

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

In the Matter of the Liquidation of
MIDLAND INSURANCE COMPANY

INDEX NO. 041294/1986

MOTION DATE 3/24/11

MOTION SEQ. NO. 080

The following papers, numbered 1 to 18 were read on this application

Order to Show Cause— Verified Petition — Exhibits A-E _____	No(s). <u>1-2</u>
Affirmation; Affidavit—Exhibit A; Objection — Affidavit; Response and Statement of Opposition; Addendum to Response and Statement of Opposition; Affirmation; Affidavit in Opposition _____	No(s). <u>3; 4; 5-6; 7; 8; 9; 10</u>
Affirmation in Further Support — Exhibits 1, 2 _____	No(s). <u>11</u>
Supplemental Affirmation in Further Support — Exhibits 1-3 _____	No(s). <u>12</u>
Affirmation—Affidavit; Affirmation; Supplemental Affirmation in Support of Opposition _____	No(s). <u>13-14; 15; 16</u>
Supplemental Affirmation in Further Support of Objection _____	No(s). <u>17</u>
Stipulation — Attachment A _____	No(s). <u>18</u>

Upon the foregoing papers, this application (denominated as a petition), by order to show cause, is decided in accordance with the annexed memorandum decision and order.

FILED

JUL 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 6/27/11
New York, New York


_____, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X

In the Matter of the Liquidation of
MIDLAND INSURANCE COMPANY

Index No. 41294/1986

Decision and Order

FILED

-----X

JUL 01 2011

HON. MICHAEL D. STALLMAN, J.:

The Superintendent of Insurance, as Liquidator of Midland Insurance Company, ^{NEW YORK} ~~proposes~~ _{COUNTY CLERK'S OFFICE} for an order establishing a deadline for claimants in this insurance liquidation proceeding to amend proofs of claims filed or deemed to have been filed with the Liquidator. Those litigants who have submitted papers in this application do not object to the concept of implementing a deadline for amendments. However, disagreements arise over the details of implementing the deadline, and the amount of information that claimants would be required to submit to the New York Liquidation Bureau.

BACKGROUND

The Court of Appeals succinctly summarized the relevant background of Midland Insurance Company (Midland) and this liquidation proceeding:

“Headquartered in Lower Manhattan, Midland was incorporated under New York law in October 1959 as a stock casualty insurer. Its charter authorized Midland to conduct business throughout the United States and in Canada. Midland carried multiline insurance, a type of insurance that typically bundles together different exposures to risks. During its existence, Midland transacted with Fortune 500 companies nationwide, underwriting a substantial amount of excess coverage policies.

In 1985, the New York State Insurance Department (the Insurance Department) commenced an investigation into Midland's financial condition. The Insurance Department's analysis of Midland's financial condition revealed that the company's liabilities exceeded its assets. On March 7, 1986, the Insurance

Department warned Midland that it would seek an order placing Midland into receivership if Midland was unable to get its financial affairs in order. Midland could not comply with the Insurance Department's directives and, by a unanimous vote of its board of directors, consented to liquidation.

By order dated April 3, 1986 (the Liquidation Order), Supreme Court adjudged Midland insolvent and placed it into liquidation pursuant to article 74 of the New York Insurance Law. As of this date, Midland's financial records showed that its assets totaled approximately \$307 million while its liabilities totaled approximately \$354 million, making it insolvent by about \$47 million. The Liquidation Order authorized the Superintendent of the Insurance Department (the Liquidator) to take possession of Midland's property and to sell or otherwise dispose of it at the best obtainable price.

Matter of Liquidation of Midland Ins. Co., 16 NY3d 536, 540-541 (2011).

Pursuant to Insurance Law § 7433 (b) (2), upon liquidation of a domestic insurer, the Liquidator must prepare a list of all persons whose names appear on the books and records of the insolvent insurance company as policyholders or claimants within 30 days of the last day for filing claims. The statute states that "Each person whose name appears upon such list shall be deemed to have duly filed a proof of claim prior to the last day set for the filing of claims."

"Following the entry of the Liquidation Order in Supreme Court, the Liquidator began the statutorily mandated process of notifying all persons with potential claims against Midland. To that end, the Liquidator mailed out over 38,000 proof of claim forms to known Midland policyholders, and other creditors. In addition to providing Midland's policyholders and creditors with notice of Midland's insolvency, the Liquidator informed them of their obligation to present their claims by filing the requisite proof of claim forms with the Insurance Department no later than April 3, 1987.¹"

Matter of Liquidation of Midland Ins. Co., 16 NY3d at 541.

¹ "The Liquidator was unable to identify every Midland creditor prior to the filing deadline. Creditors who returned their proof of claim forms after the filing deadline, but within four months of the Liquidator's mailing, were deemed to have timely filed." *Matter of Midland Ins. Co.*, 16 NY3d at 541 n 1.

Insurance Law § 7433 (a) (1) states that “[a] proof of claim shall consist of a written statement subscribed and affirmed by the claimant as true under the penalties of perjury, settling forth the claim, the consideration therefor, any securities held therefor, any payments made thereon, and that the sum is justly owing from the insurer to the claimant.” A claim may be allowed if, among other things, “it may be reasonably inferred from the proof presented that such person would be able to obtain judgment upon such cause of action against such insured.” Insurance Law § 7433 (d) (2) (A).

In this liquidation proceeding, the Liquidator permitted policyholders to submit a “Policyholder Protection” proof of claim. According to the Liquidator’s Report on the Status of the liquidation of Midland Insurance Company (Liquidator’s Report), approved by the Court on October 17, 2005, “[a] ‘policyholder protection’ proof of claim does not seek payment of a particular, known claim. Rather, it provides the policyholder with the right to present claims covered by policies issued by Midland that are presented after the claim filing deadline.” Report, at 11. Indeed, as seen in an example of a “Proof of Claim Acknowledgment” that Dana Corporation submitted to the Liquidation Bureau, a policyholder needs only to check off a box where the “Claim is made for policyholder protection up to the limits of the policy.” *Lavella Aff.*, Ex A. By contrast, other claimants making a claim under their policies are instructed to “give a concise statement below of the facts constituting the claim and the total amount claimed.” *Id.*

The Liquidator maintains that the Policyholder Protection proof of claim was justified “given the complex nature of Midland’s claims, including its many long-tail claims for asbestos, environmental and other matters.” Liquidator Suppl. Mem. at 4. Given that a Policyholder Protection proof of claim does not provide any specifics about a claim against the estate, the

Policyholder Protection proof of claim is no more informative than if a proof of claim had been deemed filed pursuant to Insurance Law § 7433 (a) (1). It gives the Liquidator notice of little more than an intent to preserve an opportunity to make a specific claim at a later unspecified time.

I.

“The responsibility for the liquidation is that of the Superintendent of Insurance. He may ask the help of the court in solving the problems which arise from time to time . . .” *Matter of Lawyers Tit. & Guar. Co.*, 254 App Div 491, 494 (1st Dept 1938). Here, the Liquidator admits that Policyholder Protection proofs of claim caused a problem. The Liquidator states that “[t]he Policyholder Protection program preserved a policyholder’s option to file future claims, but established no deadline for doing so.” Liquidator Suppl. Mem. at 4. The Liquidator now moves for an order setting a deadline for amendments to previously filed (or deemed filed) proofs of claim.

Amendment of a proof of claim is not specifically addressed in Article 74 of the Insurance Law, the article that contains New York’s adoption of the Uniform Insurers Liquidation Act (UILA). However, “[o]n this and many other aspects of the liquidation process the [UILA] is silent because it was not intended as a comprehensive scheme displacing all State laws, substantive and procedural, relating to liquidation of insolvent insurance companies.” *Matter of Levin v National Colonial Ins. Co.*, 1 NY3d 350, 359 (2004), quoting *Matter of Transit Cas. Co. (Digirol-Superintendent of Ins.)*, 79 NY2d 13, 20 (1992). Amendment of a proof of claim is necessarily contemplated within the liquidation process, given that policyholders and claimants listed on the books and records of a defunct insurer are deemed to have duly filed proofs of claim prior to the last day set for the filing of claims. *See* Insurance Law § 7433 (b) (2). Amendment of a proof of claim that was deemed duly filed must be permitted so that the Liquidator has notice of the actual particulars of that claim in

order to evaluate it.

Article 74 envisions that the distribution of the assets of a defunct insurer will strike “a reasonable balance between the expeditious completion of the liquidation and protection of unliquidated and undetermined claims.” Insurance Law § 7434 (a) (1). The statute itself does not define unliquidated or undetermined claims, but case law defines an “unliquidated claim” as a claim “where the determinative circumstance has in fact occurred and what remains to be done relates merely to its judicial ascertainment or to the ascertainment of the resultant damages. *Matter of Empire State Surety Co. (In Re People, by Emmet)*, 165 App Div 135, 139 (1st Dept 1914). That is, “if the insolvent insurer's liability is certain, but the amount of liability is unknown, then the claim is . . . merely unliquidated.” 26-165 Appleman on Insurance § 165.3. For the purposes of this decision, an “undetermined claim” is a claim for which no details about the claim have been provided to the Liquidator, so that the Liquidator cannot determine whether the estate would be liable to pay the claim.

Undetermined claims, as well as unliquidated claims, impede expeditious completion of a liquidation proceeding. Undetermined claims and unliquidated claims lack information about their dollar value. Without such information, the Liquidator is unable to make reasonable estimates of Midland's liabilities, which prevents the Liquidator from determining whether assets are available for making additional distributions. Liquidator Suppl. Mem. at 6.

Moreover, an undetermined claim could be a contingent claim, i.e., “when it is uncertain whether the insolvent insurer will ever become liable to pay.” 26-165 Appleman on Insurance § 165.3; *Matter of Empire State Surety Co. (In Re People, by Emmet)*, 165 AD at 139 (“claims which are wholly contingent, [have] in fact no basis on which to rest at the time when jurisdiction is

assumed over the fund.”).

Insurance Law § 7433 (c) provides,

“No contingent claim shall share in a distribution of assets of an insurer adjudicated to be insolvent by an order made pursuant to section [7432] of this article except that any such claim shall be considered if properly presented and may be allowed to share if:

- (1) it becomes absolute against the insurer on or before the last day fixed for filing of proofs of claim, or
- (2) there is a surplus and the liquidation is thereafter conducted upon the basis that such insurer is solvent.”

Here, the Liquidator’s longstanding practice of allowing a Policyholder Protection proof of claim, while arguably fulfilling the aim of “protection of unliquidated and undetermined claims” (*see* Insurance Law § 7434 [a] [1]), nevertheless makes expeditious completion of the liquidation more difficult. The Liquidator asserts that policyholders that filed Policyholder Protection proofs of claim have refused to submit claims data in their possession or control, because the Liquidator did not establish any deadline for submitting details of the claim after filing of the Policyholder Protection proof of claim. The Liquidator asserts that,

“Without full and updated claims data, the Liquidator cannot perform allocation analyses and determine whether and the extent to which Midland’s policies are impacted by potential future claims. This means that policyholder claims cannot be settled or submitted for allowances. Further, without an understanding of how Midland’s policies are impacted, the Liquidator is unable to make reasonable estimates of Midland’s liabilities, which prevents the Liquidator from determining whether assets are available for making additional distributions. The result is that many of Midland’s claims cannot be processed and additional distributions cannot be paid.”

Liquidator Suppl. Mem. At 6.

For the purpose of determining the dollar amount of possible claims against Midland,

Policyholder Protection proofs of claim are considered “Incurred But Not Reported” claims, “defined as claims that were incurred during the coverage period of an insurance policy, but which have not yet been reported to the insurer.” Liquidator Suppl. Mem. at 2. The Liquidator identifies two major categories of IBNR claims relevant to this liquidation proceeding:

Classic IBNR: *unknown or latent* injuries or damage that were incurred during the coverage period of a policy, but which have not yet manifested, e.g., asbestos-related diseases that may still remain latent. The Liquidator believes that “classic IBNR” does not make up a significant percent of Midland’s liabilities.

Reporting IBNR: *known* claims that have already been submitted to policyholders, *but which have not been reported by the policyholders to Midland.* The Liquidator said this category arises out of the “Policyholder Protection” program.

Liquidator Suppl. Mem. at 3 (emphasis supplied).

The Liquidator believes that setting a deadline for the amendment of a proof of claim that was timely filed or deemed to have been duly filed (a Cutoff Date) would provide an incentive for policyholders to provide full and updated claims data to the Liquidator. The Liquidator proposes that any amendments to a proof of claim after the Cutoff Date “shall be barred.” Some policyholders expressed concern about the amount of detail that they would need to provide in any amendment to a proof of claim.²

² The policyholders were The Babcock & Wilcox Company Asbestos PI Trust, CertainTeed Corporation, National Service Industries, Pfizer, Inc., and Warner-Lambert Company, LLC.

Pursuant to an undated stipulation with the Liquidator and these policyholders filed with the County Clerk on November 13, 2009, the Liquidator agreed that, for all Class Two claimants, an amendment to a proof of claim that was filed, or deemed to have been filed prior to April 3, 1987 must include “information that identifies the event, accident, or occurrence giving rise to the claim (e.g. exposure to asbestos), the person or property allegedly injured or damaged, and the nature of the allegedly injury or damage (e.g., asbestos-related bodily injury) (the “Basic Information).”

The Liquidator also agreed that “Where a claimant has submitted an effective Claim Amendment, other documents or materials in addition to Basic Information may continue to be

II.

The Court agrees with the Liquidator that a deadline for the amendments of timely filed (or deemed duly filed) proofs of claims would help the Liquidator to obtain data necessary to complete the allowance/valuation phase of the liquidation, and thereby expedite the completion of this 24 year old proceeding. As discussed above, amendment of a proof of claim is contemplated in the liquidation scheme. Without a definite deadline for amending a proof of a claim, a claimant could potentially amend a proof of claim repeatedly, or a claimant could wait indefinitely to submit a specific amendment. As a result, the Liquidator would not be able to fix the total amount of allowed claims against the estate with reasonable certainty to complete the liquidation. Multiple amendments to the filed (or deemed filed) proofs of claim are likely in this proceeding because the Liquidator permitted a proof of claim to encompass more than one claim against the estate.

The number of *proofs of claim* that were filed (27,168) did not correlate with the actual number of *claims* against the Midland estate. Liquidator's Report, at 11. For Midland's major policyholder claimants (MPHs), "there may be thousands of individual claims for each policy for many of the MPHs (e.g. asbestos claimants of an asbestos manufacturer). These individual claims of the MPHs are not reflected in the number of proofs of claim." *Id.* at 11-12. Therefore, amending a proof of claim could involve adding claims against the Midland estate that were not filed prior to the last day for filing proofs of claim, as opposed to amending the details of a previously timely filed proof of claim.

An amendment to a proof of claim should contain as much detail as is required for a proof

submitted after the Cutoff Date until such time as further submission is barred pursuant to applicable law or subsequent court order or agreement."

This Court did not so-order the stipulation.

of claim. As discussed above, “a proof of claim shall consist of a written statement . . . setting forth the claim, the consideration therefor, any securities held therefor, any payments made thereon, and that the sum is justly owing from the insurer to the claimant.” Insurance Law § 7433 (a) (1). The Liquidator’s rejection of an amendment to a proof of claim may be challenged before the Special Referee appointed to hear and report on written objections to disallowed claims. The procedures for challenging rejected amendments to proofs of claim shall follow, with some minor changes, the disallowance procedures established by Justice Beverly Cohen’s order dated March 10, 1994.

To illustrate, the Liquidator must send a notice of determination to the policyholder of its rejection of the amendment, in the same manner as the Liquidator would have sent a notice of determination of disallowance of a claim.³ The policyholder may file with the Liquidator written objections of the rejection of the amendment within 60 days of the date of the notice of rejection of a claim amendment. The timely objections received by the Liquidator will be referred to the Special Referee to hear and report.

III.

Simply setting a deadline for amending a proof of claim alone would not provide a sufficient incentive to policyholders to release claims data. Because the statute does not require detailed claims

³ The procedure for review of claims recommended for disallowance does not set an initial time frame for the Liquidator to notify claimants that their claim was recommended for disallowance. It provides that the Liquidator shall prepare a list of claims recommended for disallowance “on a periodic basis.” This lack of a clear time frame is acceptable because a claim recommended for disallowance that is successfully challenged before the Special Referee could result in the claim being allowed, or being remanded to the Liquidator for further evaluation.

By contrast, the lack of any clear time frame to notify claimants does not adapt well to the situation where the Liquidator rejects a Claim Amendment. The claimant should not have to wait until the original claim is recommended for allowance or disallowance in order to bring up for review a rejected Claim Amendment. Therefore, there should be a set time frame for the Liquidator to notify claimants that a Claim Amendment is rejected.

data to be part of a proof of claim, it follows that an amended proof of claim does not require the submission of detailed claims data.⁴

A claim may be allowed if, among other things, “it may be reasonably inferred from the proof presented that such person would be able to obtain judgment upon such cause of action against such insured.” Insurance Law § 7433 (d) (2) (A). Therefore, a deadline must be set for the submission of evidence in support of the allowance of a claim to prompt claimants to submit detailed claims data to the Liquidator.

The Court is mindful that a deadline for submission of proof in support of a claim will affect mostly the undetermined and unliquidated claims. Indeed, this was the intent of the Liquidator, who believes that “the only substantive effect of the Cutoff Date is that IBNR claims will be barred and therefore not considered for allowance.” Lorin Affirm. in Further Support ¶ 20. Setting a deadline at this time for submitting proof in support of the allowance of a claim strikes the correct balance between expeditious completion of the liquidation and protection of the undetermined and unliquidated claims.

According to the Liquidator, “Midland has a total of \$1.9 billion in allowed and estimated allowed claims.” Liquidator Suppl. Mem. at 7. By contrast, “[t]he Liquidator does not have an actuarial estimate of Midland’s IBNR, but has determined that, at its outermost limit, assuming relevant major policyholder claims reach their policy limits, IBNR would amount to \$605 million.” *Id.* at 7. The Liquidator argues that not setting a deadline for amendment of the proofs of claim means that “IBNR of \$605 million is holding up allowances and distributions of claims totaling more

⁴ Nevertheless, the Court strongly encourages claimants to submit more detailed amended proofs of claim than what the statute requires so as to facilitate expeditious evaluation of a claim by the Liquidator. Indeed, it would be advisable to submit as much information as possible.

than three times the value of the IBNR.” *Id.*

In addition, the Liquidator points out that, once a claim has been allowed, the claim will lose value until it is paid, because Insurance Law § 7434 (b) states that “No creditor shall be entitled to interest on any dividend by reason of delay in payment of such dividend.” “As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate.” *Matter of People (Norske Lloyd Ins. Co.)*, 249 NY 139, 146-147 (1928) (citation omitted). Thus, the longer it takes to complete the liquidation and pay allowed claims, the more value the allowed claims will lose. The Liquidator states that, “after 24 years, the Liquidator has determined that losses to creditors from the time-value of money (*e.g.* inflation) should be reduced and that such losses far outweigh the added marginal value of holding the estate for the filing of future, unknown claims (*ie.*, IBNR).” Liquidator Suppl. Mem. at 6.

Trane U.S. Inc. (*f/k/a* American Standard, Inc.), a policyholder, objects to language in the Liquidator’s proposed orders setting the deadlines that would forever bar a policyholder from offering information to support a future Claim Amendment, if that information “was in its possession or control as of the applicable [Cutoff Date].” Trane Suppl. Mem. at 2. Trane points out that, for many policyholders, Midland was an excess insurer in several layers of insurance. Trane essentially contends that, even if the information about the underlying injury could be in its possession or control, 24 years might be too early to know whether Midland’s excess layer would be reached.

To the extent that Trane appears to discussing a scenario where it is uncertain at this time whether Midland would ever become liable to pay for the loss, this is the scenario of a contingent claim. *See* 26-165 Appleman on Insurance § 165.3, *supra* (“when it is uncertain whether the

insolvent insurer will ever become liable to pay.”). As discussed above, contingent claims could only share in the distribution of the estate if they became absolute on the last day for filing proofs of claim, i.e., April 3, 1987. Insurance Law § 7433 (c) (1). A contingent claim that would become absolute 24 years after April 3, 1987 would not be entitled to share in the distribution of Midland’s assets.

The case law firmly establishes that no exception to the deadlines can be made in the interests of equity or fairness. In *Matter of Professional Ins. Co. of N.Y. (Jason—Superintendent of Ins. of State of N.Y.)* (67 AD2d 850 [1st Dept 1979]), a physician insured for medical malpractice by an insolvent insurer submitted a claim to the Superintendent of Insurance as liquidator, who rejected the proof as untimely. The physician commenced a special proceeding to deem the proof of claim timely filed *nunc pro tunc*. The physician argued that he could not have filed any information about the medical malpractice claim until after the deadline for filing a proof of claim. Special Term granted the application, and the Appellate Division, First Department reversed the decision, ruling, “While petitioner could not have filed any information respecting the [malpractice] claim by the deadline of May 13, 1975, his ignorance of the claim is not recognized by statute to forgive a late filing.” *Id.* at 851. On appeal, the Court of Appeals affirmed the decision of the Appellate Division, for the reasons stated by the Appellate Division. *Matter of Professional Ins. Co. of N.Y. (Jason—Superintendent of Ins. of State of N.Y., 49 NY2d 716 [1980])*.⁵

Therefore, this Court sets herein a deadline for the submission of evidence in support of the allowance of a claim. Any evidence in support of the allowance of a claim submitted after this

⁵ As discussed above, Insurance Law § 7434 (a) (1) prohibits any shareholder, policyholder, or other creditor from circumventing the priority classes “through the use of equitable remedies.”

deadline shall not be considered by the Liquidator, except in support of allowance of the claim as a claim in Class Seven, Eight or Nine of the distribution scheme, as applicable.

If the Liquidator requires more information from a claimant after the deadline to determine whether a claim should be allowed or disallowed, then the Liquidator has the discretion to request that the claimant submit additional information.⁶ In that case, the claimant may submit the requested information notwithstanding that the deadline has passed, and the Liquidator may consider the requested submissions in determining whether to allow or disallow the claim.

IV.

Eighteen Guaranty Associations have submitted papers in partial opposition to the Liquidator's application.⁷ The Guaranty Associations support a deadline for amending the proofs of claim, "because entry of such an order now will expedite the completion of the Midland estate and distributions to the Guaranty Associations and other estate claimants." Guaranty Associations Mem. at 5. However, the Guaranty Associations object to any order that would prejudice their rights to payment pursuant to respective statutes governing Guaranty Associations, and maintain that the information the Liquidator requires would impose unreasonable, unnecessary, and burdensome obligations on Guaranty Associations. The Guaranty Associations request that any order setting

⁶ This would also include the situation where the Liquidator's rejected Claim Amendment was successfully challenged before a Special Referee, who ruled in favor of a claimant after the deadline to submit proof in support of a claim had already passed.

⁷ Counsel to the Guaranty Associations submitted papers on behalf of the 11 Guaranty Associations from the District of Columbia and the states of Connecticut, Florida, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, Texas, Vermont, and Virginia.

Counsel subsequently submitted additional papers on behalf of seven additional Guaranty Associations from the states of California, Colorado, Idaho, Kansas, Montana, Washington, and Wyoming.

deadlines should include language to “make the order clear that any such rights [of a Guaranty Association] are not affected by the order.” Tanski Suppl. Affirm. ¶ 7.

Guaranty Associations are nonprofit statutory entities created and governed by the state laws that created them. Tanski Affirm. ¶ 7. With a few exceptions, the statutes creating and governing Guaranty Associations are based on the National Association of Insurance Commissioners (NAIC) Post-Assessment Property and Liability Guaranty Association Model Act. *Id.* Guaranty Associations provide protection to the public against the hardships of the insolvencies of property and casualty insurers. *Id.*

“In general, under the Guaranty Association Statutes, each Guaranty Association is obligated to pay ‘covered claims’ of the residents of its jurisdiction of organization. As a general matter, ‘covered claims’ are defined in the respective Guaranty Association Statutes as unpaid claims which arise out of and are within the coverage of policies issued by an insolvent insurer. Upon the entry of the liquidation order of Midland, the Guaranty Associations became obligated to pay “covered claims” arising under certain Midland policies subject to the limitations provided in the respective Guaranty Association Statutes.

Generally, under the respective Guaranty Association Statutes, any person recovering on a ‘covered claim’ from a Guaranty Association is deemed to have assigned to the Guaranty Association his or her rights under the policy of the insolvent insurer.”

Id. ¶¶ 7-8.

As the Guaranty Associations indicate, the laws of other states and the laws of the District of Columbia require the Guaranty Associations to file periodic “statements” with the receiver or liquidator of an insolvent insurer. These are statements of the Guaranty Associations of covered claims paid by the Guaranty Association and estimates of anticipated claims. Those laws provide that filing these statements “shall preserve the rights of the Association against the assets of the insolvent insurer” (*see e.g.* Colo Rev Stat Ann § 10-4-511 [2]; DC Code § 31-5508 [d]; Conn Gen.

Stat Ann § 38a-844 [c]; Fla Stat Ann § 631.923 [3]; Idaho Code Ann § 41-3611[3]; Kan Stat Ann § 40-2909 [c]; Mont Code Ann § 33-10-114 [4]; Wash Rev Code Ann § 48.32.090 [3]), or similar language. Wyo Stat Ann § 26-31-110 (c) (ii). New York did not enact the NAIC Model Act that contains the language cited by the Guaranty Associations.

In this liquidation proceeding, the Liquidator permitted the Guaranty Associations to submit “blanket” proofs of claim.⁸ The number of blanket proofs of claim “does not reconcile with the number of actual claims made.” Liquidator’s Report at 11. Amendment of the proofs of claim permits the Guaranty Associations to submit additional claims that the Guaranty Associations paid to policyholders since the last time a blanket proof of claim was amended. However, if a deadline for amendment of the blanket proofs of claim of guaranty associations were set, then the Guaranty Associations would not be able to submit any additional claims that they subsequently paid after the deadline for allowance in the liquidation proceeding, except for consideration as a late claim.

Under Insurance Law § 7434, the assets of an insolvent insurance company (other than a life insurance company) are distributed in priority among nine classes of claimants, and those “class nine” are the last in line to receive any distribution, if at all. The statute requires that “[e]very claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment.” Claims under insurance policies and claims of a security fund, guaranty association or the equivalent (except claims arising under reinsurance contracts) fall

⁸ The practice of permitting guaranty associations to submit “blanket” proofs of claim is consistent with the industry practice. In 2005, NAIC adopted a new model act, the Insurer Receivership Model Act (IRMA), which is intended to replace UILA and the Insurers Rehabilitation and Liquidation Model Act of 1995 (IRLMA).

Section 702 (D) of IRMA states, “A guaranty association shall be permitted to file a single omnibus proof of claim for all claims of the association in connection with payment of claims of the insurer.” New York has not adopted either IRMA or IRLMA.

within “class two” of the distribution scheme. Insurance Law § 7434 (a) (ii). The statute prohibits creation of any subclasses within any class, and “[n]o claim by a shareholder, policyholder, or other creditor shall be permitted to circumvent the priority of classes through the use of equitable remedies.” Ins Law § 7434 (a) (1). The Liquidator raised the issue of whether exempting the Guaranty Associations from an order setting a Cutoff Date would amount to creating an impermissible subclass of creditors.

While this application was pending, the Court of Appeals decided the issue of whether the insurance policies issued by Midland must be interpreted under New York substantive law (because Midland was adjudged insolvent and placed into liquidation in New York), rather than following an individual choice-of-law analysis. It was argued that an individual choice-of-law analysis on each of Midland's policies would create “subclasses” among the Major Policyholders in violation of Insurance Law § 7434 (a) (1). The Court of Appeals rejected this argument, ruling, “[t]he purpose in including language proscribing the creation of “subclasses” is to ensure that members within a particular class are not given priority vis-à-vis one another in terms of distribution.” *Matter of Liquidation of Midland Ins. Co.*, 16 NY3d 536, 546 (2011). The rule against creation of subclasses does not apply to the “valuation stage” of the liquidation proceeding. *Id.*

Insofar as deadlines for the amendments of proofs of claim and for the evidence in support of a claim occur during the “valuation stage,” an order setting these deadlines that exempts the Guaranty Associations would therefore not amount to creation of an impermissible subclass of creditors composed only of Guaranty Associations.

In this Court's view, setting a deadline for the amendment of proofs of claim and a deadline for submitting evidence in support of a claims allowance should not apply to the Guaranty

Associations. The Liquidator intended such deadlines to serve as incentives to policyholders to submit claims data and to bar consideration of IBNR claims for allowance. Lorin Affirm. in Further Support ¶ 20. Unlike IBNR claims, the claims of Guaranty Associations do not pose the same kind of obstacles to expeditious completion of the liquidation. A claim paid by a Guaranty Association is, by its nature, a liquidated claim. The dollar amount of such a paid claim is definite and certain. The Liquidator did not articulate any specific concern about whether the Guaranty Associations timely amended their blanket proofs of claim. There is no contention or indication that the Guarantee Associations withheld information from the Liquidator.

In the absence of any contention or evidence that the blanket proofs of claim of the Guaranty Associations are impeding expeditious completion of the liquidation, the Court sees no valid ground to interfere with the established practices of the Guaranty Associations of our sister states. Otherwise, to set deadlines here might make Guaranty Associations of sister states reluctant to pay claims to policyholders of defunct New York insurers residing in their states.

Therefore, the deadlines that the Court sets in this decision and order will not apply to the proofs of claims and the claims of the Guaranty Associations.

Of course, at some point, there must be an order setting a final deadline for submission of all claims for allowance in the liquidation, which would bar any further claims. *See Verified Petition, Exs B & C.* The petition does not seek such an order here. The Court sees no compelling reason to set a deadline barring submission of claims of the Guaranty Associations in advance of such an ultimate deadline.

CONCLUSION

Accordingly, it is hereby

ORDERED that January 31, 2012 is hereby established as the last date (Cutoff Date) on which the holder of a claim against Midland, except a State Guaranty Association, may submit an amendment to a previously filed (or deemed filed) proof of claim, including a policyholder protection proof of claim (Claim Amendment); and it is further

ORDERED that all Claim Amendments shall be made in writing and sent to the Liquidator electronically on or before the Cutoff Date, or by first class mail, postage paid and postmarked on or before the Cutoff Date, or by overnight courier service, fees paid and written acknowledgment of receipt by such courier on or before the Cutoff Date at the following address:

Superintendent of Insurance of the State of New York
as Liquidator of Midland Insurance Company
123 William Street
New York, New York 10038-3889
Attn: Estates Management
Gail Pierce-Siponen, Director

and it is further

ORDERED that if the Liquidator determines that a Claim Amendment does not amend a claim filed or deemed to have been filed on or before April 3, 1987, the Claim Amendment shall be deemed a proof of claim filed after April 3, 1987. If the Liquidator allows that claim, that claim shall fall under Class Seven in priority of the distribution of assets, unless such claim should fall under Class Eight or Class Nine of the distribution scheme set forth in Insurance Law § 7434; and it is further

ORDERED that the Liquidator's determination that a Claim Amendment does not amend a claim filed or deemed to have been filed on or before April 3, 1987 may be challenged before the Special Referee appointed to hear and report on written objections to claims recommended for disallowance; and it is further

ORDERED that, within 30 days after the Liquidator's rejection of a Claim Amendment, the Liquidator shall serve the claimant with a "Notice of Rejection of Claim Amendment" by first class mail to the claimant's last known address. The Notice shall advise each claimant that:

- (i) the Claim Amendment has been rejected by the Liquidator;
- (ii) the claimant may object to the Notice of Rejection of Claim Amendment by serving written objections to the Liquidator that must be received by the Liquidator within 60 days of the date of the Notice of Rejection of Claim Amendment;
- (iii) a timely objection to the Notice of Rejection of Claim Amendment will be referred to the Special Referee appointed by the Court to hear objections to claims recommended for disallowance, to hear and report on the validity of the claimant's objections, and that the Liquidator will notify each claimant of the time and place of the hearing on the objections;

and it is further

ORDERED that January 31, 2013 is hereby established as the last date on which the holder of a claim against Midland, except a State Guaranty Association, may submit proof in support of allowance of a previously filed (or deemed filed) claim against Midland, and the Liquidator shall not consider any proof submitted after January 31, 2013 in support of allowance of the claim; and it is further

ORDERED that, while the Liquidator's evaluation of a claim for allowance or disallowance is pending before the New York Liquidation Bureau, the Liquidator has the discretion to request any claimant to submit additional information and to consider the additional submissions, if the Liquidator requires such additional information to determine whether a claim should be allowed or disallowed, notwithstanding that the additional information is submitted after January 31, 2013; and it is further

ORDERED that the Liquidator shall provide notice of this Order to Midland's creditors with

unadjudicated claims who have filed, or are deemed to have filed, timely claims in this proceeding, by mailing a copy of a notice of this Order (Notice) by United States first class mail to the Policyholder's last known mailing address contained in the Liquidator's records, by publishing the Notice in *Business Insurance*, such publication to occur twice in the 30 days following entry of this Order, and by posting the Notice on the internet web page maintained by the New York Liquidation Bureau within 10 days following the entry of this order.

Dated: June 27, 2011
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN

FILED

JUL 01 2011

NEW YORK
COUNTY CLERK'S OFFICE