

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

MOTION FOR APPROVAL OF FIRST EARLY ACCESS
DISTRIBUTION TO INSURANCE GUARANTY ASSOCIATIONS

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby applies for approval of the first early access distribution to insurance guaranty associations in an amount equal to the reported claims that the guaranty associations have paid under Home insurance policies from entry of the liquidation order through June 30, 2004, less recoveries and deposits as contemplated by the Early Access Distribution Plan. As reasons therefor, the Liquidator states:

1. In accordance with RSA 402-C:29, III, the Liquidator applied for approval of an Early Access Distribution Plan ("Plan") to provide for the disbursement of assets of the Home estate from time to time to the New Hampshire Insurance Guaranty Association ("NHIGA"), the New Hampshire Life and Health Guaranty Association, and to any similar organization in another state (the "guaranty associations"). The Plan included a form of Early Access Distribution Agreement ("Agreement") to be entered into by guaranty associations receiving an early access distribution. The Court approved the Plan and Agreement by order entered October 22, 2003. See Affidavit of Peter A. Bengelsdorf, Special Deputy Liquidator, in Support of Approval of First Early Access Distribution ("Bengelsdorf Aff.") ¶ 3.

2. The statutory schemes adopted by New Hampshire and other states for the liquidation of insolvent insurers contemplate the ongoing payment by the guaranty associations

of most claims under insurance policies issued by the insolvent insurer, subject to statutory and policy limits and conditions. See RSA 402-C:29, III; RSA 402-C:44, II. See also, e.g., RSA 404-B:8, I(a) (NHIGA is obligated on “covered claims” under insurance policies issued by the insolvent insurer); RSA 404-B:8, I(b) (NHIGA is deemed the insurer to the extent of its obligation on covered claims and to such extent has the “rights, duties, and obligations” of the insurer). The “covered claims” payable by guaranty associations generally are claims, including claims for unearned premiums, which arise out of and are within the coverage and not in excess of applicable limits of insurance policies issued by the insolvent insurer. E.g., RSA 404-B:5, IV (definition of “covered claim”). The guaranty associations’ obligations thus encompass both indemnity payments and defense expense payments (commonly referred to as allocated loss adjustment expense or “ALAE” payments) covered by a policy issued by Home. Such claims are Class II claims. RSA 402-C:44, II.¹ See Bengelsdorf Aff. ¶ 4.

3. The insurer liquidation statutes provide for early access distributions to guaranty associations because the associations are otherwise initially funded by the insurance industry and ultimately the insurance-buying public. The guaranty associations generally are initially funded by assessments on their member insurers. See, e.g., RSA 404-B:8, I(c). The member insurers pass on these assessments in their rates and premiums. See, e.g., RSA 404-B:16. The guaranty

¹ The New Hampshire Insurance Guaranty Association (“NHIGA”) and other guaranty associations have taken the position that ALAE is a Class I administration expense. This difference of views does not affect this motion because guaranty associations will receive the same payment on account of ALAE through June 30, 2004 under this motion as they would receive if the view of NHIGA and other guaranty associations were correct. The difference is that an early access distribution under this motion is subject to the Agreement, including the repayment provision of the Agreement and RSA 402-C:29, III, described in paragraph 6 below. If it were later determined that ALAE paid by guaranty associations should be treated as an administration cost, then the ALAE portion of the early access distribution would be reclassified in the Liquidator’s accounts as a Class I administration cost and not an early access distribution, in which case the ALAE portion would not be subject to the Agreement or RSA 402-C:29, III. The Liquidator agrees that the receipt of an early access distribution by a guaranty association shall not be deemed to constitute an admission by the guaranty association that ALAE is a Class II claim and each guaranty association shall be deemed to have reserved the right to contend that ALAE should be paid as a Class I administration cost.

associations also are subrogated to the rights of policyholders and claimants to the extent of the payments the associations make on claims arising under the insurer's policies, and they submit requests for reimbursement to the insurer's liquidator. See, e.g., RSA 404-B:11, I and III.

4. Since the commencement of this liquidation proceeding, fifty two guaranty associations have reported making payments under insurance policies issued by Home. As of September 22, 2004, the guaranty associations have reported paying \$42,092,850.02 under policies of insurance issued by Home through June 30, 2004 (\$37,712,521.75 in indemnity and \$4,380,328.27 in ALAE). The guaranty associations also reported recoveries (e.g., subrogation recoveries) totaling \$1,150,761.07, so the unreimbursed payments total \$40,942,088.95. A chart showing the payments, recoveries and unreimbursed payments through June 30, 2004 (as reported by each guaranty association through September 22, 2004) is attached as Exhibit A to the Bengelsdorf Affidavit. It is expected that the guaranty associations will submit significant additional requests for reimbursement from the Home estate in the future due to their ongoing obligations on covered claims under policies of insurance issued by Home and that additional early access distributions will be proposed. Bengelsdorf Aff. ¶ 5.

5. As of June 30, 2004, the unrestricted liquid assets of the Home estate in the Liquidator's control totaled \$572,450,897 as set forth in the Statement of Net Assets attached as Exhibit B to the Bengelsdorf Affidavit.² The liquid assets available to the Liquidator are thus approximately 13 times the amount of the guaranty associations' payments under Home policies as of June 30, 2004, and they exceed the guaranty associations' payments under Home policies as of June 30, 2004 by approximately \$530 million. Bengelsdorf Aff. ¶ 6.

² This amount excludes other Home assets also in the Liquidator's possession: \$54,532,814 in liquid assets presently subject to restrictions limiting their use and \$17,257,486 in illiquid assets. See Bengelsdorf Aff., Ex. B.

6. To receive an early access distribution under the Plan, a guaranty association must execute the Agreement. As required by RSA 402-C:29, III, the Agreement provides that the signatory guaranty association will return early access distributions that the Liquidator subsequently determines are necessary to pay claims of secured creditors or creditors whose claims fall into the same or a higher priority class than those of the guaranty association. See Bengelsdorf Aff. ¶ 7.

7. The Plan provides for a formula to determine the percentage distribution to be made to guaranty associations based on their Home claim payments. However, in view of (a) the significant excess of the liquid assets available to the Liquidator over the guaranty associations' total payments under Home policies through June 30, 2004, (b) the future requests for reimbursement that will be submitted by guaranty associations due to their ongoing obligations on covered claims under Home insurance policies, and (c) the guaranty associations' agreement to return early access distributions necessary to pay creditors in the same or higher priority class as reflected in the Agreement, the Liquidator is of the view that it is reasonable and in accordance with the legislative policy of RSA 402-C:29, III, to make an early access distribution to each guaranty association equal to the guaranty association's reported claim payments under Home insurance policies, less subrogation and other recoveries, through June 30, 2004, as set forth on Exhibit A to the Bengelsdorf Affidavit. Prior to liquidation, Home had made deposits in a number of states as required by the laws of those states. As contemplated by the Early Access Distribution Plan, unless the deposit has been returned to the Liquidator, the Liquidator may deduct the amount of a deposit in a particular state from the early access distribution to the guaranty association in the state in order to provide equivalent reimbursement from Home to the various guaranty associations. See Bengelsdorf Aff. ¶ 8.

8. As noted in the Plan, the United States Department of Justice has asserted in other insurer liquidations that the claim filing deadline does not apply to claims by the Federal Government in light of the federal priority act, 31 U.S.C. § 3713, so that it can at any time file claims entitled to payment by the Receiver on pain of personal liability. See 31 U.S.C. § 3713(b); Ruthardt v. United States, 303 F.3d 375, 384-386 (1st Cir. 2002), cert. denied, 538 U.S. 1031 (2003). The Liquidator is accordingly seeking to obtain a limited waiver of any alleged federal priority claim, which is necessary before the first early access distribution can be made. See Bengelsdorf Aff. ¶ 9.

WHEREFORE, the Liquidator requests that the Court enter an order approving the first early access distribution to guaranty associations in accordance with the schedule of reported payments under Home policies through June 30, 2004, less recoveries and deposits. A proposed form of order is submitted herewith.


Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE
COMMISSIONER OF THE STATE OF NEW
HAMPSHIRE, AS LIQUIDATOR OF THE HOME
INSURANCE COMPANY,

By his attorneys,

KELLY A. AYOTTE
ATTORNEY GENERAL

October 1, 2004


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Certificate of Service

I hereby certify that a copy of the foregoing Motion For Approval of First Early Access Distribution To Insurance Guaranty Associations, the accompanying Affidavit of Peter A. Bengelsdorf, Special Deputy Liquidator, and the Proposed Order Approving First Early Access Distribution To Insurance Guaranty Associations was sent, this day, by first class mail, postage prepaid to all persons on the attached service list.


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