

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**

**AFFIDAVIT OF PETER A. BENGELSDORF, SPECIAL DEPUTY LIQUIDATOR,
IN SUPPORT OF APPROVAL OF SETTLEMENT AGREEMENT WITH FEDERAL
CLAIMANTS AND RELEASE AGREEMENT WITH UNITED STATES**

I, Peter A. Bengelsdorf, hereby depose and say:

1. I was appointed Special Deputy Liquidator of the Home Insurance Company (“Home”) by the Insurance Commissioner of the State of New Hampshire, as Liquidator (“Liquidator”) of Home. I submit this affidavit in support of the Liquidator’s Motion for Approval of Settlement Agreement with Federal Claimants and Release Agreement with United States. The facts and information set forth are either within my own knowledge gained through my involvement with this matter, in which case I confirm that they are true, or are based on information provided to me by others, in which case they are true to the best of my knowledge, information, and belief.

1. The motion seeks approval of (a) a Settlement Agreement (“Settlement Agreement”) between the United States of America on behalf of the U.S. Environmental Protection Agency (“EPA”), the U.S. Department of the Navy (“Navy”), U.S. Department of the Interior (“DOI”) and the National Oceanic and Atmospheric Administration of the United States Department of Commerce (“NOAA”) (collectively, the “Federal Claimants”) and the Liquidator, and (b) a Release Agreement (“Release Agreement”) between the United States of America (“United States”) and the Liquidator.

2. The Settlement Agreement and the Release Agreement were negotiated under my supervision. Copies of the Settlement Agreement dated October 2, 2018 and the Release Agreement dated November 21, 2018 are attached as Exhibits A and B to the motion. Both the Settlement Agreement and the Release Agreement are subject to the approval of the Court. Settlement Agreement ¶¶ 1, 6; Release Agreement ¶ III.1. The Liquidator previously gave notice of these agreements by the Liquidator's Notice of Settlement Agreement, Subject to Conditions, with the United States of America on behalf of Federal Claimants filed on November 22, 2018.

3. The Federal Claimants filed five proofs of claim in the Home liquidation asserting claims under policies of insurance issued by Home or its predecessors to certain policyholders that the Federal Claimants claimed are liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 to 9675 (the "Proofs of Claim"). Settlement Agreement, second whereas clause.

4. Four of the Proofs of Claim were resolved prior to the Settlement Agreement. Settlement Agreement, fifth whereas clause. In particular, the EPA's claim concerning Paul Sauget, Industrial Salvage and Disposal, and Sauget & Company ("Sauget Claim") was resolved through a \$4,125,000 Class II allowance under a Settlement Agreement and Mutual Release dated March 31, 2010, and approved by the Court on June 3, 2010. The Sauget Claim resolution is not affected by the Settlement Agreement. Settlement Agreement ¶ 2(d).¹

5. The United States Department of Justice ("US DOJ") also filed a protective proof of claim on behalf of EPA, DOI, NOAA, the U.S. Department of Defense and other agencies

¹ The United States Department of Labor filed a separate proof of claim in the Home liquidation for \$2,672,527 in special fund assessments pursuant to the Longshore and Harbor Workers' Act, 33 U.S.C. §§ 901-50. That claim was allowed and, after litigation, assigned to priority Class III (the "DOL Claim"). See *Solis v. Home Ins. Co.*, 848 F.Supp.2d 91 (D.N.H. 2012); *In Matter of Liquidation of Home Ins. Co.*, 2014 WL 7636148, No. 03-E-106 (N.H. Super. Ct., Merrimack Cty., Sept. 9, 2014). The DOL Claim resolution is not affected by the Settlement Agreement. Settlement Agreement ¶ 2(d).

relating to any claims held by these agencies not currently known or not currently known to be related to Home (the “Protective Proof of Claim”). Settlement Agreement, third whereas clause.

6. The US DOJ, on behalf of EPA, subsequently informed the Liquidator that it was prepared to file additional proofs of claim alleging that certain Home policies potentially provide coverage for EPA claims under CERCLA against six other Home insureds (the “Additional Proofs of Claim”). Settlement Agreement, sixth whereas clause.

7. As reported in the Liquidator’s regular status reports, the Liquidator and the US DOJ and EPA have engaged in lengthy discussions and exchanges of information in an effort to resolve these matters. Ultimately, the Liquidator and the United States negotiated the Settlement Agreement reflecting a resolution of all matters concerning the Proofs of Claim and the Additional Proofs of Claim. See Settlement Agreement, eighth whereas clause. The Settlement Agreement represents a compromise of disputed positions. *Id.*, ninth and eleventh whereas clauses, ¶ 9.

8. The Settlement Agreement is subject to approval by the Court. Settlement Agreement ¶ 1; see *id.* ¶ 6(a). It is also subject to the condition that the United States and the Liquidator enter a mutually acceptable release under 31 U.S.C. § 3713. *Id.* ¶ 1; see *id.* ¶ 6(b). Further, the Settlement Agreement is subject to at least a 30-day period of public comment following publication of notice in the Federal Register. *Id.* ¶ 6(c). The United States reserved the right to withdraw from the Settlement Agreement if comments disclosed facts which indicated that the agreement was not in the public interest, and it agreed to promptly notify the Liquidator following the public comment period whether or not it would go forward with the agreement. *Id.*

9. The United States and the Liquidator subsequently negotiated the Release Agreement, which was signed November 21, 2018.

10. The US DOJ then published notice of the Settlement Agreement and a 30-day comment period in the Federal Register on December 6, 2018. 83 Fed. Reg. 62907 (Dec. 6, 2018). Following the conclusion of the public comment period on January 7, 2019, on March 5, 2019, the United States notified the Liquidator that it had concluded that the proposed settlement should proceed.

11. The Settlement Agreement provides that the Liquidator will recommend allowance of one of the Proofs of Claim and the six Additional Proofs of Claim in the aggregate amount of \$27,044,146 (the “Recommended Amount”) as a Class II priority claim under RSA 402-C:44. Settlement Agreement ¶ 2(a). The Recommended Amount is allocated among the seven claims as set forth in ¶ 3(a). Allowance of the Recommended Amount as a Class II claim will fully and finally resolve the Proofs of Claim and the Additional Proofs of Claim. Id. ¶ 2(b). (As noted above, the prior Sauget Claim and the DOL Claim resolutions are not affected.) Distributions based on that allowance will be made at the same intervals and at the same percentages as distributions to other Class II creditors of Home. Id. ¶ 2(c).

12. The Settlement Agreement is intended to resolve the Proofs of Claim and the Additional Proofs of Claim. See Settlement Agreement, eighth whereas clause, ¶ 2(b). To that end, the Settlement Agreement provides a covenant by the United States on behalf of the Federal Claimants not to sue the Liquidator or Home for obligations arising under CERCLA under policies issued by Home to the insureds named in the Proofs of Claim and the Additional Proofs of Claim. Id. ¶ 4. It also includes a covenant by the Liquidator not to sue the United States for obligations to the Federal Claimants arising under those Home insurance policies. Id. ¶ 5.

13. The Settlement Agreement provides that, when it becomes effective, the Proofs of Claim and the Additional Proofs of Claim shall be fully resolved and terminated, with prejudice. Settlement Agreement ¶ 7. Further, by the Settlement Agreement, the United States withdraws the Protective Proof of Claim without prejudice. *Id.*, fourth whereas clause. Finally, in the Settlement Agreement, the Federal Claimants advise that they do not intend to file proofs of claim in the Home liquidation beyond the Additional Proofs of Claim. *Id.*, tenth whereas clause. The Settlement Agreement thus resolves all asserted claims of the Federal Claimants, withdraws the proof of claim concerning unknown claims of the Federal Claimants, and provides confirmation – albeit in a non-binding way – that the Federal Claimants do not intend to file additional claims.

14. As described in the Liquidator’s reports and motions for approval of the first, second and third interim distributions, the US DOJ has asserted that the claim filing deadline does not apply to claims by the Federal Government in light of the Federal Priority Statute, 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 under 31 U.S.C. § 3713(b). In light of this potential exposure of the Liquidator to the United States for making distributions that reduce the claim-paying ability of the estate, each of the interim distributions has been subject to receipt of a waiver of claims under the Federal Priority Statute by the United States in a form acceptable to the Liquidator. The Liquidator obtained acceptable releases for the first and second interim distributions.²

15. While the Federal Claimants sought to resolve all their claims in the estate, the Liquidator sought a more encompassing waiver from the United States that would allow future

² The release agreement providing the waiver for the second interim distribution was only obtained after the Liquidator commenced litigation regarding the Protective Proof of Claim and application of the Federal Priority Statute. See *Sevigny v. United States*, 2014 WL 3573566 (D.N.H. July 21, 2014). See Liquidator’s Report Regarding Release Agreement with United States (Nov. 6, 2014).

distributions to proceed without the necessity of obtaining a waiver for each one. In consequence, when the parties agreed upon the Settlement Agreement, it was conditioned upon a mutually acceptable release under 31 U.S.C. § 3713. Settlement Agreement ¶¶ 1, 6(b). When the Liquidator and the United States later agreed upon the Release Agreement, it in turn was conditioned upon approval of the Settlement Agreement and allowance of the \$27,044,146 of EPA Claims at Class II. See Release Agreement ¶¶ II.2, II.5.

16. The Release Agreement is also conditioned upon payment by the Liquidator of the presently approved (through the third interim distribution) Class II distribution percentage of 30% on the newly allowed EPA claims (\$8,113,243.80) as well as payment of the 5% third interim distribution percentage on the Sauget Claim (\$206,250) to the Sauget Executor (25% has been paid on that claim in connection with the first and second interim distributions) within 90 days after the Release Agreement is approved by the Court. See Release Agreement ¶¶ II.2, II.3, III.1. This condition confirms that the Federal Claimants' claims will receive the presently existing percentage distributions along with other Class II creditors of Home.

17. The Release Agreement also provides for payment of the Class III DOL Claim to the extent, and only to the extent, that funds are available to pay Class III claims. Release Agreement ¶ III.2. This is consistent with the results of the litigation over the priority of the DOL Claim (see note 1 above). The Liquidator does not expect that there will be sufficient funds to make any payment on Class III claims.

18. Most significantly from the Liquidator's perspective, the Release Agreement provides that, subject to the conditions noted above and the exclusions noted below, the United States releases the Liquidator "from any and all liability and obligations under 31 U.S.C. § 3713 in connection with Home's liquidation." Release Agreement ¶ III.4. Once effective, this release

will, absent some unanticipated development, allow the Liquidator to make future distributions without the need to request further releases of Federal Priority Statute claims from the United States. This facilitates the ultimate closure of the Home liquidation process.

19. The Release Agreement excludes several categories of claims that the Liquidator does not anticipate being an issue: criminal law claims; federal tax claims; False Claims Act, Program Frauds Civil Remedies Act, Civil Monetary Penalties Act, Employee Retirement Income Security Program and Medicare Secondary Payer claims; and pension benefit, fraudulent conveyance or any other fraud claim. Release Agreement ¶ III.5(a)-(d). It also excludes claims for any obligation created by the Release Agreement, the Settlement Agreement or the Sauget Settlement Agreement. Id. ¶ III.5(e).

20. The Settlement Agreement and the Release Agreement together represent an integrated resolution of outstanding issues with the United States. See Settlement Agreement ¶ 13. The Settlement Agreement was entered after extensive efforts by the EPA to identify claims against Home and significant exchanges of information respecting sites, claims and Home policies. The Settlement Agreement resolves the known claims of the Federal Claimants asserted in the Proofs of Claim and the Additional Proofs of Claim, and it removes the cloud of the potential claims reflected in the Protective Proof of Claim by withdrawal of that proof of claim and through the related Release Agreement. If any claims for coverage under Home policies are filed by the Federal Claimants in the future, they will not present Federal Priority Statute issues.

21. The Settlement Agreement reflects a compromise of the claims asserted in the Proofs of Claim and the Additional Proofs of Claim. It is the result of negotiations involving the Claims Department, under my supervision, which has extensive experience in assessing the

exposure presented by claims under Home's insurance policies. The agreed settlement amount is based on careful evaluation and negotiation of the Federal Claimants' claims and the coverage obligations under Home policies. It also was a necessary step toward obtaining a release of Federal Priority Statute claims to facilitate future distributions on allowed Class II claims in the Home liquidation.

22. The Release Agreement was entered after a lengthy process, including litigation (see note 2 above) and the eventual resolution of claims in the Settlement Agreement. The Release Agreement resolves complex issues affecting the distribution of assets to all Class II creditors of the Home estate. The Liquidator has long sought to obtain a more general release of liability under 31 U.S.C. § 3713 so that it will not be necessary obtain a release for each distribution. The release of all liability and obligations under that statute "in connection with Home's liquidation," Release Agreement ¶ III.4, achieves that objective. The exclusions from the release are consistent with exclusions found in the release agreements for the first and second interim distributions in the Home liquidation and in release agreements in other insurer liquidations.

23. The Liquidator accordingly recommends approval of the Settlement Agreement, allowance of the \$27,044,146 Recommended Amount as a Class II claim of the Federal Claimants in accordance with RSA 402-C:45 and RSA 402-C:44, and approval of the Release Agreement.

24. I believe that the Settlement Agreement and the Release Agreement are fair and reasonable and in the best interests of the policyholders and creditors of Home.

Signed under the penalties of perjury this 5 day of March, 2019.

Peter A. Bengelsdorf

Peter A. Bengelsdorf
Special Deputy Liquidator of The Home Insurance
Company

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached and not the truthfulness, accuracy or validity of that document.

STATE OF CALIFORNIA
COUNTY OF VENTURA

On March 5, 2019 before me, Pam J. White, Notary Public personally appeared Peter A. Bengelsdorf, Special Deputy Liquidator of The Home Insurance Company, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature *Pam J. White*
Signature of Notary Public

