

ON PC

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

2009 NOV 17 A 10:03

Docket No. 03-E-0106

**In the Matter of the Liquidation of
The Home Insurance Company**

NH SUPERIOR COURT
MERRIMACK COUNTY
CONCORD, NH

**MOTION FOR APPROVAL OF SIXTH 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 a sixth 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 September 30, 2009, less (a) guaranty association recoveries, and (b) approved first, second, third, fourth and fifth early access distribution amounts. The early access distributions will also be subject to deductions for unreturned deposits and questioned claim items and application of a percentage distribution cap. As reasons therefor, the Liquidator states:

1. On October 8, 2003, 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 Insurance Guaranty Association, and any similar organization in another state (the "guaranty associations") in accordance with RSA 402-C:29, III. 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. Affidavit of Peter A. Bengelsdorf, Special Deputy Liquidator, in Support of Approval of Sixth 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 ultimately funded by 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 associations also are subrogated to the rights

¹ Certain guaranty associations have taken the position that ALAE is a Class I administration cost. 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.

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. On October 1, 2004, the Liquidator moved for approval of a first early access distribution to guaranty associations of approximately \$40.9 million based on reported guaranty fund payments less recoveries through June 30, 2004, subject to deductions based on unreturned deposits held by various states. The Court approved the first early access distribution on October 15, 2004. The Liquidator applied deductions based on deposits held by certain states and made first early access distributions to guaranty associations totaling \$35,321,789.43. The Liquidator moved for approval of a second early access distribution of approximately \$63.1 million on November 23, 2005, and the Court approved the second early access distribution on December 9, 2005. The Liquidator applied deductions based on deposits held by certain states and made second early access distributions totaling \$57,334,436.82. The Liquidator moved for approval of a third early access distribution of approximately \$48.4 million on February 1, 2007, and the Court approved the third early access distribution on March 12, 2007. The Liquidator applied deductions and a 40% percentage cap and made third early access distributions totaling \$39,276,227.69. The Liquidator moved for approval of a fourth early access distribution of approximately \$36.4 million on October 30, 2007, and the Court approved the fourth early access distribution on November 16, 2007. The Liquidator applied deductions and a 40% distribution cap and made fourth early access distributions totaling \$33,805,881.59 on February 12, 2008. The Liquidator moved for approval of a fifth early access distribution of approximately \$39.1 million on November 25, 2008, and the Court approved the fifth early access distribution on January 12, 2009. The Liquidator applied deductions and a 40%

percentage cap and made fifth early access distributions totaling \$22,843,900.03 on March 18, 2009. Bengelsdorf Aff. ¶ 5.

5. Since the commencement of this liquidation proceeding, fifty-seven guaranty associations have reported making indemnity or ALAE payments under insurance policies issued by Home. As of October 30, 2009, the guaranty associations have reported paying \$293,865,033.75 under policies of insurance issued by Home through September 30, 2009 (\$260,025,857.37 in indemnity and \$33,839,176.38 in ALAE). The guaranty associations also reported recoveries (e.g., subrogation, net worth and second injury fund recoveries) totaling \$25,625,282.56, so the guaranty association payments after recoveries total \$268,239,751.19 at this time. The approved first, second, third, fourth and fifth early access distribution amounts – now paid by the estate or through deduction of state deposits – totaled \$231,192,886.71, so the potential total for the sixth early access distribution is \$37,046,864.48.² A chart showing the payments and recoveries through September 30, 2009 (as reported by each guaranty association through October 30, 2009) together with the previous early access payments and the potential sixth early access distribution amounts is attached as Exhibit A to the Bengelsdorf Affidavit. Bengelsdorf Aff. ¶ 6.

6. As of September 30, 2009, the unrestricted liquid assets of the Home estate in the Liquidator's control totaled \$974,545,023 as set forth in the Statement of Net Assets attached as Exhibit B to the Bengelsdorf Affidavit. The liquid assets available to the Liquidator are thus approximately twenty-six times the amount of the guaranty associations' payments eligible for a sixth early access distribution, and they exceed those payments by approximately \$937 million.

² The amounts paid by guaranty associations and the prior early access distribution amounts in this paragraph include the \$3,148,212.13 paid to workers compensation claimants on behalf of guaranty funds during 2003 by the Liquidator as advances on early access distributions in order to avoid disruptions in payments to the claimants.

The liquid assets that would remain after the proposed sixth early access distribution are approximately 3.5 times the amount of the guaranty associations' net payments through September 30, 2009. Bengelsdorf Aff. ¶ 7.

7. 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. This is sometimes referred to as a "claw back". All but two guaranty associations have executed the Agreement. (Those two guaranty associations have not received any early access distributions, although the deposits held in their states exceed their current paid amounts.) See Bengelsdorf Aff. ¶ 8.

8. 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. The first two early access distributions accordingly equaled one-hundred percent (100%) of the amounts the guaranty funds had paid as of September 30, 2005. The third, fourth and fifth early access distributions were based on 100% of guaranty fund payments as of September 30, 2006, September 30, 2007, and September 30, 2008, respectively, but they were subject to a distribution cap equal to forty percent (40%) of the total incurred costs (paid amounts plus case reserves but not including any incurred but not reported reserves) projected by each guaranty association. The Liquidator plans to apply this 40% cap to the proposed sixth early access distribution as well. The cap is designed to avoid situations in which a "claw back" pursuant to RSA 402-C:29, III(b)(4) may be necessary

by keeping each guaranty association's total early access distributions at a level of no more than 40% of its total projected incurred costs. The cap is expected to affect twenty-two guaranty associations: Alaska Insurance Guaranty Association, Florida Insurance Guaranty Association, Florida Workers Compensation Insurance Guaranty Association, Hawaii Insurance Guaranty Association, Maryland Property and Casualty Insurance Guaranty Association, Massachusetts Insurers Insolvency Fund, Missouri Insurance Guaranty Fund, Montana Insurance Guaranty Fund, Nebraska Insurance Guaranty Fund, New Hampshire Life and Health Guaranty Association, Nevada Insurance Guaranty Association, New Jersey Workers Compensation Security Fund, New York Liquidation Bureau, Ohio Insurance Guaranty Association, Ohio Life & Health Insurance Guaranty Association, Pennsylvania Worker's Compensation Security Fund, South Dakota Property & Casualty Insurance Guaranty Association, Utah Insurance Guaranty Association, Vermont Insurance Guaranty Association, Washington Insurance Guaranty Association, West Virginia Insurance Guaranty Association, and the West Virginia Life and Health Insurance Guaranty Association. Use of the cap will reduce the amount to be distributed in the sixth early access distribution by a total of approximately \$14.1 million. Bengelsdorf Aff. ¶ 9.

9. 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 and the orders approving the prior early access distributions, the Liquidator deducted the amount of deposits in certain states from the early access distributions where the deposit had not been returned to the Liquidator. This served to provide equivalent reimbursement from Home to the various guaranty associations. Where deposits remain unreturned and were not deducted in connection with the previous early access distributions, the Liquidator may deduct the amount of a deposit in a

particular state from the sixth early access distribution to the guaranty association in the state.

Bengelsdorf Aff. ¶ 10.

10. The Liquidator asks guaranty associations for clarification regarding payments or recoveries with respect to specific claims. There is now one such inquiry pending (with the Tennessee Insurance Guaranty Association), and the Liquidator plans to withhold the early access distribution based on such claim until the inquiry is resolved. The guaranty association has been contacted about the question. Bengelsdorf Aff. ¶ 11.

11. 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 obtained limited waivers of alleged federal priority claims as a precondition to making the previous early access distributions, and will need to obtain a waiver before making the sixth early access distribution as well. See Bengelsdorf Aff. ¶ 12.

WHEREFORE, the Liquidator requests that the Court:

A. Grant this Motion for Approval of Sixth Early Access Distribution to Insurance Guaranty Associations;

B. Enter an order in the form submitted herewith approving the sixth early access distribution based on reported guaranty association payments through September 30, 2009, less recoveries and previous early access distribution amounts, all as set forth on Exhibit A to the Bengelsdorf Affidavit, and subject to the percentage cap and deductions for unreturned deposits and claim clarifications; and

C. Grant such other and further relief as justice may require.

Respectfully submitted,

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

By his attorneys,
MICHAEL A. DELANEY,
ATTORNEY GENERAL

J. Christopher Marshall
NH Bar ID No. 1619
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3650

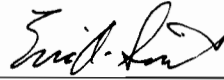


J. David Leslie
NH Bar ID No. 16859
Eric A. Smith
NH Bar ID No. 16952
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110
(617) 542-2300

November 16, 2009

Certificate of Service

I hereby certify that a copy of the foregoing Motion For Approval of Sixth Early Access Distribution To Insurance Guaranty Associations, the accompanying Affidavit of Peter A. Bengelsdorf, Special Deputy Liquidator, and the Proposed Order Approving Sixth Early Access Distribution To Insurance Guaranty Associations was sent, this 16th day of November, 2009, by first class mail, postage prepaid to all persons on the attached service list.



Eric A. Smith
NH Bar ID No. 16952

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SERVICE LIST

Lisa Snow Wade, Esq.
Orr & Reno
One Eagle Square
P.O. Box 3550
Concord, New Hampshire 03302-3550

Gary S. Lee, Esq.
James J. DeCristofaro, Esq.
Kathleen E. Schaaf, Esq.
Morrison & Foerster
1290 Avenue of the Americas
New York, New York 10104-0050

Pieter Van Tol, Esq.
Lovells
590 Madison Avenue
New York, New York 10022

Gail M. Goering, Esq.
Adam Goodman, Esq.
Eric Haab, Esq.
Lovells
One IBM Plaza
330 N. Wabash Avenue, Suite 1900
Chicago, Illinois 60611

Peter G. Callaghan, Esq.
Preti, Flaherty, Beliveau, Pachos
& Haley, PLLP
57 North Main Street
P.O. Box 1318
Concord, New Hampshire 03302-1318

George T. Campbell, III, Esq.
Robert A. Stein, Esq.
Robert A. Stein & Associates, PLLC
One Barberry Lane
P.O. Box 2159
Concord, New Hampshire 03302-2159

David M. Spector, Esq.
Dennis G. LaGory, Esq.
Schiff Hardin LLP
6600 Sears Tower
Chicago, Illinois 60606

Stephan P. Parks, Esq.
Doreen F. Connor, Esq.
Wiggin & Nourie, P.A.
670 North Commercial Street, Suite 305
P.O. Box 808
Manchester, New Hampshire 03105-0808

Michael Cohen, Esq.
Cohen & Buckley, LLP
1301 York Road
Baltimore, Maryland 21093

David H. Simmons, Esq.
Mary Ann Etzler, Esq.
de Beaubien, Knight, Simmons,
Mantzaris & Neal, LLP
332 North Magnolia Avenue
P.O. Box 87
Orlando, Florida 32801