

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**

**AFFIDAVIT OF PETER A. BENGELSDORF, SPECIAL DEPUTY
LIQUIDATOR, IN SUPPORT OF MOTION FOR APPROVAL OF
SETTLEMENT AGREEMENT WITH CLAIMANT THE DELACO
COMPANY**

I, Peter A. Bengelsdorf, depose and say:

1. I was appointed as Special Deputy Liquidator of The Home Insurance Company (“Home”) by the Insurance Commissioner of the State of New Hampshire, acting as liquidator of Home (“Liquidator”), effective June 11, 2003. The facts and information set forth in this affidavit are either within my own knowledge gained through my involvement with this matter, in which case I confirm that they are true, or are based on information provided to me by others, in which case they are true to the best of my knowledge, information and belief.

2. I submit this affidavit in support of the Liquidator’s Motion for Approval of Settlement Agreement with Claimant The Delaco Company. The motion seeks approval of a Settlement Agreement and Mutual Release (“Settlement Agreement”) among The Delaco Company (“Delaco”), the Florida Insurance Guaranty Association (“FIGA”), and Home. A copy of the Settlement Agreement is attached as Exhibit A to the motion.

3. A Home insured, Thompson Medical Company, Inc. (“Thompson”), was merged into Delaco during December 2000. Thompson was insured by Home under three primary surplus lines general liability policies and two standard lines excess policies during the period August 1992 through December 1994.

4. Delaco has filed proofs of claim in the Home liquidation (Proof of Claim Nos. INSU700205, INSU59531, INSU64749, INSU90530, and INSU41872) asserting claims under those policies. Delaco's proofs of claim concern present and future claims against Delaco and/or its predecessor Thompson arising from Thompson's manufacture and sale of a diet product, Dexatrim, that contained phenylpropanolamine ("PPA") between the 1970's and 1998. Since 2001, hundreds of suits have been filed against Delaco alleging adverse effects, such as stroke, due to use of PPA-containing products. Delaco's proofs of claim refer to 55 PPA-related claims which allegedly arose during the periods of Home coverage. These claims create the potential for exposure under both the primary and excess policies issued by Home to Thompson. In addition, twelve third party claimants asserting PPA-related claims against Delaco have filed proofs of claim in the Home liquidation. Delaco also sought recovery from FIGA with respect to certain PPA-related claims arising under the standard lines policies.

5. In light of the lawsuits against it, Delaco filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York on February 12, 2004. In re: The Delaco Company, Case No. 04-10899 (PCB). Since that time, Delaco has acted as a debtor in possession. The Bankruptcy Court established a bar date of May 29, 2004 for creditors to file nongovernmental proofs of claim. The Bankruptcy Court's order bars any holder of a nongovernmental claim that does not file a proof of a claim from asserting any such claim against the debtor (Delaco), the reorganized debtor or any successors.

6. Delaco has proposed a plan of reorganization under Chapter 11 ("Delaco Plan"). The Delaco Plan incorporates a complete and global settlement of Dexatrim-related litigation against Delaco and provides for the establishment of a trust to fund the global settlement

(“Trust”). The Trust is to be funded by settlements with insurers of Delaco that are approved by the Bankruptcy Court. The Delaco Plan presently reflects settlements with eight insurers, including the settlement with Home that is the subject of the present motion. The Delaco Plan contemplates entry of a confirmation order that contains a channeling injunction pursuant to Bankruptcy Code §105(a) that (a) channels all PPA-related claims against Delaco and the settling insurers to the Trust, and (b) enjoins the prosecution of such claims against Delaco and the settling insurers.

7. Delaco, the Liquidator, and FIGA have reached an agreement to resolve all matters with respect to PPA-related claims. The agreement is embodied in the Settlement Agreement. The Settlement Agreement is subject to approval by this Court and by the Bankruptcy Court. Settlement Agreement §§ XX, XXI.

8. The Settlement Agreement provides that Home and FIGA will pay “up to” \$5,450,000 into the Trust. Settlement Agreement § II(A). FIGA will pay \$450,000. *Id.* § II(B)(2). The remaining \$5 million will be treated as an allowance of Delaco’s proofs of claim. Distributions based on that allowance will be made to the Trust at the same times and at the same percentages as distributions to all other Class II creditors of Home. *Id.* § II(B)(1). Under the Settlement Agreement, this Court has exclusive jurisdiction over matters concerning the distributions to the Trust from the Home estate, and the Bankruptcy Court has jurisdiction over other matters arising under the Settlement Agreement. *Id.* § XVII.

9. The payments of any of these amounts is conditioned upon confirmation of the Delaco Plan, including the global settlement and establishment of the Trust, by the Bankruptcy Court. Settlement Agreement § II(A)(3)-(5). (Home and FIGA may terminate the Settlement Agreement if the Delaco Plan is not confirmed by August 31, 2006. *Id.* § XV.) It is also

conditioned upon the Delaco Plan and the confirmation order containing a channeling injunction channeling PPA-related claims against Delaco, Home, and FIGA to the Trust and permanently enjoining the assertion of such claims against Home and/or FIGA. Id. § II(A)((6). The Settlement Agreement also provides for Delaco to seek a protective order from the Bankruptcy Court in the event any third party seeks to pursue Dexatrim claims against Home or FIGA under Home policies. Id. §II(A)(1). In addition, the Trust agrees to indemnify Home and FIGA, to the extent of payments made by them, against losses, liabilities or costs (including reasonable legal expenses) in the event that liability is asserted under the Home policies with respect to PPA-related claims after FIGA makes its payment. Id. § IV(A).

10. The Settlement Agreement is intended to resolve all matters relating to PPA-related claims under Home policies and bring finality to the Home/Delaco relationship. To that end, it also provides for mutual releases, exhaustion of all parties' obligations under and the buyback of the Home policies. Settlement Agreement § III.

11. The Liquidator has negotiated the Settlement Agreement in compromise of Delaco's claims asserted on its proofs of claim and now recommends approval of the Settlement Agreement and allowance of the \$5 million settlement amount as a Class II claim as provided in the Settlement Agreement in accordance with RSA 402-C:45. The Liquidator has reviewed Delaco's claims and submits that the amount recommended is fair and reasonable and that the priority class recommended is proper under RSA 402-C:44.

12. The amount recommended is an agreed aggregate amount based on evaluation and negotiation of coverage issues under the policies and assessment of underlying claims against Delaco. The Settlement Agreement resolves coverage issues and addresses all PPA-related claims against Delaco, which will be channeled to the Trust by the Delaco Plan and the

confirmation order. Payments to the Trust under the Settlement Agreement will serve to provide equality of treatment of similarly situated third party claimants against Delaco. The global settlement incorporated in the Delaco Plan includes a settlement matrix providing for various settlement amounts for Dexatrim-related claims against Delaco, depending upon the nature of the third party's claim and alleged injuries. Using the settlement matrix that is part of the Trust (and was agreed between Delaco and counsel for claimants) to value the underlying claims that arguably may fall within the Home policies, the value of the claims exceeds the recommended allowance for Delaco. Under the Delaco Plan, Dexatrim claimants may choose to litigate rather than accept payment under the settlement matrix, but they can litigate only against the Trust, not Delaco or the settling insurers.


13. The Delaco Plan is subject to approval by vote of the class of persons asserting Dexatrim-related claims against Delaco in accordance with the Bankruptcy Code. If it is approved by the class and by the Bankruptcy Court, then under the Bankruptcy Code it will be binding on all such claimants, including the third party claimants who have filed claims in the Home liquidation.

14. If the Bankruptcy Court approves the Delaco Plan after ratification by the Dexatrim claimants, all those claims against Delaco will be resolved through the Trust. The channeling injunction will direct all such claims to the Trust, and it will enjoin the prosecution of all such claims against Delaco and the settling insurers, including Home. In these circumstances, there will be no third party claims for the Liquidator to address, as those claims will have been channeled to the Trust. As the Delaco Plan will have the effect of discharging Delaco from liability for the claims, the purpose of providing the insured with some of the protection it would have received if Home had not become insolvent will have been served.

15. The Settlement Agreement resolves the proofs of claim submitted by Delaco, and any other matters that might arise under the policies issued by Home to Delaco's predecessor Thompson, in an efficient and comprehensive way. The channeling injunction to be issued by the Bankruptcy Court will direct third party claims against the policies presented in the Home liquidation to the Trust. As the settlement amount reflects negotiation and compromise, it does not appear that addressing individual underlying claims and delaying distributions would result in any savings to the estate.

16. In the circumstances, I believe that the Settlement Agreement is fair and reasonable and in the best interests of the policyholders and creditors of Home.

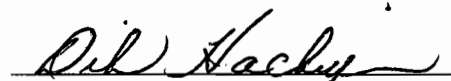
Signed under the penalties of perjury this 21st day of December, 2005.


Peter A. Bengelsdorf
Special Deputy Liquidator of
The Home Insurance Company

STATE OF CALIFORNIA
COUNTY OF VENTURA

Subscribed and sworn to, before me, this 21st day of December, 2005.




Notary Public/Justice of the Peace