

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE  
IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY  
DISPUTED CLAIMS DOCKET

**In Re Liquidator Number:** 2012-HICIL-55  
**Proof of Claim Number:** EMPL713583  
**Claimant Name:** Linda Faye Peeples  
**Claimant Number:**  
**Policy or Contract Number:**  
**Date Of Loss:**

**ORDER ON THE MERITS**

The issue before the Referee is whether Ms. Peeples' claim, which was accepted by the Liquidator as a Class V claim, should be reclassified to a higher class. The parties have briefed the issue, and agreed that there was no need for discovery as to the reclassification issue. Telephonic oral argument was held on March 15, 2013.

**The Facts**

Ms. Peeples was an employee of the Home Insurance Company from September 1986 to November 1990. During her employment, Ms. Peeples invested six percent of her earnings in the Home Insurance Company 401(k) Plan.<sup>1</sup> The Home matched a portion of her investment. Ms. Peeples claims that the Home invested in "junk bonds" and that she never received anything from the 401(k) plan.

Ms. Peeples filed a Proof of Claim on May 5, 2010 seeking amounts due to her from the Plan. On July 14, 2011, the Liquidator issued a Notice of Determination and assigned the claim to Class V – Residual Classification for priority. Because the Liquidator does not anticipate there will be sufficient assets to permit a distribution to Class V claimants, the Liquidator deferred addressing the merits of Ms. Peeples' claim. On August 9, 2011, Ms. Peeples filed a Request for Review of the priority classification, requesting that the claim be treated as a Class II – Policy Related Claim. On November 8, 2011, the Liquidator issued a Notice of Redetermination confirming the assignment of the claim to Class V for priority. On December 13, 2011, Ms. Peeples objected to the Notice of Redetermination. She later filed a disputed claim.

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<sup>1</sup> According to the Liquidator Home provided employees with a savings plan – The Home Builders Savings Plan which late because the AmBase Savings Plan, and which was later converted into a Section 401(k) Plan within the meaning of the Internal Revenue Code. Effective January 1, 1987. For ease of reference, all three plans are referred to as the Home 401(k) Plan or "the Plan."

## Analysis

The New Hampshire Insurers Rehabilitation and Liquidation Act, RSA 402-C (“the Act”) governs this liquidation. The Act sets forth statutory priorities and requires that the assets of an insolvent insurer are to be distributed under the direction of the Court according to the statutory priorities. The statute also provides that every claim in each successive priority class is to be paid in full, or adequate funds be retained to make such payment, before any member of the next class receives payment. RDSA 402-C:44. The Act sets forth ten classes. In this dispute, we need only consider a few of those classes.

I. Administration Costs. The cost and expenses of administration, including but not limited to the following: the actual and necessary costs of preserving or recovering the assets of the insurer; compensation for all services rendered in the liquidation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorney’s fees.

II. Policy Related Claims. All claims by policyholders, including claims for unearned premiums in excess of \$50, beneficiaries, and insureds arising from and within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company, and liability claims against insureds which claims are within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company and claims of the New Hampshire Insurance Guaranty Association, the New Hampshire Life and Health Insurance Guaranty Association and any similar organization in another state...

III. Claims of the Federal Government. [federal claims that do not fall within Classes I and II above].

IV. Wages. (a) Debts due to employees for services performed, not to exceed \$1000 to each employee which have been earned within one year before the filing of the petition for liquidation. Officers shall not be entitled to the benefit of this priority. (b) Such priority shall be in lieu of any similar priority authorized by law as to wages or compensation of employees.

V. Residual Classification. All other claims...not falling within other classes under this section...

Ms. Peeples argues that her 401(k) plan was set up as a before and after tax contribution to a policy of insurance and that Home assumed a risk of loss for that “retirement plan policy.” She asserts that employees who contributed to the 401(k) are equivalent to Home Insurance Company policyholders, who purchased liability or other insurance from Home. She argues that claims by employees arising from the alleged mis-investment of funds in the 401(k) plan by Home are the same as those by policy holders and the claims are meant to be included in Class II under the Act. Ms. Peeples provides no legal or other support for her contention.

Class II of the Act provides priority for “Policy Related Claims.” In Class II, the Act specifically identifies three types of claimants who fall within the category. The first type of claimant identified includes policyholders, beneficiaries and insureds. The second is liability claims against insureds and the third is the two New Hampshire guaranty associations and similar organizations in other states. The only one of the three categories at issue in this disputed claim is the first – policyholders, beneficiaries and insureds.

Ms. Peeples asserts that she thinks of the 401(k) plan as a “retirement plan policy.” She believes paying a portion of her earnings into the Plan is akin to paying the premium on an insurance policy. However, nothing in the record describes the Plan as such. The documents provided regarding the Home Builder Savings Plan and the AmBase Savings Plan indicate the plans provided employees an opportunity to save with tax advantages. None of the documents demonstrate either Savings Plan was the equivalent of an insurance policy.

It is also clear from the language of the statute that the legislature did not intend to include employees who contributed to 401(k) plans as policyholders, beneficiaries and insureds. The legislature did not include any language related to employees of the insolvent insurer in Class II. In fact, the New Hampshire Supreme Court has indicated “the purpose of RSA chapter 402-C is to protect preferred creditors by reserving assets for them, including people insured by Home, and people with claims against those insured by Home.” The Supreme Court did not add to that list employees who invested in a 401(k) sponsored by the Home Insurance Company. The Iowa Supreme Court has specifically addressed this issue under a similar statute. In State ex rel. Hager v. Iowa Nat’l Mut. Ins. Co., 430 N.W.2d 420 (Iowa 1988), the Court indicated that the language of a similar statute suggested that the priority status was aimed at the insolvent insurance company’s obligations to its insureds and not to employee claims. In that case, the court held that claims by employees under the insurer’s deferred compensation plan did not fall within the policy related priority class.

Turning to the other priority classes in the Act, Ms. Peeples' claim does not fall in any of those. It is not an Administration Cost defined in Class I as post liquidation expenses for authorized activities undertaken in furtherance of the liquidation. Class III includes claims of the federal government – this is not one of those claims. Class IV is for debts due to employees for services performed within one year before the filing of the petition for liquidation. Ms. Peeples was employed from 1986 until 1990 and so was not employed within a year of the liquidation in 2003. Given that her claim does not fall in any of the first four classes of priority, it falls within Class V.

The Referee upholds the Liquidator's determination that Ms. Peoples' claim falls within Class V for priority under RSA 402-C.

**So ordered.**

March 27 2013  
Date:

Melinda S. Gehris  
Referee, Melinda S. Gehris