

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 217-2003-EQ-00106

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

**LIQUIDATOR'S MOTION FOR APPROVAL
OF RETURN OF EXCESS COLLATERAL**

Christopher R. Nicolopoulos, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby moves for an order approving the return of excess collateral held by the Liquidator to the policyholders that provided the security to Home. As reasons therefor, the Liquidator states:

1. The Liquidator holds funds received by Home as security for the obligations of policyholders or reinsurers to Home. The funds were either received as cash deposits or result from drawing down on other forms of collateral, such as letters of credit ("LOCs") pursuant to contract. In certain cases, the funds are no longer needed as security because the policyholder's or reinsurer's obligations to Home have been satisfied and the Liquidator does not expect any further activity on the account that would give rise to additional obligations to Home. Other funds and collateral may be determined to be excess in the future.

2. The return of excess collateral is contemplated by the New Hampshire Insurers Rehabilitation and Liquidation Act, RSA 402-C (the "Act") and is required by the agreements between Home and the policyholders. The collateral is not part of the general assets of Home. As described below, the agreements generally provide that (1) the policyholders are required to deposit funds and/or provide LOCs, bonds or trust accounts as security for their obligations to Home, and (2) Home could use the funds or proceeds only to satisfy the obligations of the

policyholders or reinsurers to Home. The agreements also typically further provide either that (a) when in Home's opinion there is no further need for the security, the remaining amounts will be returned to the policyholder, or (b) that proceeds of the security were to be held in a separate account and were not part of Home's general assets.

3. The funds and other collateral held by Home were not intended to be assets of Home but instead to be security to ensure that funds were available to reimburse Home. When there are no more reimbursement obligations, the collateral is required to be returned. The Liquidator accordingly seeks approval to return excess collateral funds and other collateral to the policyholders that provided the collateral.

BACKGROUND

4. The Liquidator holds funds and other collateral as security for the obligations of policyholders or reinsurers to Home. The collateral was posted in connection with three types of arrangements:

- Deductible reimbursement arrangements. Home and certain policyholders entered deductible agreements under which the policyholders agreed to reimburse Home for amounts Home paid under the policies up to specified "deductible" amounts. The policyholders also entered into security agreements with Home to provide security for their obligations to Home under the deductible agreements.
- Retrospective premium plans. Home and certain policyholders entered retrospective premium plan agreements under which the policyholders agreed to pay "retrospective premiums" to Home to reimburse Home for amounts it paid under the policies. The premium agreements for these paid loss retrospective plans and incurred loss retrospective plans require the policyholders to provide security to Home for their obligations to Home under the agreements.
- Captive reinsurance arrangements. Certain policyholders entered arrangements under which "captive" reinsurers (typically reinsurers affiliated with the policyholder) reinsured Home for Home's obligations to the policyholders under the policies. As part of these arrangements, Home and the policyholders entered into security agreements under which the policyholder provided security to Home for the reinsurer's obligations to Home.

Affidavit of Peter A. Bengelsdorf in Support of Motion for Approval of Return of Excess Collateral (“Bengelsdorf Aff.”) ¶ 3.

5. Under each of these arrangements, Home received deposits, LOCs, bonds or rights in trust accounts to secure the obligations of the policyholder or reinsurer to Home. Home (pre-liquidation) and the Liquidator (post-liquidation) held the deposit or drew down on the LOC as permitted by the relevant agreement. The deposits or draw down proceeds were commingled with Home assets, but Home recorded the amounts as “in escrow” in Home’s records. The Liquidator has continued that practice. Bengelsdorf Aff. ¶ 4.

6. As the liquidation has progressed, the Liquidator has identified policyholder deductible, retrospective premium or captive reinsurance arrangements under which the Liquidator does not anticipate having any further claims, either because the policyholder has not pursued claims in the liquidation or because the policyholders’ claims have been resolved and no further claims are expected. Since the Liquidator does not expect any further underlying claims, the Liquidator does not anticipate making any further claims for deductible or retrospective premium or captive reinsurance reimbursements. The Liquidator accordingly seeks approval to return the remaining – and now excess – funds or other collateral to the policyholders who posted the collateral, and to return additional collateral to other policyholders in the future. Bengelsdorf Aff. ¶ 5.

A. The Agreements

7. Deductible reimbursement security agreements. Home entered deductible reimbursement and security agreements with various policyholders under which the policyholder deposited funds and/or posted LOCs to secure the policyholders’ deductible reimbursement obligations to Home. The agreements varied somewhat over the years, but they generally include provisions like those discussed below. Bengelsdorf Aff. ¶ 6.

8. The deductible reimbursement security agreements typically require the insured to provide security for its obligations by depositing with Home a “Deposit Fund” representing an estimate of reimbursable amounts over a set period and by posting an LOC in a percentage of reserves for incurred amounts within the deductible. The agreements generally include the following terms:

- Home may draw down on the Deposit Fund and/or LOC if the insured becomes subject to bankruptcy proceedings or defaults on its obligations.
- Home may use the proceeds of the Deposit Fund or LOC only to satisfy the policyholder’s obligations to Home. Some agreements provide that Home “agrees that it will use and apply any amounts which it may withdraw from the Deposit Fund and/or draw down on the LOC solely for the purpose of reimbursing the COMPANY in accordance with the deductible provision of the POLICIES for the deductible amounts and allocated loss expense it has paid or may pay.” (emphasis added). Others specify that Home “may apply such cash to the payment of: (i) claims for damages; (ii) allocated loss adjustment expenses; and (iii) any other debt owed to COMPANY . . . by the INSURED . . .” (emphasis added).
- Home shall return excess collateral to the insured when, in Home’s opinion, Home has been reimbursed for deductible amounts and all claims arising under the policies have been closed. In those circumstances, the agreements generally provide that Home “shall promptly return to the INSURED any remaining amount of the proceeds from the Deposit Fund and the proceeds from the LOC.” (emphasis added).

Under these agreements, (1) the funds are deposited and LOC posted as security for the obligations of the insured to Home, (2) Home is to use the proceeds only to reimburse itself for covered loss and expenses, and (3) when in Home’s opinion there is no further need for the security, the remaining amounts are to be returned to the insured. Bengelsdorf Aff. ¶ 7.

9. Retrospective plan premium agreements. Under the retrospective plan premium agreements, the policyholders agreed to provide Home with LOCs or trust funds and, in some instances, deposited funds to secure the policyholders’ retrospective premium obligations to Home. The agreements typically required the insured to provide security to Home either by

delivering a promissory note and a letter of credit or a Trust Agreement for a trust account.

Bengelsdorf Aff. ¶ 8.

10. The agreements generally provide that:

- Home may draw on the LOC or trust account where the insured becomes bankrupt or defaults. In that case, Home “may convert [the security] into cash.” (emphasis added). Some agreements also provide for Home to draw on the LOC where the insured fails to provide a replacement LOC.
- Home may only use the drawn funds to pay the Insured’s obligations to Home, and must otherwise hold them apart from its general assets: Home “may apply such cash to pay any debt owed to [Home] by the insured” and “[s]hould such cash be more than the Insured’s obligation to Company, Company shall deposit the excess in a separate account in the name of the Company, in a bank or trust company and apart from its general assets, for use as part of the collateral required hereunder for payment of any other debts owed to Company by the Insured.” (emphasis added). A trust agreement may emphasize the point by providing that “The Beneficiary [Home] hereby covenants to the Grantor that it shall use and apply any withdrawn Assets . . . only for the purpose of paying the Beneficiary the premiums due the Beneficiary under the Premium Agreement and the amounts paid within the policy deductible under the Deductible Agreement.” (emphasis added).

Under the retrospective premium agreements, (1) the LOC is posted or the Trust Account established as security for the obligations of the insured to Home, (2) Home is to use the LOC proceeds or Trust Account withdrawals only to pay amounts due Home from the Insured, and (3) Home is to hold excess funds in a separate account apart from its general assets. The agreements do not by their terms provide that any ultimately remaining amounts are to be returned to the insured, but given the other provisions such a requirement is clearly implied.

Bengelsdorf Aff. ¶ 9.

11. Captive reinsurance arrangements. Under captive reinsurance arrangements, the policyholder posts security for the reinsurer’s performance of its obligations to Home.

Bengelsdorf Aff. ¶ 10.

12. Under typical agreements, the insured agrees to provide an LOC as security and, as further security, funds designated as a “Loss Fund.” The Loss Fund may be held in Home’s

general accounts and used to pay loss, expense and unearned premium when Home pays them prior to reimbursement. The agreements generally provide that:

- If the insured does not replenish the Loss Fund or reimburse Home for amounts it pays, Home may draw down on the LOC.
- If the insured posting the security is involved in bankruptcy proceedings or fails to replace the LOC when necessary, Home may “draw down the full amount” of the LOC and hold the proceeds as security for the insured’s or reinsurer’s payments.
- Home agrees to return excess security. “When in the reasonable opinion of the HOME, all potential losses and related expenses have been paid, HOME shall return to INSURED any remaining amounts.”

Bengelsdorf Aff. ¶ 11.

B. Tracking of Collateral and Collection of Amounts Due

13. Prior to liquidation, Home kept records tracking deposits and other security posted by policyholders, including proceeds received when Home drew down on LOCs, bonds or trust accounts. Home also tracked the amounts due from policyholders for deductibles and retrospective premiums and amounts due from reinsurers on captive reinsurance arrangements. Home generally billed the policyholder or reinsurer for such amounts and sought to collect them from the policyholder or reinsurer. However, when collection efforts failed or the policyholder was bankrupt, Home would collect the amounts by deducting them from the deposit or security reflected on Home’s books. In certain instances as permitted by the agreements, Home drew down on the LOC, bond or trust account and held the proceeds. The deposits or proceeds of security provided by policyholders were tracked separately by Home and referred to as “escrow,” although the amounts were usually commingled with Home funds. Bengelsdorf Aff. ¶ 12.

14. Since the liquidation started, the Liquidator has continued to track the deposits and security, including the proceeds of LOCs, bonds and trust accounts. The Liquidator has also continued to track and bill amounts due on deductibles, retrospective premiums and captive

reinsurance arrangements based on claims allowed in the liquidation. When amounts due were not paid, the Liquidator continued to collect collateral by deducting the reimbursement amounts from the deposits or proceeds reflected on Home’s books. In certain instances, the Liquidator has drawn down on LOCs posted by policyholders. The Liquidator has kept records of the amounts collected from the collateral by deducting reimbursement amounts from the “escrow” amounts reflected in the liquidation’s records. Bengelsdorf Aff. ¶ 13.

C. The Collateral to be Returned

15. The Liquidator has identified a number of insureds with policies subject to deductibles, retrospective premiums, or captive reinsurance arrangements that have had no claims for several years, and in some instances since before the liquidation commenced. In many instances, there has been no contact with the policyholders for years. While some of the policyholders have received claim allowances during the liquidation, none of these policyholders have open POCs, and some did not file any POCs. Based on a review of Home’s records concerning these accounts, the Liquidator does not expect there to be any further claims under the policies involved. Bengelsdorf Aff. ¶ 14.

16. As of December 31, 2020, the number of these “closed” policyholder accounts and the total excess collateral funds held by the Liquidator on those closed accounts was:

Arrangement	# Closed <u>Accounts</u>	\$ Excess <u>Funds Held Collateral</u>
Deductible	47	\$1,483,526
Retrospective	0	0
Captive	36	\$1,099,458.58
Total:	83	\$2,582,984.58

The amount of excess collateral funds involved in the closed accounts ranges from \$500 to \$400,000. The Liquidator proposes to return the excess collateral on these accounts to the policyholders who posted the collateral. Bengelsdorf Aff. ¶ 15.

17. The Liquidator also holds collateral on a number of “open” policyholder accounts. The total collateral presently held on those open accounts as security for the policyholders’ or reinsurers’ ongoing obligations to Home was as of December 31, 2020:

Arrangement	# Open <u>Accounts</u>	\$ Funds Held <u>Collateral</u>	\$ LOC, Bond or <u>Trust Account Collateral</u>
Deductible	65	\$1,793,431	\$12,787,334
Retrospective	6	\$270,781	\$2,316,683
Captive	9	\$1,465,380.78	\$8,436,668
Total:	80	\$3,529,592.78	\$23,540,685

The Liquidator proposes to return collateral funds held on these accounts to policyholders as the accounts close and the Liquidator no longer expects to have further claims to the security. The Liquidator will also release the LOCs, bonds or trust accounts when that collateral is no longer needed. Bengelsdorf Aff. ¶ 16.

EXCESS COLLATERAL SHOULD BE RETURNED BECAUSE IT IS NO LONGER NECESSARY TO PROTECT THE HOME ESTATE AND IS NOT PART OF HOME’S GENERAL ASSETS.

18. The Liquidator requests approval to return the excess deposits, proceeds of LOCs or other collateral, and other types of collateral to the policyholders who provided the security. Return of the collateral is warranted because the Liquidator no longer needs to retain the collateral to protect the Home estate, and because the collateral is subject to a contractual right of return and is not part of Home’s general assets. Bengelsdorf Aff. ¶ 17.

19. First, the collateral is no longer needed. The policyholder accounts involved do not have any open claims, and the Liquidator does not expect that there will be any further claims under the policies. To ensure that the accounts do not present any potential future exposure, the Liquidator will require the policyholder involved to waive any additional claims against Home under the policies and contracts involved as a condition to return of the excess collateral. Bengelsdorf Aff. ¶ 18.

20. Second, as described below, the collateral deposits, proceeds and other collateral held by Home and now the Liquidator are not part of Home's general assets. Amounts held under security agreements like those at issue here are not part of the insolvent insurer's estate. They are instead held subject to the policyholders' right to the return of collateral amounts that are not necessary as security for their obligations to Home. See Bengelsdorf Aff. ¶ 19.

I. DEPOSITS AND OTHER COLLATERAL POSTED AS SECURITY ARE NOT ASSETS OF THE HOME ESTATE.

21. The New Hampshire Insurers' Rehabilitation and Liquidation Act, RSA 402-C, does not expressly address the return of collateral held by an insolvent insurer. However, the Act includes provisions addressing security posted by the insolvent insurer, which offer guidance in the handling of security posted by others for the benefit of Home. The Act recognizes that deposits constitute security, respects the posting party's residual rights in collateral, and excludes collateral from the general assets of the estate.

22. The Act broadly defines security in terms that encompass the deductible, retrospective premium and captive reinsurance agreements at issue here. The Act defines "secured claim" as "any claim secured by mortgage, trust deed, deposit as security, escrow or otherwise, but not including claims against general assets." RSA 402-C:3, XIII (emphasis added). The Act provides for claimants to obtain payment from such security. See RSA 402-

C:43, II (the value of security “shall be credited upon the secured claim”). The Act states that amounts provided by the insurer as collateral are not part of its “general assets.” The Act defines “general assets” as:

all property, real, personal or otherwise, not specifically mortgaged, pledged, deposited or otherwise encumbered for the security or benefit of specified persons or limited classes of persons, and as to such specifically encumbered property the term includes all such property or its proceeds in excess of the amount necessary to discharge the sums secured thereby.

RSA 402-C:3, X (emphasis added). The Act thus recognizes various types of security and excludes property specifically encumbered for the security of particular persons from general assets.

23. Applying the principles of these provisions to collateral held by Home, (1) amounts deposited as security with Home constitute collateral, and (2) excess collateral or collateral proceeds no longer needed to secure claims belong to the party posting the security, not to Home. In the language of RSA 402-C:3, X, the deposited funds and drawdown proceeds were “specifically . . . deposited or otherwise encumbered” as security and are not part of Home’s general assets. Accordingly, they are properly returned to the party posting the security once it is clear that the security is no longer needed.

24. The Court may also consider the position of the National Association of Insurance Commissioners (“NAIC”) as set forth in the NAIC’s Insurers Receivership Model Act (“IRMA”). See Matter of Liquidation of Home Ins. Co., 154 N.H. 472, 481 (2006) (considering IRMA in interpreting the Act). IRMA provides that security, including cash held by the insolvent insurer, is to be handled in accordance with the relevant agreement with the insured. It broadly defines “loss reimbursement collateral” – a phrase that encompasses deductible and retrospective reimbursement arrangements – as:

any cash, letters of credit, surety bond or any other form of security provided by the insured to secure its loss reimbursement obligations, regardless of whether the collateral is held by, for the benefit of, or assigned to the insurer, and regardless of whether the collateral also secures other obligations of the insured.

IRMA § 712(A)(4). Any such collateral “shall be maintained and administered in accordance with the loss reimbursement policy except where the loss reimbursement policy conflicts with this section.” IRMA, § 712(D) (emphasis added).

25. IRMA expressly recognizes that unneeded security should be returned. Section 710 addresses the situation where the insolvent insurer provided a surety bond for the performance of a principal and obtained collateral from that principal: “If the time to assert claims against a surety bond or a surety undertaking has expired and all of the claims have been satisfied in full, any remaining collateral for the surety bond or surety undertaking shall be returned to the principal.” IRMA § 710(B)(5) (emphasis added).

26. The NAIC Receiver’s Handbook similarly recognizes that amounts held as security should be handled in accordance with the agreements and returned when no longer needed:

The receiver needs to consider all other assets purportedly held by the insolvent insurer in some trust, collateral or non-general capacity to verify that these assets are, in fact, not general assets of the estate and to ascertain what continuing obligations the receiver may have (i.e., who has the rights to the funds and how and to whom the funds should be distributed). The entry of an order of liquidation does not abrogate these special situations and the receiver should take steps to assure that these assets and obligations are separately addressed and the rights of claimants protected.

NAIC, Receiver’s Handbook 526 (2021) (emphasis added). In the language of the Receiver’s Handbook, the funds and other items are held in a “trust, collateral or non-general capacity.” Excess collateral accordingly should be returned to the insured or reinsurer posting the security.

27. The collateral amounts held by Home were commingled with Home funds, and Home’s deductible, retrospective premium and captive reinsurance agreements typically provide

that they are governed by New York law. This might be relevant because certain New York cases treat commingled funds as part of a bank's assets unless the evidence shows the funds were not intended to be treated as a deposit (in which case the relationship is bailor and bailee). See, e.g., In re Howell's Will, 260 N.Y.S. 510, 513 (App. Div. 1932). The cases distinguish between "general" deposits (which are part of the bank's assets) and "special" deposits (which are not). See Merrill Lynch Mortg. Capital, Inc. v. F.D.I.C., 293 F.Supp.2d 98, 107 (D.D.C. 2003) (applying New York law); Genesee Wesleyan Seminary v. U.S. Fidelity & Guar. Co., 159 N.E. 702 (N.Y. 1928). Bank deposits are presumed to be general, but a depositor can overcome the presumption "by proving the existence of an agreement, express or implied, that an account was a special deposit." Merrill Lynch, 293 F.Supp.2d at 105.

28. However, the presumption that a bank deposit is general does not apply here, where – unlike the situation with a bank – there is no reason for a policyholder or reinsurer to deposit funds with Home other than as security. The deductible, retrospective premium and captive reinsurance agreements here clearly show that the funds were provided as "security" for the limited purpose of satisfying the policyholder's or reinsurer's obligations to Home. If an intent to create a special deposit were required, the agreements evidence that intent. The Liquidator is accordingly required to return the excess security to the policyholder.¹

II. THE PROCESS FOR RETURN OF EXCESS SECURITY.

29. The Liquidator proposes to contact the policyholders that deposited the security by mail and/or by email (if an email address is available) at their last known addresses reflected

¹ Some of the funds at issue were received after the liquidation began and thus after the rights-fixing date of RSA 402-C:21, II. This puts them in a separate category regardless of the treatment of pre-liquidation deposits. To the extent that the Liquidator drew down and received LOC proceeds after the liquidation commenced, or the insured provided and the Liquidator accepted fresh deposits after the liquidation began, the Liquidator received the funds as security subject to the terms of the agreement and should return the excess.

in the Home liquidation records. If a policyholder does not respond, the Liquidator will conduct a reasonable internet search for a current address and again attempt contact by mail and, if an email address is available, by email. Bengelsdorf Aff. ¶ 20.

30. The Liquidator will advise the policyholder of the remaining deposit or other collateral and request a release of any further claims against Home under the Home policies and the contractual arrangement(s) involved. The release will ensure that there is no reason to retain the collateral on account of potential future deductible, retrospective or reinsurance obligations. Once the release is received, the Liquidator will return the excess collateral to the policyholder. Bengelsdorf Aff. ¶ 21.

31. If a policyholder cannot be located through this process, the Liquidator will turn over the unclaimed excess funds to the New Hampshire State Treasurer in accordance with RSA 402-C:47, I., before the liquidation closes. The policyholder will be able to obtain its excess security from the State Treasurer in accordance with that statute. Bengelsdorf Aff. ¶ 22.

Conclusion

The Liquidator requests that the Court enter an order in the form submitted herewith:

- (1) Granting this motion;
- (2) Approving the Liquidator's return of excess collateral to the policyholder on the condition that the policyholder first provide the Liquidator with a satisfactory release of all claims under the Home policies and the deductible reimbursement, retrospective premium or captive reinsurance arrangements involved; and
- (3) Granting other appropriate and equitable relief.

Respectfully submitted,

CHRISTOPHER R. NICOLOPOULOS, INSURANCE
COMMISSIONER OF THE STATE OF NEW
HAMPSHIRE, AS LIQUIDATOR OF THE HOME
INSURANCE COMPANY,

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September 2, 2021

Certificate of Service

I hereby certify that copies of the foregoing Liquidator's Motion for Approval of Return of Excess Collateral Funds were sent this 2nd day of September, 2021, by first class mail, postage prepaid to all persons on the attached service list.

/s/ Eric A. Smith
Eric A. Smith
NH Bar ID # 16952

THE STATE OF NEW HAMPSHIRE

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