

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

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

**MOTION FOR APPROVAL OF TENTH 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 moves for approval of a tenth 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, 2014, net of guaranty association recoveries and approved early access distribution amounts and subject to deductions for deposits and unpaid/unreturned funds, deductible reimbursements, amounts reported as “claim expenses” that do not have Class II priority, and questioned claim items. The proposed tenth early access distribution will also be subject to application of incurred and paid percentage distribution caps. As reasons therefor, the Liquidator states:

**Background**

1. The insurer liquidation statutes provide the New Hampshire Insurance Guaranty Association, the New Hampshire Life and Health Insurance Guaranty Association, and any similar organization in another state (the “guaranty associations”) with early access to estate assets because the guaranty associations are ultimately funded by the insurance buying (or, in some states, tax-paying) public. See RSA 402-C:39, III. Guaranty association obligations are initially funded by assessments on their member insurers. See, e.g., RSA 404-B:8, I(c); CAL.

INS. CODE § 1063.5; TEX. INS. CODE § 462.151. Statutes then provide various mechanisms through which member insurers may recoup guaranty association assessments by passing them on to the broader public. See, e.g., RSA 404-B:16 (increase in rates and premiums); CAL. INS. CODE § 1063.14(a) (surcharge on policies); TEX. INS. CODE § 462.157 (offset to the members' premium taxes). Together with other forms of recovery (e.g., subrogation pursuant to RSA 404-B:11, I), early access distributions reduce guaranty association operating deficits and thus the need for payment by the public.

2. New Hampshire statutes require that the Liquidator make application to the Court "from time to time" for approval of a proposal to distribute assets from the estate to the guaranty associations. RSA 402-C:29, III(a). On October 8, 2003, the Liquidator applied for approval of an Early Access Distribution Plan ("Plan") in accordance with RSA 402-C:29, III. The Plan included a form of Early Access Distribution Agreement ("Early Access Agreement") to be entered into by guaranty associations receiving an early access distribution. The Court approved the Plan and form of Early Access Agreement by order entered October 22, 2003. Affidavit of Peter A. Bengelsdorf in Support of Liquidator's Motion for Approval of Tenth Early Access Distribution to Insurance Guaranty Associations ("Bengelsdorf Aff.") ¶ 2.

3. The guaranty association claims on which early access distributions can be made are those with Class II priority. Guaranty association claims with Class I priority are "expenses of administration" for which provision must be made prior to any early access distribution.<sup>1</sup> See RSA 402-C:29, III(b)(1). See also RSA 402-C:44, I; RSA 404-B:11, II. Because payment of Class I claims occurs outside the early access distribution process, guaranty associations' Class II claims are the first class of claims eligible for early access distributions. See RSA 404-C:44 (all

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<sup>1</sup> In the Home liquidation such provision is made by issuing Class I claim notices and paying a Class I distribution on an annual basis. Bengelsdorf Aff. ¶ 3.

claims in a priority class must be paid in full before claims of lower priority classes may receive payment). The assets of the Home estate will not be sufficient to pay all Class II claims in full so guaranty associations' Class II claims are the only claims on which early access distributions can be made. See id.; Bengelsdorf Aff. ¶ 3.

4. Guaranty association Class II claims are claims against Home's estate arising from the associations' obligations to make payment on "covered claims." See RSA 404-C:44, II; e.g., RSA 404-B:8, I(a) and I(b). Pursuant to statute, "covered claims" are claims against the guaranty associations (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. See, e.g., RSA 404-B:5, IV (definition of "covered claim"). Subject to statutory and policy limits and conditions, the guaranty associations' obligations under policies issued by Home thus encompass both indemnity and claim defense expense payments.<sup>2</sup> See RSA 402-C:44, II; RSA 404-B:8, I(a) and I(b). These are the amounts on which the Court has approved previous early access distributions and on which the Liquidator now proposes to make a tenth early access distribution. Bengelsdorf Aff. ¶ 4.

5. Since the commencement of this liquidation proceeding, fifty-seven guaranty associations have reported making indemnity or defense payments under insurance policies issued by Home. Beginning in 2004, the Liquidator has regularly moved for (and the Court has approved) early access distributions based on reported guaranty association payments less reported recoveries. Most recently, the Liquidator moved for approval of a ninth early access

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<sup>2</sup> Certain guaranty associations took the position that claim defense expenses are Class I administration costs rather than Class II policy related claims. To resolve this dispute, the Liquidator and fifty-six guaranty associations entered into a Settlement Agreement approved by the Court on July 15, 2013. Under the Settlement Agreement, 90% of the guaranty associations' claim defense expenses are now assigned to Class II and 10% to Class I. Only the Class II expenses are the subject of early access. Bengelsdorf Aff. at 2, note 2.

distribution of approximately \$30.4 million on February 7, 2013, and the Court approved the ninth early access distribution on February 26, 2013. The Liquidator applied deductions and a 40% distribution cap and has made a ninth early access distribution totaling \$15,950,945.51. Bengelsdorf Aff. ¶ 5.

### **The Proposed Tenth Early Access Distribution**

6. Guaranty Association Payments, Recoveries, and Early Access Distributions. The guaranty associations have reported paying \$500,324,056.90 through September 30, 2014, regarding policies of insurance issued by Home (\$450,051,969.51 in indemnity and \$50,272,087.39 in “claim expense payments”).<sup>3</sup> The guaranty associations also reported recoveries (e.g. subrogation, net worth, and second injury fund recoveries) totaling \$53,416,320.95, so the guaranty associations’ reported payments after recoveries total \$446,907,735.95. The approved first through ninth early access distribution amounts totaled \$376,524,221.80 (which was then subject to deductions and a distribution cap, so the actual distributions have been less).<sup>4</sup> Accordingly, the potential total for a tenth early access distribution is \$70,383,514.15 (which will then be subject to deductions and distribution caps as described below). A chart showing reported payments and recoveries through September 30, 2014 (as reported by each guaranty association by October 30, 2014) together with the previously approved early access amounts and potential tenth early access distribution amounts is attached as Exhibit A to the Bengelsdorf Affidavit. Bengelsdorf Aff. ¶ 6.

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<sup>3</sup> “Claim expense payments” may include amounts to which the Liquidator will assign Class I, Class II, or Class V priority. Bengelsdorf Aff. at 3, note 3.

<sup>4</sup> 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 associations during 2003 by the Liquidator as advances on early access distributions in order to avoid disruptions in payments to the claimants during the transition of claim paying responsibility to the guaranty associations. Bengelsdorf Aff. at 3, note 4.

7. Estate Assets. As of December 31, 2014, the net assets of the Home estate in the Liquidator's control totaled \$1,047,579,235 as set forth in the Statement of Net Assets (unaudited) attached as Exhibit B to the Bengelsdorf Affidavit.<sup>5</sup> The assets available to the Liquidator are thus approximately fifteen times the amount of the guaranty associations' payments eligible for a tenth early access distribution, and they exceed those payments by almost \$1 billion. The assets that would remain after the proposed tenth early access distribution are approximately 2.2 times the amount of the guaranty associations' net payments through September 30, 2014. Bengelsdorf Aff. ¶ 7.

8. Deposits and Unpaid/Unreturned Funds. Prior to liquidation, Home had made deposits in a number of states as required by the laws of those states. As contemplated by the 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 prior early access distributions, the Liquidator will deduct the amount of a deposit in a particular state from the tenth early access distribution to the guaranty association in that state. The Liquidator may also deduct amounts due to Home from guaranty associations for other reasons where the guaranty association has not paid the amount to the Liquidator. Bengelsdorf Aff. ¶ 8.

9. Deductible Reimbursements. The guaranty associations receive so-called "deductible reimbursements" from certain policyholders who had entered agreements with Home under which they were to reimburse Home for amounts it paid to claimants within agreed

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<sup>5</sup> This sum represents the estate's assets after the 15% interim distribution on allowed Class II claims. Bengelsdorf Aff. at 4.

deductible amounts. The guaranty associations that have paid claims within those amounts may recover from such policyholders as more fully set forth in the Liquidator's Motion for Approval of Agreement Regarding Home Deductible Policies filed March 23, 2011, but those amounts are not included within the recoveries identified on Exhibit A to the Bengelsdorf Affidavit. The Liquidator will deduct the amount of such deductible reimbursements by a particular guaranty association from the tenth early access distribution to that association. Bengelsdorf Aff. ¶ 9.

10. Class I and Class V Claims. Certain amounts reported as "claim expenses" may not be defense payments made pursuant to a Home policy and, instead, may be classified as expenses of administration with Class I priority. See RSA 402-C:44, II; RSA 404-B:11, I. Further, a portion of defense expenses will be assigned to Class I pursuant to the Liquidator's Settlement with guaranty associations approved July 15, 2013. See note 2 above. The Liquidator will deduct the amount of such Class I claims from the tenth early access distribution. Similarly, portions of the "claim expenses" reported by the guaranty associations may not be entitled to either Class I or Class II priority and therefore have residual Class V priority. See RSA 402-C:44, V. Class V claims are not eligible for distribution (see ¶ 3 above) so the Liquidator will deduct the amount of any such claims from the tenth early access distribution.<sup>6</sup> Bengelsdorf Aff. ¶ 10.

11. Removal of Questioned Claim Items. The Liquidator asks guaranty associations for clarification regarding payments, expenses, or recoveries. The Liquidator will deduct such questioned items from the early access distribution. The Liquidator will also deduct any claimed

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<sup>6</sup> The Liquidator agrees that the receipt by a guaranty association of any early access distribution from which Class V claims have been deducted does not constitute an admission by the guaranty association as to the proper priority classification of the deducted claims. Bengelsdorf Aff. at 5, note 6.

amounts that are subject to pending requests for review. There is presently one such item (from the California Insurance Guarantee Association). Bengelsdorf Aff. ¶ 11.

12. Caps on Distribution as a Percentage of Incurred and Paid Amounts. To receive an early access distribution under the Plan, a guaranty association must execute the Early Access Agreement. As required by RSA 402-C:29, III, the Early Access 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 Early Access Agreement. Bengelsdorf Aff. ¶ 12.

13. 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 through ninth early access distributions were based on 100% of guaranty fund payments as of September 30 for each year from 2006 through 2012, but they were subject to a distribution cap equal to forty percent (40%) of the total incurred costs projected by each guaranty association.<sup>7</sup> The Liquidator plans to apply this 40% incurred cap to the proposed tenth early access distribution as well. The 40% incurred cap is not an estimate of the ultimate distribution that will be made on Class II claims but, instead, is designed to avoid

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<sup>7</sup> For purposes of early distribution calculations, “total incurred” costs includes paid amounts, case reserves, and any amounts subject to requests for redetermination but does not include reserves for incurred but not reported loss or for claims subject to “net worth” provisions. Consistent with the use of reported claim expenses (rather than determined claims), reserves against which the distribution cap is applied reflect guaranty association estimates rather than Liquidator calculations. Bengelsdorf Aff. ¶ at 6, note 7.

situations in which a “claw back” pursuant to RSA 402-C:29, III(b)(4) and the Early Access Agreement 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.

14. The Liquidator has noted that application of the 40% incurred cap has resulted in certain guaranty associations receiving early access distributions for nearly all of their paid indemnity and claim expense amounts, while other guaranty associations have received a much lower percentage of paid amounts. This differential arises because the 40% cap is based on incurred costs, including reserves, and guaranty associations have varying ratios of paid claims to reserves. (A guaranty association with relatively large reserves will be able to receive early access distributions for a greater percentage of its paid amounts.) To reduce both this disparity and the potential for “claw back,” the Liquidator proposes to apply an additional cap on early access distribution of seventy-five percent (75%) of guaranty association paid amounts, so that the early access distributions will not exceed 75% of each guaranty association’s paid total. Application of the 40% incurred cap is expected to affect 51 guaranty associations and the 75% paid cap is expected to affect 10 guaranty associations. Together, they are expected to affect all 55 guaranty associations eligible to receive early access distributions. Bengelsdorf Aff. ¶ 14; Bengelsdorf Aff. Ex. A (noting the affected associations).

15. Amount Proposed to be Distributed. Deductions for deposits and unpaid/unreturned funds, deductible reimbursements, Class I and Class V claim expenses, and questioned items, together with the distribution caps, will reduce the amount of the proposed tenth early access distribution by approximately \$54.5 million. The Liquidator therefore expects that the total amount distributed will be approximately \$15.9 million. Bengelsdorf Aff. ¶ 15.



### **The United States Priority Act**

16. 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 Liquidator on pain of potential 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).

17. The Liquidator obtained limited waivers of alleged federal priority claims as a precondition to making the first through sixth early access distributions. The Liquidator did not request waivers for the seventh through ninth early access distributions.<sup>8</sup> In light of the statutory claw back provision, the Early Access Agreement with guaranty associations receiving early access distributions, and the factors described in ¶ 7, the Liquidator believed that making the early access distributions was reasonable and prudent even without waivers. For those reasons, the Liquidator similarly believes it is reasonable and prudent to make the proposed tenth early access distribution without a waiver. The Liquidator will consider this issue anew in connection with any future proposed early access distributions. See Bengelsdorf Aff. ¶ 17.

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<sup>8</sup> The Liquidator recently obtained a waiver of federal priority claims to permit the interim distribution. See the Liquidator's Report Regarding Release Agreement with the United States filed November 7, 2014.

WHEREFORE, the Liquidator requests that the Court:

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

B. Enter an order in the form submitted herewith approving the tenth early access distribution based on reported guaranty association payments through September 30, 2014, less recoveries and previous early access distribution amounts, all as set forth on Exhibit A to the Bengelsdorf Affidavit, and subject to deductions for deposits and unpaid/unreturned funds, deductible reimbursements, amounts with Class I or Class V priority, and questioned items and also to the 40% incurred and 75% paid distribution caps; and

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

Respectfully submitted,

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

By his attorney,

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March 5, 2015

Certificate of Service

I hereby certify that a copy of the foregoing Motion For Approval of Tenth Early Access Distribution to Insurance Guaranty Associations, the accompanying Affidavit of Peter A. Bengelsdorf, and the Proposed Order Approving Tenth Early Access Distribution to Insurance Guaranty Associations was sent, this 5th day of March, 2015, by first class mail, postage prepaid to all persons on the attached service list.



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Eric A. Smith

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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The Home Insurance Company  
Docket No. 03-E-0106

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