

EXHIBIT E

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of Liquidation
of the Home Insurance Company

No. 03-E-106

ORDER ESTABLISHING PROCEDURES REGARDING CLAIMS FILED WITH
THE HOME INSURANCE COMPANY IN LIQUIDATION

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**PROCEDURES
REGARDING CLAIMS FILED WITH
THE HOME INSURANCE COMPANY IN LIQUIDATION**

1 Applicability

The provisions of these Procedures shall apply to the resolution of claims against The Home Insurance Company in Liquidation ("The Home"), a New Hampshire property and casualty insurance company which was placed into liquidation effective June 11, 2003, by order of the Superior Court for Merrimack County, New Hampshire (the "Liquidation Court"), in The Matter of the Rehabilitation of The Home Insurance Company, No. 03-E-0106 (the "Liquidation Proceedings"). These Procedures shall apply to claim proceedings before the Liquidator, any court-appointed Referee and the Liquidation Court. These Procedures are adopted pursuant to RSA 402-C:41.

2 Definitions

a. "**Proof of Claim**" shall mean, unless otherwise ordered by the Liquidation Court, any Official Claim Form or any other writing received within the Liquidation the content of which asserts that monies may be owed by The Home to a Claimant.

b. "**Claimant**" shall mean any policyholder, reinsured, reinsurer, general creditor, third-party, or guaranty association that has filed a Proof of Claim. In these Procedures, "Claimant" refers to the Claimant whose right to payment is at issue.

c. "**Determination**" shall mean a decision by the Liquidator (including the Special Deputy Liquidator or a designated Staff Assistant)

regarding a claim, which determines whether a claim is to be allowed in whole or in part, whether a claim is to be disallowed and, if allowed, how the claim is to be classified under RSA 402-C:44. If a claim becomes a Disputed Claim, **"Determination"** shall also mean the determination or order of the Referee or the Liquidation Court determining whether a claim is to be allowed in whole or in part and, if allowed, how the claim is to be classified as to priority.

d. **"Disputed Claim"** shall mean a claim which has been disallowed in whole or in part or classified as to priority by the Liquidator's Notice of Determination and for which the Claimant has timely filed an Objection.

e. **"Disputed Claims Docket"** shall mean the separate file and numbering system set up and maintained by the Liquidation Clerk for the handling of Disputed Claim proceedings.

f. **"Guaranty Fund"** shall mean an association or other legal entity existing under the laws of any state, the District of Columbia or Puerto Rico and lawfully authorized to pay covered claims under policies issued by an insolvent insurance company.

g. **"The Home Docket"** shall mean the docket maintained by the Merrimack County Superior Court Clerk ("Clerk") in the Liquidation Proceedings.

h. **"Liquidation"** or **"Liquidation Proceeding"** shall mean the court-supervised Liquidation Proceeding of The Home, which proceeding was ordered and established by the Liquidation Court effective June 11, 2003.

i. **"Liquidation Clerk"** shall be the person responsible for the orderly clerical processing of Proofs of Claim once those claims are disputed. The current address for the Liquidation Clerk is The Home Insurance Company in Liquidation, Office of Disputed Claims, P.O. Box 1720, Manchester, New Hampshire, 03105-1720.

j. **"Liquidation Court"** or **"Court"** shall mean the Superior Court for Merrimack County, New Hampshire. The current address for the Liquidation Court is Office of the Clerk, Merrimack County Superior Court, 4 Court Street, Concord, New Hampshire 03301, Attention: Home Docket, No. 03-E-0106. A copy of any filing with the Liquidation Court should be mailed to the Liquidator at the address given below, and the Office of the Attorney General, Department of Justice, 33 Capitol Street, Concord, New Hampshire 03301, Attention: Home Insurance.

k. **"Liquidator"** shall mean the Insurance Commissioner of the State of New Hampshire in his or her capacity as Liquidator of The Home and, for purposes of these Procedures, includes the Special Deputy Liquidator appointed by the Liquidator pursuant to RSA 402-C:25(1) and any Staff Assistants designated by the Liquidator or Special Deputy Liquidator. The current address of the Liquidator, for purposes of these Procedures, is The Home Insurance Company in Liquidation, Claims Determination Unit, P.O. Box 1720, Manchester, New Hampshire, 03105-1720.

1. **"Motion to Recommit"** shall mean a request by the Liquidator or the Claimant that the Court consider and review the Referee's Report of a Disputed Claim.

m. **"Official Claim Form"** shall mean the proof of claim form approved by the Court or other specific claim forms approved by the Liquidator.

n. **"Participant"** shall mean the Claimant, the Liquidator and any other person or entity who is granted leave to participate in proceedings under these Procedures.

o. **"Referee"** shall mean an attorney appointed by the Liquidation Court pursuant to RSA 402-C:41(II), RSA 519:9, and N.H. Super. Ct. R. 81 to hear and decide Disputed Claims.

p. **"Request for Review"** shall mean a request by a Claimant that the Liquidator reconsider a Notice of Determination issued to that Claimant.

3 Scope and Purpose

a. These Procedures shall govern the practice and procedures in all proceedings before the Liquidator, any Referee, and the Liquidation Court with respect to claims against The Home, pursuant to the New Hampshire "Insurers Rehabilitation and Liquidation Act," RSA 402-C:1 - 402-C:61.

b. The purpose of these Procedures is to achieve uniformity and to provide procedures for the presentation, processing, determination and classification of claims and to assist all Claimants worldwide in the orderly presentation of their claims against The Home.

c. In adopting these Procedures, the Court intends to formulate a uniform procedure that will assure that the Liquidation, Claimants (wherever resident), Guaranty Funds and other interested persons or entities are treated fairly and ratably.

4 **Filing of Claims** [RSA 402-C:37]

Except for preferred ownership and proprietary claims and subject to the provisions of RSA 402-C:37 and C:40 and further order of the Liquidation Court, proof of all claims must be filed with the Liquidator in the form outlined in Rule 5 of these Procedures on or before June 13, 2004.

5 **Proof of Claim** [RSA 402-C:38]

a. **Claim Form.** The Official Claim Form is the preferred form for use in making a claim. The failure of a Claimant to use the Official Claim Form will not necessarily be fatal to a claim if the filing fulfills the criteria of a claim as defined in Section 5(b) below.

b. **Contents of Proof of Claim.** Unless otherwise ordered by the Liquidation Court, Proof of Claim shall consist of a verified statement that includes all of the following that are applicable:

- i. The particulars of the claim, including the consideration given for it.
- ii. The identity and amount of the security on the claim.
- iii. The payments made on the debt, if any.
- iv. That the sum claimed is justly owing and that there is no setoff, counterclaim or defense to the claim.

v. Any right of priority of payment or other specific right asserted

~~by the Claimant.~~

vi. A copy of any written instrument which is the foundation of the claim.

vii. In the case of any third party claim based on a liability policy issued by The Home, a release of the insured pursuant and subject to RSA 402-C:40(I).

viii. The name and address of the Claimant and the attorney who represents the Claimant, if any.

c. No claim need be considered or allowed if it does not contain all the information under Section 5(b) above which may be applicable. The Liquidator may require that a prescribed form be used and may require that other information and documents be included.

d. Supplementary Information. At any time the Liquidator may request the Claimant to present information or evidence supplementary to that required under Section 5(b) above, and may take testimony under oath, require production of affidavits or depositions or otherwise obtain additional information or evidence.

6 Process of Determining Claims by the Liquidator

a. POC Claim Files; Case Files. The Liquidator shall maintain a file that shall include: any supporting data provided by the Claimant, any relevant documentation found in the Liquidation's records or developed by Liquidation personnel, including without limitation, any available claims file (which may be

incorporated by reference); and, in the case of a coverage issue, any relevant and available policy or contract records, outside litigation documents, consultants' reports, or learned treatises and studies. The Liquidator may request that the Claimant submit additional information or documentation to support the claim. All pertinent information considered by the Liquidator shall be retained in this "POC Claim File", which shall contain a copy of the claim and Liquidator's Determination. When a claim becomes a Disputed Claim by the Claimant's timely filing of an Objection a file will be created and known as the "Case File." The Case File shall contain all of the most pertinent non-privileged information considered by the Liquidator in rendering the Notice of Determination, including a copy of the policy or other contract upon which a claim is based, a copy of the Proof of Claim, copies of pertinent correspondence from Claimant's counsel and/or Claimant and the Liquidator's responses thereto and a copy of the Notice of Determination or Re-determination of the claim.

b. Determination. The Liquidator shall review all claims duly filed in the Liquidation and shall make such further investigation as he or she deems necessary. The Liquidator may compound, compromise or in any other manner negotiate the amount for which claims will be recommended to the Court. The Liquidator shall enter a determination, which shall either (1) allow the claim in whole or in part and classify the amount of the allowed claim or (2) disallow the claim in whole.

Notice of Determination. The Liquidator shall transmit a copy of the Determination to the Claimant by first-class U.S. mail at the address shown on the original Proof of Claim or at such other address as is subsequently provided by the Claimant or his or her authorized representative (as determined by the Liquidator). This transmittal will be known as the "Notice of Determination."

7 Claimant's Request for Review and Liquidator's Re-determination

a. Request for Review. If the claim is disallowed in whole or in part, the Claimant may file a Request for Review with the Liquidator within thirty (30) days of the date on which the Notice of Determination was mailed to the Claimant. The Request for Review must set forth with specificity the reasons why the Determination is being challenged and how it should be modified.

b. Re-determination of Claim. After a Request for Review is filed, the Liquidator will review the claim. The Liquidator shall inform the Claimant of the results of such review by issuing a Notice of Redetermination in writing by first-class mail.

8 Objections to Denial of Claims [RSA 402-C:41(I)]

When a claim is denied in whole or in part in a Notice of Determination, the Claimant may file an Objection with the Court within sixty (60) days from the mailing of the notice. If a timely Request for Review is filed with the Liquidator under Section 7(a) above then the Claimant shall have sixty (60) days from the mailing of the Notice of Redetermination to file an Objection with the Court. The Claimant shall mail a copy of the Objection to the Liquidator. If

no timely Objection is filed, the Claimant may not further object to the Determination.

9 **Service of Filings after Claim is Disputed**

a. When a Claimant files a timely Objection, the Liquidation Clerk shall mail a Notice of Disputed Claim to the Claimant, with a copy to the Referee or Court, to initiate the Disputed Claim proceeding. The Liquidator and the Claimant are the only persons who shall be considered parties to the Disputed Claim proceeding.

b. Persons or entities who are directly affected by the Disputed Claim proceeding may seek leave to intervene therein by filing a "Motion to Participate" with the Referee no later than thirty (30) days after the date of mailing of the Notice of Disputed Claim proceeding. Guaranty Funds with an actual or potential interest shall recite that interest in the motion. Reinsurers that have a contractual right to interpose any defense or defenses that they deem available to The Home shall identify the contract in question and state that they have a contractual right to interpose defenses. Persons or entities granted leave to participate in the Disputed Claim proceeding shall not be considered parties to the Disputed Claim proceeding but may participate in the proceeding in all respects not specifically denied in these Procedures.

c. After the Liquidation Clerk has issued a Notice of Disputed Claim proceeding, any subsequent filings with respect to the claim, whether in the form of notices, motions, pleadings, orders, letters or other papers, shall be served by first class mail, by overnight courier service, or by hand on all

Participants in such proceeding. The original of any filing shall be filed with the Liquidation Clerk and a copy shall be sent to the Referee at his or her business address, unless the Liquidation Court determines, either sua sponte or on motion by the Liquidator or the Claimant, to adjudicate a disputed claim, in which event a copy shall be sent to the Court. Should a Disputed Claim be adjudicated by a Referee, no filings shall be made with the Superior Court for Merrimack County. If an attorney has entered an appearance on behalf of a Participant, all future communications to that Participant for so long as the attorney remains counsel of record shall be transmitted to the attorney rather than to the Participant. Service on an attorney of record shall be deemed to be service upon a Participant represented by such attorney.

d. Once the Liquidation Clerk has issued a Notice of Disputed Claim, no other pleadings or motions shall be filed except as expressly provided in these Procedures.

10 Referees

Unless the Liquidation Court determines, either sua sponte or on motion by the Liquidator or the Claimant, to adjudicate a Disputed Claim:

- a. Each Disputed Claim shall be adjudicated by a Referee appointed by the Court pursuant to RSA 519:9.
- b. All Disputed Claim proceedings shall be conducted by the Referee according to the rules of equity or law, as the case may be, pursuant to RSA 519:10, and shall be governed by the New

Hampshire Superior Court Rules and the New Hampshire Rules of Evidence.

- c. Referees shall have all the powers, duties and limitations specified in RSA 493-A:1 and shall enjoy the same immunity as the Court. All Referees shall be governed by all of the canons of the Code of Judicial Conduct. Notwithstanding any appointment, Referees shall serve at the pleasure of the Court.
- d. Referees shall be allowed reasonable compensation for their services and expenses at such rate as the Court shall determine from time to time. All bills for services and expenses shall be submitted to the Clerk and shall include reference to the days when the Referee sat and Disputed Claims heard. For deliberation times, research and decision writing, cases shall be listed by Claimants' name and claim number with the amount of time spent per claim. Expenses shall be itemized. The Clerk shall pay the Referee in the first instance and then submit a bill to the Liquidator for reimbursement.
- e. No Referee shall appear as counsel in connection with any matter connected to the Liquidation.

11 Requests for Evidentiary Hearing

Each Disputed Claim shall be adjudicated on the basis of written submissions and oral argument as set forth in Section 15 of these Procedures, unless either the Claimant or the Liquidator files a request for evidentiary

hearing to be conducted in accordance with the procedures set forth in Section 16 of these Procedures. Persons or entities granted leave to participate pursuant to Section 9(b) may not request an evidentiary hearing. If an evidentiary hearing is granted, the Court or the Referee, as the case may be, shall issue an order designating the time and place for the hearing.

12 Expedited Disputed Claims Proceedings for "Small Claims"

In the case of Disputed Claim that is a "Small Claim," the Liquidator is authorized to vary from these procedures so as not to burden the Claimant or the administration of the Liquidation. The Liquidator may, among other things, immediately set the case for pre-hearing conference with a Referee specially designated in advance by the Liquidation Court to handle such matters to attempt to resolve such Small Claims. Notice of such conference shall be mailed to the Claimant not less than ten (10) days before the conference. No pre-hearing brief is required but will be accepted if filed. The Referee has the authority to issue a final determination of a Small Claim at a pre-hearing conference. For the purposes of this Section, the term "Small Claim" shall include any claim with an asserted value of less than \$50,000.

13 Bifurcation

To the extent The Home's coverage is contested (including situations when a policyholder's liability to a third-party is contested), at any time up to the Structuring Conference pursuant to Section 14, any party may request that the issues of coverage and valuation of the claim be bifurcated. When the issues are bifurcated, discovery and any proceeding shall be limited to the

issue pending before the Referee at that time. The Request to Bifurcate shall be determined in the Structuring Conference Order.

14 Case Management

a. A Structuring Conference for each Disputed Claim shall be scheduled in accordance with N.H. Super. Ct. R. 62 following issuance of the Notice of Disputed Claim.

b. Within thirty (30) days from the date on which the Notice of Disputed Claim was mailed to the Claimant, the Liquidator shall provide the Claimant and the Liquidation Clerk (but not the Court or the Referee, as the case may be) with a copy of the "Case File" as referred to in Section 6(a) of these Procedures. Within thirty (30) days after the date on which the Liquidator mails the Case File to the Claimant and Liquidation Clerk, the Claimant shall provide the Liquidator and the Liquidation Clerk (but not the Court or the Referee, as the case may be) with a written submission stating the amount the Claimant asserts is due, the method of calculation of the amounts owed and the allocation methodology (if applicable), along with any additional documents or other evidentiary material that the Claimant contends support the amount claimed due. These document submissions will be considered "mandatory disclosures." Persons or entities granted leave to participate pursuant to Section 9(b) shall be provided a copy of the Case File, mandatory disclosures and any other information submitted by the Liquidator or Claimant, within thirty (30) days from the date on which they are permitted to participate in the proceedings, upon a written request to the Liquidation Clerk.

A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures. Unless otherwise directed by the Court or the Referee, as the case may be, all disclosures required hereby shall be made in writing, signed, served and promptly filed. A party who has made a disclosure or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired.

c. Discovery, including interrogatories, requests for documents, requests for admissions or evidence depositions, shall be governed by N.H. Super. Ct. R. 35-45-A.

d. Persons or entities who have filed a Motion to Participate in Disputed Claim proceedings are required to provide to both the Liquidator and the Claimant a copy of any documents supporting any defenses they may assert to the Disputed Claim.

e. If an evidentiary hearing is granted in a Disputed Claim proceeding it shall be held at such time and place in Manchester, New Hampshire, or elsewhere as ordered. The hearing may be adjourned as may reasonably be determined and the attendance of the Participants and all witnesses with all documents or other relevant evidence in their possession or under their control may be required. If after receipt of the order granting an evidentiary hearing, a

Participant shall fail to appear at the time and place for the hearing, the hearing may proceed and that Participant shall have waived its right to any further participation.

f. Upon motion by a Participant, and for good cause shown, the hearing may be continued to a later date, not to exceed thirty (30) days from the original hearing date.

g. Upon a motion by the Claimant or the Liquidator, and for good cause shown, the evidentiary hearing may be held at any other place as shall be determined appropriate. All requests for the hearing to be held in a location other than Manchester, New Hampshire shall be made in writing prior to the date of the Structuring Conference. A copy of the motion must be served on all other Participants.

15 **Briefing and Oral Argument – Disputed Claim Without an Evidentiary Hearing**

a. Unless a request for an evidentiary hearing in a Disputed Claim proceeding has been granted, the Disputed Claim proceeding will be conducted based on the written submissions and oral argument of the Participants. The Claimant shall have thirty (30) days after the Structuring Conference Order is entered to submit a written submission in support of the Proof of Claim, unless the Court or the Referee, as the case may be, directs otherwise. The Liquidator and other persons or entities that are participating will then have thirty (30) days from the filing of the Claimant's submission in which to respond. The Case File shall be filed if the Court or the Referee, as the case may be, so

directs. The Participants shall make no other submissions unless specifically requested by the Court or the Referee.

b. The written submissions shall include: (1) a statement of the contested issues of fact and law to be determined by the Court or Referee, as the case may be; (2) a list of exhibits relied upon, including affidavits submitted; and (3) a legal brief. The written submission may be no longer than thirty (30) pages, exclusive of the affidavits and exhibits. The written submission and all attachments shall be filed with the Liquidation Clerk and served on all Participants to the Disputed Claim proceeding. A copy shall also be served on the Court or the Referee, as the case may be.

c. Upon request of a party, the Court or the Referee, as the case may be, may order that oral argument be scheduled. The Liquidation Clerk shall mail notice of such hearing to the Participants not less than ten (10) nor more than thirty (30) days before the hearing. In accordance with N.H. Super. Ct. R. 58, the Referee may issue his or her report within ten days of the filing of the last written submission.

16 Briefing – Disputed Claim With an Evidentiary Hearing

a. When a request for evidentiary hearing pursuant to Section 11 of these Procedures is granted, all Participants to the Disputed Claim proceeding shall be required to submit a pre-hearing statement in accordance with N.H. Super. Ct. R. 62.

b. If disputed issues of law exist, the filing of pre-hearing briefs may be allowed concurrently with the pre-hearing statements.

Pre-Hearing Conference

No less than thirty (30) days prior to the evidentiary hearing in a Disputed Claim proceeding, if one is granted, the Participants shall be directed to appear either in person or by telephone conference call for a Trial Management Conference in accordance with N.H. Super. Ct. R. 62.

Evidentiary Hearing Procedures

a. When an evidentiary hearing in a Disputed Claim proceeding has been granted, the hearing shall be conducted in accordance with the New Hampshire Superior Court Rules and New Hampshire Court practice.

b. Electronic, magnetic or mechanical sound or video recording devices or a court reporter or a stenographer shall be used for the purpose of preserving the record. The costs of such recording shall be payable as an administrative expense by the Liquidator, provided, however, that if the testimony is transcribed and if the Claimant or any other Participant wants a copy of the transcript, that Participant shall be responsible for paying for the cost of the copy.

c. The parties may, in accordance with RSA 519:11, submit proposed findings of fact and rulings of law.

Report

The Disputed Claim shall be ruled on after the completion of the filing of the written submissions and oral argument or after the close of the evidentiary hearing and if adjudicated by a Referee, the Referee shall issue his or her report in accordance with RSA 519:10-12. The Liquidation Clerk shall mail

copies of all such reports to all Participants. A report by a Referee shall be filed with the Court in accordance with RSA 519:10.

20 **Motions to Recommit**

a. Within fifteen (15) days from the date the Referee's report is filed with the Court, the Claimant or the Liquidator shall have the right to file a Motion to Recommit with the Clerk for the Liquidation Court at the address set forth in Section 2(j) of these Procedures. Persons or entities who have been granted leave to participate in a Disputed Claim proceeding pursuant to Section 9(b) shall not have the right to file a Motion to Recommit independently but may join in a Motion filed by the Claimant or the Liquidator. The Motion shall request that the Court review the report of the Referee. A copy shall also be filed with the Liquidation Clerk at the address set forth in Section 2(i) of these Procedures and served on all Participants and also the Office of the Attorney General at the Address set forth in Section 2(j).

b. If a Motion to Recommit is filed, any other Participants (including persons or entities granted leave to participate pursuant to Section 9(b)) to the Disputed Claim proceeding shall have ten (10) days from service of the Motion within which to file a response to the motion.

c. If no Motion to Recommit is filed within 15 days of the filing of the Referee's report, the Court shall enter judgment thereon in accordance with RSA 519:12.

Liquidation Clerk

The Liquidation Clerk shall be an employee of the Liquidator, subject to the direction and supervision of the Court, who shall:

- a. Receive, log, assign and track all Disputed Claims forwarded to the Disputed Claims office;
- b. Keep a record of the date on which the Notice of Disputed Claim is sent to the Claimant, and any persons or entities granted leave to participate pursuant to Section 9(b);
- c. Receive all original documents filed in all pending Disputed Claims proceedings;
- d. Serve a copy of any interim orders on all Participants in a Disputed Claim proceeding;
- e. Coordinate hearings pursuant to the Structuring Conference Order;
- f. Serve copies of the Referee's report on the Participants in the Disputed Claim proceedings and file the report with the Court;
- g. Keep a record of the current status of all Disputed Claims proceedings; and
- h. Maintain current minute entries on each Disputed Claim file.

Captions of Pleadings and Orders In Disputed Claim Proceedings

Captions of pleadings and orders filed in Disputed Claim proceedings before a Referee should be captioned as follows:

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

In Re Liquidator Number: _____
Proof of Claim Number: _____
Claimant Name: _____
Claimant Number: _____ if any
Policy or Contract Number: _____ if any
Insured or Reinsured Name: _____ if any
Date of Loss: _____ if any

23 Costs

No filing fee or Court costs shall be chargeable with respect to proceedings related to a Disputed Claim proceeding except, however, the following costs and charges shall be paid by a Claimant:

- (1) The cost of the original of a deposition taken at the request of a Claimant in a Disputed Claim proceeding.
- (2) The cost of any deposition copy or transcript secured by a Claimant.
- (3) Charges for any copies made of documents for the Claimant.
- (4) Costs incurred by a Claimant, including but not limited to, witness fees.
- (5) Deposition costs and witness fees in a Disputed Claim proceeding may be charged against a Claimant if the Liquidator is the prevailing party.

Any other Court costs not mentioned heretofore, including the compensation and expenses of the Referee, shall be paid by the Court and assessed against

the Liquidation and said expense shall be an expense of administration. The Referee may impose costs against a party in accordance with RSA 519:14.


24 Severability

If any part of these Procedures shall be determined to be invalid, such portion is hereby declared to be severable, and the remaining portions of these Procedures shall be considered as remaining in full force and effect.

25 Effective Date

These Procedures shall be effective as of the date of approval by the Court and where applicable and appropriate shall be retroactive in application to the date when The Home was ordered into liquidation on June 11, 2003.

SO ORDERED:


Presiding Justice

Dated this _____ day of _____, 2003.

12/19/03

EXHIBIT F

(e) *Date special election ordered.* The earliest nomination papers may be circulated for the special election is the date the special election is ordered. Sees. 8.50 (3).

(f) *18 days before special primary.* 5 p.m., 18 days before the special primary, is the deadline for filing nomination papers for special election. See s. 8.50 (3).

(g) *4 weeks before special election.* 4 weeks before the special election is the special primary. See ss. 5.02 (6) (a) and 8.50.

(h) *Special election.* See ss. 5.02 (6) (b) and 8.50.

(5) PUBLIC AND GENERAL PROVISIONS. (a) *General.* The provisions for financial statements, recount, registration, absentee voting and other general provisions apply to special elections.

(b) *Date for special primary.* The special primary shall be 4 weeks before the day of the special election. See ss. 5.02 (6) (a) and 8.50 (2) (b).

(c) *Date for special election.* The date for the special election shall be not less than 55 nor more than 70 days from date of order. See s. 8.50 (3).

(d) *Date special election ordered.* The earliest nomination papers may be circulated for the special election is the date the special election is ordered. See s. 8.50 (3).

(e) *18 days before special primary.* 5 p.m., 18 days before the special primary, is the deadline for filing nomination papers for special election. See s. 8.50 (3).

(f) *4 weeks before special election.* 4 weeks before the special election is the special primary. See ss. 5.02 (6) (a) and 8.50.

(g) *Special election.* See ss. 5.02 (6) (b) and 8.50.

SECTION 3. This act shall take effect on July 1, 1967, or upon passage and publication, whichever is later.

Approved July 20, 1967.

Senate Bill 303

Date published:
August 4, 1967

CHAPTER 89, LAWS OF 1967

AN ACT to repeal 20.460 (1) (j), 200.08 (1) to (5), (7) and (8), 200.09, 200.26 (9), 201.13 (1) and (2), 201.27 (2), 201.51 and chapter 616; to renumber 201.27 (1); to renumber and amend 200.08 (6) and 201.13 (3); to amend 102.65 (15), 200.03 (13), 201.16 (2), 206.19 and 286.12; and to create chapter 645 of the statutes, relating to delinquency proceedings in insurance.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 20.460 (1) (j) of the statutes is repealed.

SECTION 2. 102.65 (15) of the statutes is amended to read:

102.65 (15) The expense of administering the stock fund shall be paid out of the stock fund, the expense of administering the mutual fund shall be paid out of the mutual fund, and the expense of administering the reciprocal fund shall be paid out of the reciprocal fund. In the case of domestic carriers, the expenses as fixed by the commissioner of insurance shall be subject to the approval of the court ~~as provided for in subsection (5) of section 200.08.~~ The commissioner of insurance and the industrial commissioners as co-administrators of the funds shall serve without additional compensation, but may be allowed and paid from any fund expenses incurred in the performance of their duties in connection with

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ally and superficially contingent, if contingent at all, and should be treated as if it were an ordinary claim. This technical contingency conceals the underlying reality of present insurer liability. Wisconsin, with its direct action statute, has already recognized that reality for automobile liability insurance. That notion is further implemented in this provision. Second, unliquidated or undetermined claims are often miscalled "contingent" claims in the statutes, and either denied or relegated to an inferior place in the hierarchy of claims. This is unjustified, and perhaps has its historical origin in the misnaming of such claims as contingent. Unliquidated and undetermined claims should be regarded as absolute and unqualified claims.

645.63 SPECIAL CLAIMS. (1) CLAIMS CONTINGENT ON JUDGMENTS. The claim of a third party which is contingent only on his first obtaining a judgment against the insured shall be considered and allowed as if there were no such contingency.

(2) CLAIMS UNDER TERMINATED POLICIES. Any claim that would have become absolute if there had been no termination of coverage under s. 645.43, and which was not covered by insurance acquired to replace the terminated coverage, shall be allowed as if the coverage had remained in effect, unless at least 10 days before the insured event occurred either the claimant had actual notice of the termination or notice was mailed to him as prescribed by s. 645.47 (1) or 645.48 (1). If allowed the claim shall share in distributions under s. 645.68 (8).

(3) OTHER CONTINGENT CLAIMS. A claim may be allowed even if contingent, if it is filed in accordance with s. 645.61 (2). It may be allowed and may participate in all dividends declared after it is filed, to the extent that it does not prejudice the orderly administration of the liquidation.

(4) IMMATURE CLAIMS. Claims that are due except for the passage of time shall be treated as absolute claims are treated, except that where justice requires the court may order them discounted at the legal rate of interest.

(5) CLAIM UNDER SECURITY FUNDS. The state treasurer in his capacity as custodian of the workmen's compensation security funds under s. 102.65 may file a claim with the liquidator for all sums paid or to be paid from those funds.

645.64 *Introductory comment:* Third party claims raise tortuous and difficult problems, and this section has surely not completely solved them. The goal was to devise a more subtle and discriminating method of handling third party claims than now exists, which would both do greater equity and also encourage quick termination of the liquidation. This section enacts a system that goes a long way in that direction.

This section provides for the third party claimant to make a choice between pursuing his claim against the insured and presenting his claim in the liquidation. At first blush it would seem harsh and unnecessary to force such a choice. But this is not the case. Before he has to choose, the claimant has every opportunity to determine whether the insured is individually financially responsible. If he is, the claimant can proceed against him, rather than take his chances in the liquidation. If the insured is judgment proof or of doubtful solvency, the claimant can claim in the liquidation. So long as the choice is made before the deadline for filing, the claimant will participate in the liquidation at the appropriate level of priority. He may wait longer to elect if he wishes, but will then be a late filer. He would still have the possibility of participating, though on a lower priority level. See comment on s. 645.61 (2) and (3).

645.64 SPECIAL PROVISIONS FOR THIRD PARTY CLAIMS. (1) THIRD PARTY'S CLAIM. Whenever any third party asserts a cause of action against an insured of an insurer in liquidation, the third party may file

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a claim with the liquidator. The filing of the claim shall release the insured's liability to the third party on that cause of action in the amount of the applicable policy limit, but the liquidator shall also insert in any form used for the filing of third party claims appropriate language to constitute such a release. The release shall be void if the insurance coverage is avoided by the liquidator.

Comment on sub. (1): By putting pressure on the third party to release the insured to the extent of the applicable policy limit if he wishes to make a claim in the proceeding, the liquidation can at least help make the insurance fund do the job of protecting the policyholder. It is unfortunate that the innocent third party must relinquish his right against the insured in order to claim in the liquidation but in no other way is it possible to settle the matter expeditiously, efficiently and equitably. The notion that the election is valid only if there is effective insurance does elementary justice.

(2) **INSURED'S CLAIM.** Whether or not the third party files a claim, the insured may file a claim on his own behalf in the liquidation. If the insured fails to file a claim by the date for filing claims specified in the order of liquidation or within 60 days after mailing of the notice required by s. 645.47 (1) (b), whichever is later, he is an unexcused late filer.

Comment on sub. (2): It is entirely fair to the third party claimant to compel him to elect whether to share in the liquidation or exercise rights against the insured. This is a burden upon him, but is a reasonable allocation to him of part of the total burden imposed by an insolvency. If he claims in the liquidation, he must release the insured. If he does not claim, but pursues the insured instead, then of course the insured will have to pay any judgment in full if he is not judgment proof. The insured, if he has filed a timely claim, is entitled to payment from the liquidation proceeding the appropriate percentage of the amount allowed on his claim, though the judgment against him will not be conclusive as to the value of his claim in the liquidation. See sub. (3). If the insured turns out to be judgment proof, the third party claimant could still claim in the liquidation, but then would ordinarily be a late filer and would suffer disadvantage as a result. Thus, without actually forcing the third party to elect in a formal sense, these provisions strongly encourage him to make an early decision, and preferably one to come into the liquidation. Ordinarily a third party will stay out of the liquidation only if he has a clearly solvent defendant. If the third party elects to pursue this insured, the liquidator will not ordinarily need to defend the suit, though he has the power to defend, when necessary to protect the estate. That power is given by s. 645.49 (1). The liquidator can and often should allow reasonable attorney's fees as a part of the insured's claim.

(3) **PROCEDURE FOR INSURED'S CLAIM.** The liquidator shall make his recommendations to the court under s. 645.71 for the allowance of an insured's claim under sub. (2) after consideration of the probable outcome of any pending action against the insured on which the claim is based, the probable damages recoverable in the action and the probable costs and expenses of defense. After allowance by the court, the liquidator shall withhold any dividends payable on the claim, pending the outcome of litigation and negotiation with the insured. Whenever it seems appropriate, he shall reconsider the claim on the basis of additional information and amend his recommendations to the court. The insured shall be afforded the same notice and opportunity to be heard on all changes in the recommendation as in its initial determination. The court may amend its allowance as it thinks appropriate. As claims against the insured are settled or barred, the insured shall be paid from the amount withheld the same percentage dividend as was paid on other claims of like priority, based on the lesser of a) the amount actually recovered from the insured by action

or paid by agreement plus the reasonable costs and expenses of defense, or b) the amount allowed on the claims by the court. After all claims are settled or barred, any sum remaining from the amount withheld shall revert to the undistributed assets of the insurer. Delay in final payment under this subsection shall not be a reason for unreasonable delay of final distribution and discharge of the liquidator.

Comment on sub. (3): The fact that a third party claim often remains unsettled for a long time should not prevent the insured from getting such protection from his policy as others have received from theirs, so long as it does not unreasonably delay the liquidation. Each claim should be evaluated at the latest possible time and a dividend apportioned to it. In such case, however, the amount should not be paid to the insured but withheld for future payment to him, after completion of the litigation and payment of the judgment. If he wins the litigation, the fund would fall back into the unallocated funds of the liquidator except for the allowable defense costs. If it comes back at a time in an amount that would make it uneconomic to distribute it, it will go to the state, as is provided later.

(4) **MULTIPLE CLAIMS.** If several claims founded upon one policy are filed, whether by third parties or as claims by the insured under this section, and the aggregate allowed amount of the claims to which the same limit of liability in the policy is applicable exceeds that limit, each claim as allowed shall be reduced in the same proportion so that the total equals the policy limit. Claims by the insured shall be evaluated as in sub. (3). If any insured's claim is subsequently reduced under sub. (3), the amount thus freed shall be apportioned ratably among the claims which have been reduced under this subsection.

645.65 **DISPUTED CLAIMS.** (1) **NOTICE OF REJECTION AND REQUEST FOR HEARING.** When a claim is denied in whole or in part by the liquidator, written notice of the determination shall be given to the claimant and his attorney by first class mail at the address shown in the proof of claim. Within 60 days from the mailing of the notice, the claimant may file his objections with the court. If no such filing is made, the claimant may not further object to the determination.

Comment on sub. (1): This subsection describes the procedure by which a dissatisfied claimant may request review. Sixty days is a realistic time limit within which to permit objections to the liquidator's determination. Liquidations are rather deliberate and 60 days is not serious delay. In fact, it may not slow the process down at all if hearings are scheduled promptly.

(2) **NOTICE OF HEARING.** Whenever objections are filed with the court, the liquidator shall ask the court for a hearing as soon as practicable and give notice of the hearing by first class mail to the claimant or his attorney and to any other persons directly affected, not less than 10 nor more than 20 days before the date of the hearing. The matter may be heard by the court or by a court-appointed referee.

645.66 **CLAIMS OF SURETY.** Whenever a creditor whose claim against an insurer is secured in whole or in part by the undertaking of another person fails to prove and file that claim, the other person may do so in the creditor's name, and shall be subrogated to the rights of the creditor, whether the claim has been filed by the creditor or by the other person in the creditor's name, to the extent that he discharges the undertaking. In the absence of an agreement with the creditor to the contrary, the other person shall not be entitled to any dividend until the amount paid to the creditor on the undertaking plus the dividends paid on the claim from the insurer's estate to the creditor equals the amount of the entire claim of the creditor. Any excess received by the creditor shall be held by him in trust for such other person.

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