in the order of liquidation or within 60 days after mailing of the notice required by s. 645.47 (1) (b), whichever is later, he is an unexcused late filer.

Comment on sub. (2): It is entirely fair to the third party claimant to compel him to elect whether to share in the liquidation or exercise rights against the insured. This is a burden upon him, but is a reasonable allocation to him of part of the total burden imposed by an insolvency. If he claims in the liquidation, he must release the insured. If he does not claim, but pursues the insured instead, then of course the insured will have to pay any judgment in full if he is not judgment proof. The insured, if he has filed a timely claim, is entitled to payment from the liquidation proceeding the appropriate percentage of the amount allowed on his claim, though the judgment against him will not be conclusive as to the value of his claim in the liquidation. See sub. (3). If the insured turns out to be judgment proof, the third party claimant could still claim in the liquidation, but then would ordinarily be a late filer and would suffer disadvantage as a result. Thus, without actually forcing the third party to elect in a formal sense, these provisions strongly encourage him to make an early decision, and preferably one to come into the liquidation. Ordinarily a third party will stay out of the liquidation only if he has a clearly solvent defendant. If the third party elects to pursue this insured, the liquidator will not ordinarily need to defend the suit, though he has the power to defend, when necessary to protect the estate. That power is given by s. 645.49 (1). The liquidator can and often should allow reasonable attorney's fees as a part of the insured's claim.

(3) **PROCEDURE FOR INSURED'S CLAIM.** The liquidator shall make his recommendations to the court under s. 645.71 for the allowance of an insured's claim under sub. (2) after consideration of the probable outcome of any pending action against the insured on which the claim is based, the probable damages recoverable in the action and the probable costs and expenses of defense. After allowance by the court, the liquidator shall withhold any dividends payable on the claim, pending the outcome of litigation and negotiation with the insured. Whenever it seems appropriate, he shall reconsider the claim on the basis of additional information and amend his recommendations to the court. The insured shall be afforded the same notice and opportunity to be heard on all changes in the recommendation as in its initial determination. The court may amend its allowance as it thinks appropriate. As claims against the insured are settled or barred, the insured shall be paid from the amount withheld the same percentage dividend as was paid on other claims of like priority, based on the lesser of a) the amount actually recovered from the insured by action

or paid by agreement plus the reasonable costs and expenses of defense, or b) the amount allowed on the claims by the court. After all claims are settled or barred, any sum remaining from the amount withheld shall revert to the undistributed assets of the insurer. Delay in final payment under this subsection shall not be a reason for unreasonable delay of final distribution and discharge of the liquidator.

Comment on sub. (3): The fact that a third party claim often remains unsettled for a long time should not prevent the insured from getting such protection from his policy as others have received from theirs, so long as it does not unreasonably delay the liquidation. Each claim should be evaluated at the latest possible time and a dividend apportioned to it. In such case, however, the amount should not be paid to the insured but withheld for future payment to him, after completion of the litigation and payment of the judgment. If he wins the litigation, the fund would fall back into the unallocated funds of the liquidator except for the allowable defense costs. If it comes back at a time in an amount that would make it uneconomic to distribute it, it will go to the state, as is provided later.

(4) **MULTIPLE CLAIMS.** If several claims founded upon one policy are filed, whether by third parties or as claims by the insured under this section, and the aggregate allowed amount of the claims to which the same limit of liability in the policy is applicable exceeds that limit, each claim as allowed shall be reduced in the same proportion so that the total equals the policy limit. Claims by the insured shall be evaluated as in sub. (3). If any insured's claim is subsequently reduced under sub. (3), the amount thus freed shall be apportioned ratably among the claims which have been reduced under this subsection.

~~645.65 DISPUTED CLAIMS. (1) NOTICE OF REJECTION AND REQUEST FOR HEARING. When a claim is denied in whole or in part by the liquidator, written notice of the determination shall be given to the claimant and his attorney by first class mail at the address shown in the proof of claim. Within 60 days from the mailing of the notice, the claimant may file his objections with the court. If no such filing is made, the claimant may not further object to the determination.~~

~~*Comment on sub. (1):* This subsection describes the procedure by which a dissatisfied claimant may request review. Sixty days is a realistic time limit within which to permit objections to the liquidator's determination. Liquidations are rather deliberate and 60 days is not serious delay. In fact, it may not slow the process down at all if hearings are scheduled promptly.~~

~~(2) NOTICE OF HEARING. Whenever objections are filed with the court, the liquidator shall ask the court for a hearing as soon as practicable and give notice of the hearing by first class mail to the claimant or his attorney and to any other persons directly affected, not less than 10 nor more than 20 days before the date of the hearing. The matter may be heard by the court or by a court-appointed referee.~~

~~645.66 CLAIMS OF SURETY. Whenever a creditor whose claim against an insurer is secured in whole or in part by the undertaking of another person fails to prove and file that claim, the other person may do so in the creditor's name, and shall be subrogated to the rights of the creditor, whether the claim has been filed by the creditor or by the other person in the creditor's name, to the extent that he discharges the undertaking. In the absence of an agreement with the creditor to the contrary, the other person shall not be entitled to any dividend until the amount paid to the creditor on the undertaking plus the dividends paid on the claim from the insurer's estate to the creditor equals the amount of the entire claim of the creditor. Any excess received by the creditor shall be held by him in trust for such other person.~~

Martha C. Ramos and Ruben Ramos, Appellants, v. Julius Jackson, Appellee

No. 86-2951

Court of Appeals of Florida, Third District

510 So. 2d 1241; 1987 Fla. App. LEXIS 9981; 12 Fla. L. Weekly 2037

August 18, 1987, Filed

PRIOR HISTORY: [1]**

An Appeal from the Circuit Court for Dade County, Richard S. Hickey, Judge.

LexisNexis(R) Headnotes

COUNSEL:

Walton, Lantaff, Schroeder & Carson and Luis S. Konski, for Appellants.

Beasley, Olle & Downs and Pam A. Chamberlin, for Appellee.

JUDGES:

Barkdull, Hendry and Baskin, JJ.

OPINIONBY:

PER CURIAM

OPINION:

[*1241] The trial court held that pursuant to Section 631.011(10), n1 Florida Statutes (1985), Ch. 631, Florida Statutes (1985), the "Insurers Rehabilitation and Liquidation Act" governs foreign insolvent insurers with insureds in this state, and that once an election to seek relief under section 631.193, n2 Florida Statutes (1985) is made the insured is released, and furthermore that such election may not be withdrawn. We find no error and affirm. *See and compare Ervin v. Capital Weekly Post, Inc.*, 97 So.2d 464 (Fla. 1957); *Richard Bertram & Co. v. Green*, 132 So.2d 24 (Fla. 3d DCA 1961); *Matthews v. G.S.P. Corporation*, 354 So.2d 1243 (Fla. 1st DCA 1978). We do not find that such a provision amounts to a denial to access to the courts pursuant to Article I, Section 21 of the Florida

Constitution [*1242] (1968) as the injured party has a right to either seek relief against alleged tortfeasors [**2] or waive same and seek relief from the receiver of the insolvent insurer. *Compare Acton v. Fort Lauderdale Hospital*, 440 So.2d 1282 (Fla. 1983); *Lasky v. State Farm Insurance Company*, 296 So.2d 9 (Fla. 1974); *Mahoney v. Sears, Roebuck & Company*, 419 So.2d 754 (Fla. 1st DCA 1982). Therefore, the final summary judgment under review be and the same is hereby affirmed.

n1 Section 631.011 Florida Statutes (1985)

(10) "Insurer," in addition to persons so defined under s. 624.03, also includes persons purporting to be insurers or organizing, or holding themselves out as organizing, in this state for the purpose of becoming insurers and *all insurers who have insureds resident in this state.* (Emphasis added.)

n2 631.193 Releases

The filing of a claim constitutes a release of the insured from liability to the claimant to the extent of the coverage or policy limits provided by the insolvent insurer. The release is conditioned upon the cooperation on the insured with the receiver and the Florida Insurance Guaranty Association and any other guaranty association in defense of the claim. This release does not operate to discharge the Florida Insurance Guaranty Association or any other guaranty association from any of its responsibilities and duties set out in this chapter.

[**3]

Affirmed.

LEXSTAT FLA. STAT. ANN. § 631.193

LexisNexis (R) Florida Annotated Statutes
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*** THIS DOCUMENT IS CURRENT THROUGH ALL 2003 LEGISLATION ***
*** ANNOTATIONS CURRENT THROUGH AUGUST 11, 2004 ***

TITLE 37. INSURANCE
CHAPTER 631. INSURER INSOLVENCY; GUARANTY OF PAYMENT
PART I. INSURER INSOLVENCY: REHABILITATION AND LIQUIDATION

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Fla. Stat. § 631.193 (2003)

§ 631.193. Releases

The filing of a claim constitutes a release of the insured from liability to the claimant to the extent of the coverage or policy limits provided by the insolvent insurer. The release is conditioned upon the cooperation of the insured with the receiver and the Florida Insurance Guaranty Association and any other guaranty association in defense of the claim. This release does not operate to discharge the Florida Insurance Guaranty Association or any other guaranty association from any of its responsibilities and duties set out in this chapter.

HISTORY: ss. 15, 39, ch. 83-38; s. 4, ch. 85-339; ss. 187, 188, ch. 91-108; s. 4, ch. 91-429.

LexisNexis (R) Notes:

LEXSTAT KY. REV. STAT. ANN. § 304.33-390

KENTUCKY REVISED STATUTES ANNOTATED
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*** CURRENT THROUGH THE 2004 REGULAR SESSION ***
*** ANNOTATIONS CURRENT THROUGH JULY 16, 2004 ***

TITLE XXV. BUSINESS AND FINANCIAL INSTITUTIONS
CHAPTER 304. INSURANCE CODE
SUBTITLE 33. INSURERS REHABILITATION AND LIQUIDATION

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

KRS § 304.33-390 (2004)

§ 304.33-390. Special provision for third-party claims

(1) Third-party's claim. Whenever any third party asserts a cause of action against an insured of an insurer in liquidation, the third party may file a claim with the liquidator. The filing of the claim shall release the insured's liability to the third party on that cause of action in the amount of the applicable policy limit, but the liquidator shall also insert in any form used for the filing of third-party claims appropriate language to constitute such a release. The release shall be void if the insurance coverage is avoided by the liquidator.

(2) Insured's claim. Whether or not the third party files a claim, the insured may file a claim on his own behalf in the liquidation. If the insured fails to file a claim by the date for filing claims specified in the order of liquidation or within sixty (60) days after mailing of the notice required by paragraph (b) of subsection (1) of KRS 304.33-250, whichever is later, he is an unexcused late filer.

(3) Procedure for insured's claim. The liquidator shall make his recommendations to the court under KRS 304.33-440 for the allowance of an insured's claim under subsection (2) of this section after consideration of the probable outcome of any pending action against the insured on which the claim is based, the probable damages recoverable in the action and the probable costs and expenses of defense. After allowance by the court, the liquidator shall withhold any dividends payable on the claim, pending the outcome of litigation and negotiation with the insured. Whenever it seems appropriate, he shall reconsider the claim on the basis of additional information and amend his recommendations to the court. The insured shall be afforded the same notice and opportunity to be heard on all changes in the recommendation as in its initial determination. The court may amend its allowance as it thinks appropriate. As claims against the insured are settled or barred, the insured shall be paid from the amount withheld, the same percentage dividend as was paid on the other claims of like priority, based on the lesser of (a) the amount actually recovered from the insured by action or paid by agreement plus the reasonable costs and expenses of defense, or (b) the amount allowed on the claims by the court. After all claims are settled or barred, any sum remaining from the amount withheld shall revert to the undistributed assets of the insurer. Delay in final payment under this subsection shall not be a reason for unreasonable delay of final distribution and discharge of the liquidator.

(4) Multiple claims. If several claims founded upon one (1) policy are filed, whether by third parties or as claims by the insured under this section, and the aggregate allowed amount of the claims to which the same limit of liability in the policy is applicable exceeds that limit, each claim as allowed shall be reduced in the same proportion so that the total equals the policy limit. Claims by the insured shall be evaluated as in subsection (3) of this section. If any insured's claim is subsequently reduced under subsection (3) of this section, the amount thus freed shall be apportioned ratably among the claims which have been reduced under this subsection.

HISTORY: Enact. Acts 1970, ch. 301, subtitle 33, § 39.

LEXSTAT MINN. STAT. § 60B.40

LEXISNEXIS (TM) MINNESOTA ANNOTATED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH ALL 2003 LEGISLATION ***
*** AUGUST 10, 2004 Annotation Service ***

Insurance

CHAPTER 60B INSURERS REHABILITATION AND LIQUIDATION

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Minn. Stat. § 60B.40 (2003)

60B.40 Special provisions for third party claims

Subdivision 1. Third party's claim. Whenever any third party asserts a cause of action against an insured of an insurer in liquidation, the third party may file a claim with the liquidator. The filing of the claim shall release the insured's liability to the third party on that cause of action in the amount of the applicable policy or contract limit, but the liquidator shall also insert in any form used for the filing of third party claims appropriate language to constitute such a release. The release shall be void if the coverage is avoided by the liquidator.

Subd. 2. Insured's claim. Whether or not the third party files a claim, the insured may file a claim on the insured's own behalf in the liquidation. If the insured fails to file a claim by the date for filing claims specified in the order of liquidation or within 60 days after mailing of the notice required by section 60B.26, subdivision 1, clause (b), whichever is later, the insured is an unexcused late filer.

Subd. 3. Procedure for insured's claim. The liquidator shall make recommendations to the court under section 60B.45 for the allowance of an insured's claim under subdivision 2 after consideration of the probable outcome of any pending action against the insured on which the claim is based, the probable damages recoverable in the action, and the probable costs and expenses of defense. After allowance by the court, the liquidator shall withhold any dividends payable on the claim, pending the outcome of litigation and negotiation with the insured. Whenever it seems appropriate, the liquidator shall reconsider the claim on the basis of additional information and amend the recommendations to the court. The insured shall be afforded the same notice and opportunity to be heard on all changes in the recommendation as in its initial determination. The court may amend its allowance as it thinks appropriate. As claims against the insured are settled or barred, the insured shall be paid from the amount withheld the same percentage dividend as was paid on other claims of like priority, based on the lesser of (a) the amount actually recovered from the insured by action or paid by agreement plus the reasonable costs and expenses of defense, or (b) the amount allowed on the claims by the court. After all claims are settled or barred, any sum remaining from the amount withheld shall revert to the undistributed assets of the insurer. Delay in final payment under this subdivision shall not be a reason for unreasonable delay of final distribution and discharge of the liquidator.

Subd. 4. Multiple claims. If several claims founded upon one policy or contract of coverage are filed, whether by third parties or as claims by the insured under this section, and the aggregate allowed amount of the claims to which the same limit of liability in the policy or contract is applicable exceeds that limit, each claim as allowed shall be reduced in the same proportion so that the total equals the policy or contract limit. Claims by the insured shall be evaluated as in subdivision 3. If any insured's claim is subsequently reduced under subdivision 3, the amount thus freed shall be apportioned ratably among the claims which have been reduced under this subdivision.

HISTORY: 1969 c 708 s 40; 1986 c 444

40 P.S. § 221.40

LEXSTAT PA. STAT. ANN. TIT. 40, § 221.40

PENNSYLVANIA STATUTES, ANNOTATED BY LEXISNEXIS(R)

* THIS SECTION IS CURRENT THROUGH ACT 68 OF THE 2004 LEGISLATIVE SESSION *

*** With exceptions as detailed in the Online Product Guide ***

*** SEPTEMBER 2004 ANNOTATION SERVICE ***

PENNSYLVANIA STATUTES
TITLE 40. INSURANCE
CHAPTER 1. INSURANCE DEPARTMENT
ARTICLE V. SUSPENSION OF BUSINESS--INVOLUNTARY DISSOLUTIONS
(C) FORMAL PROCEEDINGS
B. LIQUIDATION
4. CLAIMS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

40 P.S. § 221.40 (2004)

§ 221.40. Special provisions for third party claims

(a) Whenever any third party asserts a cause of action against an insured of an insurer in liquidation the third party may file a claim with the liquidator. The filing of the claim shall operate as a release of the insured's liability to the third party on that cause of action in the amount of the applicable policy limit, but the liquidator shall also insert in any form used for the filing of third party claims appropriate language to constitute such a release. The release shall be null and void if the insurance coverage is avoided by the liquidator.

(b) Whether or not the third party files a claim, the insured may file a claim on his own behalf in the liquidation. If the insured fails to file a claim by the date for filing claims specified in the order of liquidation or within sixty days after mailing of the notice required by section 524(a), whichever is later, he shall be deemed to be an unexcused late filer.

(c) The liquidator shall make his recommendations to the court under section 545 for the allowance of an insured's claim under subsection (b) after consideration of the probable outcome of any pending action against the insured on which the claim is based, the probable damages recoverable in the action, and the probable costs and expenses of defense. Such recommendations as are not modified by the court within a period of sixty days following submission by the liquidator shall be treated by the liquidator as allowed recommendations, subject thereafter to later modification or to rulings made by the court pursuant to section 541. After allowance by the court, the liquidator shall withhold any distributions payable on the claim, pending the outcome of litigation and negotiation with the insured. Whenever it seems appropriate, he shall reconsider the claim on the basis of additional information and amend his recommendations to the court. The court may amend its allowance as it thinks appropriate. As claims against the insured are settled, the claimant shall be paid from the amount withheld the same percentage distribution as was paid on other claims of like priority, based on the lesser of either: (i) the amount allowed on the claims by the court, or (ii) the amount actually recovered from the insured by action or paid by agreement plus the reasonable costs and expenses of defense. After all claims are settled, any sum remaining from the amount withheld shall revert to the undistributed assets of the insurer. Delay in final payment under this subsection shall not be a reason for unreasonable delay of final distribution and discharge of the liquidator.

(d) In the event several claims founded upon one policy are filed, whether by third parties or as claims by the insured under this section, and the aggregate allowed amount of the claims to which the same limit of liability in the policy is applicable exceeds that limit, then each claim as allowed shall be reduced a proportionate amount so that the total equals the policy limit. Claims by the insured shall be evaluated as in subsection (c). If any insured's claim is subsequently reduced under subsection (c), the amount thus freed shall be apportioned ratably among the claims which have been reduced under this subsection.