

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

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SUPERIOR COURT

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Docket No. 03-E-0106

NH SUPERIOR COURT
MERRIMACK COUNTY
CONCORD, NH

In the Matter of the Liquidation of
The Home Insurance Company

**LIQUIDATOR'S MOTION FOR
APPROVAL OF NEW YORK TAX SETTLEMENT**

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("The Home"), by his attorneys, the Office of the Attorney General, hereby moves the Court to enter an order approving the Liquidator's entering into a settlement as such is reflected in the proposed stipulated judgment ("Settlement") attached as Exhibit A, of tax certiorari proceedings between The Home and The Tax Commissioner of the City of New York and the Department of Finance ("New York City") concerning real estate taxes on the property at 59 Maiden Lane, New York, New York. As reasons therefor, the Liquidator states as follows:

1. The Home was the owner of property at 59 Maiden Lane until 1981 when it sold the building to Olympia and York Maiden Lane Company ("O&Y") under the terms of a sale leaseback transaction intended to facilitate The Home's occupancy of a building that O&Y was developing in lower Manhattan. Thereafter, The Home decided to remain at 59 Maiden Lane and not to occupy the new building and its lease at 59 Maiden Lane was amended.

2. In 1996, The Home commenced an action against O&Y and others seeking damages for, among other things, rent overcharges, and for refusal to obtain relief on tax certiorari petitions pending before the New York Supreme Court, County of New York, which challenges would benefit The Home. The action was settled pursuant to the terms of a Settlement Agreement between The Home, O&Y, and others dated December 22, 1997 (“O&Y Settlement”) which agreement was approved by the US Bankruptcy Court in New York. See Marine Midland Bank v. Zurich Ins. Co. (In re Olympia & York Maiden Lane Co.), 1999 WL 58581 (Bankr. S.D.N.Y. 1998) (discussing settlement and other disputes).

3. The Home obtained the right to control the prosecution of the tax certiorari proceedings commenced by O&Y by assignment as part of the O&Y Settlement. The petitions filed in the tax certiorari proceedings sought review of the assessed valuation of the 59 Maiden Lane property for tax years 1991/92 through 1995/96 and a refund of associated real estate taxes from New York City. Affidavit of Peter A. Bengelsdorf, Special Deputy Liquidator, in support of Motion for approval of New York Tax Settlement (“Bengelsdorf Aff.”) The O&Y Settlement further provided that The Home shall not enter any settlement of the tax certiorari proceedings without the owner’s prior written consent, which consent “shall not be unreasonably withheld.”

4. The O&Y Settlement also provided that The Home is entitled to receive and retain a pro rata share of the net proceeds (after deduction of expenses) of the tax certiorari proceedings based on the ratio of taxes paid by The Home (under its lease) to the total tax on the 59 Maiden Lane property, as well as the owners’ share based on

vacant space, but excluding amounts the owner may be obligated to remit to other tenants. This reflects the fact that The Home was one of several tenants at 59 Maiden Lane that paid real estate taxes (through higher rent under their leases) during the tax years in question, and that other tenants may be entitled to a portion of the tax refund. Bengelsdorf Aff. ¶ 3.

5. Since that time, The Home has prosecuted the tax certiorari proceedings. The proceedings involve complex issues of fact and law concerning whether the assessed valuations of the 59 Maiden Lane property were too high for the tax years at issue. Those issues include questions concerning appropriate market valuations of the building in light of complicated 1981 and 1984 transactions with respect to the sale of the 59 Maiden Lane property and leases of that and other property between the owner and The Home, certain secured notes issued by the owner, and the presence of asbestos in the building. Bengelsdorf Aff. ¶ 4.

6. Justice Schoenfeld of the New York Supreme Court hears all tax certiorari proceedings in New York City. After a settlement conference, Justice Schoenfeld made a settlement recommendation to the parties. There were further negotiations between New York City and The Home in light of the settlement recommendation, and ultimately the parties to the tax certiorari proceedings reached the proposed Settlement. As set forth in the stipulated judgment, New York City would significantly reduce the assessed valuation of the 59 Maiden Lane property for the tax years 1991/92 and 1992/93, and by a lesser amount for tax year 1993/94. Bengelsdorf Aff. ¶ 5.

7. New York counsel to the Liquidator advised Judge Schoenfeld that the Settlement would require approval of both this Court and the Liquidator.

8. The reduced assessed valuations in the Settlement will result in a gross real estate tax refund from New York City of approximately \$16 million, and an approximate net recovery by The Home of \$11 million. Of the gross amount, approximately \$4 million may need to be distributed to other tenants of 59 Maiden Lane who had also paid real estate taxes under their leases for the tax years in question. The Home's counsel in the tax certiorari proceedings will be due a contingency fee of approximately \$1.15 million and there are also related appraisers' fees of approximately \$24,000. The Settlement is subject to the approval of this Court and also of the New York Law Department and Comptroller's Offices in accordance with the New York City Administrative Code and Charter. Bengelsdorf Aff. ¶ 6.

9. In accordance with the O&Y Settlement, The Home has requested the consent of the owner. The owner has not consented, on the ground that the Settlement does not provide for reductions in the assessed valuation for the tax years 1994/95 and 1995/96, which apparently would be more advantageous to it because of a possible spillover effect to the immediately following tax years 1996/97 and later years for which the owner has proceedings of its own pending. Essentially, the owner contends that the Settlement prejudices its litigation position in proceedings to which The Home is not party.

10. In the Liquidator's view, the owner has unreasonably withheld consent to this favorable settlement. A compromise settlement valuation, such as that

reflected by the Settlement, has no relevance to the owner's own tax litigation because it should not even be admitted as evidence with respect to a valuation dispute for a subsequent year, let alone act as *res judicata*. The assessment of New York real property is to be determined each year according to the subject property's state and condition and the valuation of such property as of the applicable tax status valuation date (January 5th each year). See New York Real Property Law § 302. The concept of annual *de novo* assessments is also supported by New York case law. See In the Matter of Phelps Dodge Industries, Inc. v. Kondzielaski, 131 A.D.2d 675, 516 N.Y.S.2d 754, 755-756 (1987) (notwithstanding the decision of a court on valuation for prior years, such a prior determination "could not conclusively bind [the court] in a review of the assessments for subsequent tax years, even those immediately following the years reviewed in the prior proceeding") (emphasis added); People ex rel. Hilton v. Fahrenkopf, 279 N.Y. 49, 17 N.E.2d 765, 766 (1938) ("the doctrine of *res judicata* can have no true application to the issues of value in recurring assessment proceedings"). Notice of this motion for approval of the Settlement has been provided to the owner so it may seek to express its position should it choose to do so. See Bengelsdorf Aff. ¶ 7.

11. The Liquidator submits that the Settlement is fair and reasonable and that it is in the best interests of the policyholders and other creditors of The Home. The Settlement is for reasonable consideration in light of the recommendation of the presiding Justice and the uncertainty and delay that would result from taking the tax certiorari proceedings to trial. The Settlement will expedite a significant payment by New York City to The Home, which will benefit the policyholders and other creditors

of The Home generally. The payments to other tenants and to counsel and appraisers are necessary costs of the collection of this asset for The Home's estate, and they appropriately should be paid from the Settlement proceeds. *See Bengelsdorf Aff.* ¶ 8.

WHEREFORE, the Liquidator prays that this Court enter an Order in the form submitted herewith approving the Liquidator's entering into the Settlement and payment of other tenants' portion of the refund and The Home's litigation costs (counsel and appraisers' fees) from the Settlement proceeds, and granting such other and further relief as may be just.

Respectfully submitted,

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

By his attorneys

PETER W. HEED, ATTORNEY GENERAL



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Dated: February 3, 2004

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