

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

-----X
In the Matter of the Liquidation of
MIDLAND INSURANCE COMPANY
-----X

Index No. 41294/86

Assigned to:
Hon. Michael Stallman

REPLY AFFIRMATION OF VINCENT J. PROTO

Vincent J. Proto, an attorney duly admitted to practice before the
Courts of the State of New York, affirms under penalty of perjury as follows:

1. I am a shareholder of the law firm of Budd Lerner, P.C., counsel
for Everest Reinsurance Company f/k/a Prudential Reinsurance Company
("Everest"), in this case.

2. I respectfully submit this Reply Affirmation in further support of
Everest's Supplemental Submission.

3. Annexed hereto as Exhibit A is an excerpt of the Insurer
Receivership Model Act of the National Association of Insurance
Commissions Model Laws.

Dated: New York, New York
December 20, 2006



VINCENT J. PROTO

EXHIBIT “A”

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (N.A.I.C.)
MODEL LAWS, REGULATIONS AND GUIDELINES
N.A.I.C. MODEL LAWS, REGULATIONS AND GUIDELINES
VOLUME 3
INSOLVENCY
INSURER RECEIVERSHIP MODEL ACT
NAIC 555-1

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objections upon the receiver, the receivership court may hear and determine the matter or may appoint a referee to hear it and make such order as the facts warrant.

H. The receiver may enforce any order or collect any judgment under Subsection F by any lawful means.

I. Any assessment of a subscriber or member of an insurer made by the receiver pursuant to the order of receivership court fixing the aggregate amount of the assessment against all members or subscribers and approving the classification and formula made by the receiver under this section shall be *prima facie* correct.

J. Any claim filed by an assessee who fails to pay an assessment, after the conclusion of any legal action by the assessee objecting to the assessment, shall be deemed a late filed claim under Section 801.

Drafting Note: This section may be eliminated if the state has no insurers issuing assessable policies.

Section 611. Reinsurer's Liability

A. Except as otherwise provided in this Act, the amount recoverable by the receiver from reinsurers shall not be reduced as a result of a delinquency proceeding with a finding of insolvency, regardless of any provision in the reinsurance contract or other agreement. No agreement, written, oral or otherwise shall be enforceable to the extent it is in conflict, or not in strict compliance, with this section. Except as expressly provided herein, no other person whether as a creditor, third party beneficiary or otherwise shall have a direct right to reinsurance proceeds from any reinsurer of the insolvent insurer on the basis of any written or oral agreement, or pursuant to any action or cause of action seeking any equitable or legal remedy. This section shall apply to all the insurer's reinsurance contracts including but not limited to treaty reinsurance, quota share reinsurance, facultative reinsurance, or fronting or captive reinsurance arrangements.

B. Except as otherwise provided in Subsection I of this section, the amount recoverable by the liquidator from reinsurers shall be payable under a contract or contracts reinsured by the reinsurer on the basis of:

(1) Proof of payment of the insured claim by a guaranty association, the insurer or the receiver to the extent of the payment; or

(2) The allowance of the claim pursuant to Section 708, an order of the receivership court or a plan of rehabilitation.

C. If an insurer takes credit for a reinsurance contract in any filing or submission made to the commissioner, and the reinsurance contract does not contain the provisions required with respect to the obligations of reinsurers in the event of insolvency of the reinsured, that reinsurance contract shall be deemed to contain the provisions required with respect to the obligations of reinsurers in the event of insolvency of the reinsured in order to obtain credit for reinsurance or other applicable statutes.

D. All reinsurance contracts that are presumed or construed to contain provisions pursuant to Subsection C, shall be deemed to contain the following provision:

In the event of insolvency and the appointment of a receiver, the reinsurance obligation shall be payable to the ceding insurer or to its receiver without

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diminution because of the insolvency or because the receiver has failed to pay all or a portion of the claim. Payment shall be made upon either:

(1) Proof of payment of the insured claim by a guaranty association, the insurer or the receiver to the extent of the payment; or

(2) The allowance of the claim pursuant to Section 708 of the Insurer Receivership Act, or the allowance of claims pursuant to an order of the receivership court or plan of rehabilitation.

E. The receiver shall give written notice, in accordance with the terms of the contract, to each reinsurer obligated in relation to the claim of the pendency of a claim against the reinsured company. Failure of the receiver to give notice of a pending claim pursuant to a provision in the reinsurance contract shall not excuse the obligation of the reinsurer unless it is prejudiced thereby, and if it is prejudiced, its obligations shall be reduced only to the extent of the prejudice. The reinsurer may interpose, at its own expense, in the proceeding in which the claim is to be adjudicated, any defense or defenses that it may deem available to the reinsured company or its receiver.

F. The entry of an order of conservation, rehabilitation or liquidation shall not be deemed a breach or an anticipatory breach of any reinsurance contract, nor shall it be grounds for retroactive revocation or retroactive cancellation of any reinsurance contracts by the reinsurer.

G. In the event that reinsurance payments to a receiver of a ceding insurer are later determined to be payments in excess of the amounts actually due to the receiver, the excess shall be credited against future payments due to the receiver or shall be repaid to the reinsurer as an administrative expense of the estate pursuant to Section 801A. Any repayment may be limited based on the property remaining in the estate.

H. (1) Subject to Subsection A, payments made by the reinsurer directly to an insured or other creditor shall not diminish the reinsurer's obligation to the insurer's estate and payments made by the reinsurer shall be made directly to the ceding insurer or its receiver, except when:

(a) The reinsurance contract, or other written agreement to which the insured, ceding insurer and reinsurer are all parties specifically provides another payee, other than an affiliate of the ceding insurer or reinsurer, of the reinsurance in the event of the insolvency or receivership of the ceding insurer; provided that the provision is contained in the reinsurance contract as it was written on the date of its initial execution; or the provision is contained in the other written agreement as it was written on the date of the initial policy issuance;

(b) The reinsurance contract, as it was written on the date of its initial execution contains a provision where the assuming insurer with the consent of the direct insured and the ceding insurer has assumed all policy obligations of the ceding insurer as direct obligations of the assuming insurer to the payees under the policies and in substitution for the entire obligations of the ceding insurer to the payees; or

(c) A life and health insurance guaranty association has made the election to succeed to the rights and obligations of the insolvent insurer under a contract of reinsurance in accordance with Section 612, the life and health guaranty association laws of its domiciliary state, or pursuant to other applicable law, rule, order or assignment contract, in which case payments shall be made directly to or at the direction of the guaranty association.

(2) Both the receiver and the reinsurer shall be entitled to recover from any

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person (other than the receiver or a guaranty association), who unsuccessfully makes a claim directly against the reinsurer, their attorneys' fees and expenses incurred in preventing any collection by that person.

I. Nothing in this Act shall be construed to authorize the liquidator or any other entity to compel payment from a non-life reinsurer on the basis of estimated incurred but not reported losses or loss expenses or case reserves for unpaid losses and loss expenses, except under Sections 614 and 615 and with respect to claims allowed in accordance with Section 705.

Section 612. Life and Health Reinsurance

A. Contracts reinsuring life, disability income or long term care insurance policies or annuities issued by a ceding insurer that has been placed in conservation or rehabilitation proceedings pursuant to this Act shall be continued or terminated pursuant to the terms or conditions of each contract and the provisions of this section.

B. Contracts reinsuring life, disability income or long term care insurance policies or annuities issued by a ceding insurer that has been placed into liquidation pursuant to this Act shall be continued, subject to the provisions of this section, unless either (i) the contracts were terminated pursuant to their terms prior to the date of the order of liquidation (the "coverage date"); or (ii) the contracts were terminated pursuant to the order of liquidation, in which case the provisions of Subsection I shall apply.

C. (1) At any time within 180 days of the coverage date, a guaranty association covering life, disability income or long term care insurance policies or annuities, in whole or in part, may elect to assume the rights and obligations of the ceding insurer that relate to the policies or annuities covered, in whole or in part, by the guaranty association, in each case under any one or more reinsurance contracts between the insolvent insurer and its reinsurers selected by the guaranty association. Any such assumption shall be effective as of the coverage date. The election shall be effected by the guaranty association or the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) on its behalf sending written notice, return receipt requested, to the affected reinsurers.

(2) To facilitate the earliest practicable decision about whether to assume any of the contracts of reinsurance, and in order to protect the financial position of the estate, the receiver and each reinsurer of the ceding insurer shall make available upon request to affected guaranty associations or to NOLHGA on their behalf as soon as possible after commencement of formal delinquency proceedings (i) copies of in-force contracts of reinsurance and all related files and records relevant to the determination of whether such contracts should be assumed, and (ii) notices of any defaults under the reinsurance contracts or any known event or condition which with the passage of time could become a default under the reinsurance contracts.

(3) The following Subparagraphs (a) through (d) shall apply to reinsurance contracts so assumed by a guaranty association:

(a) The guaranty association shall be responsible for all unpaid premiums due under the reinsurance contracts, for periods both before and after the coverage date, and shall be responsible for the performance of all other obligations to be performed after the coverage date, in each case that relates to policies of life,

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after the valuation.

C. Claims filed by reinsurers whose reinsurance contracts are terminated pursuant to Section 612, which arise from the termination, shall not be deemed late if they are filed within ninety (90) days of the termination and shall receive a ratable share of distributions, whether past or future, as if the claims were not late.

D. The liquidator may petition the receivership court, subject to Section 107, to set a date certain after which no further claims may be filed, notwithstanding any other provision of this Act.

Section 702. Proof of Claim

A. Proof of claim shall consist of a statement signed by the claimant or on behalf of the claimant that includes all of the following that are applicable:

- (1) The particulars of the claim including the consideration given for it;
- (2) The identity and amount of the security on the claim;
- (3) The payments made on the debt, if any;
- (4) That the sum claimed is justly owing and that there is no setoff, counterclaim or defense to the claim;
- (5) Any right of priority of payment or other specific right asserted by the claimant;
- (6) The name and address of the claimant and the attorney, if any, who represents the claimant; and
- (7) The claimant's social security or federal employer identification number.

B. The liquidator may require that a prescribed form be used, and may require that other information and documents be included.

C. At any time the liquidator may require the claimant to present information or evidence supplementary to that required under Subsection A and may take testimony under oath, require production of affidavits or depositions, or otherwise obtain additional information or evidence.

D. 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. The omnibus proof of claim may be periodically updated by the association without regard to the deadline specified in Section 701A, and the association may be required to submit a reasonable amount of documentation in support of the claim.

Section 703. Allowance of Claims

A. Except as provided in Subsections K and L, the liquidator shall review all claims duly filed in the liquidation proceeding and shall further investigate, as the liquidator considers necessary. Consistent with the provisions of this Act, the liquidator may allow, disallow or compromise claims that will be recommended to the receivership court unless the liquidator is required by law to accept claims as settled by a person or organization, including a guaranty association, subject to any statutory or contractual rights of the affected reinsurers to participate in the claims allowance process. Notwithstanding any other provision of this Act, no claim under a policy of insurance shall be allowed for an amount in excess of the applicable policy limits or otherwise beyond or contrary to the coverage provided under the terms of the insurer's policies or contracts.

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B. Pursuant to the review, the liquidator shall provide notice of the claim determination by any means authorized under Subsection 107 of this Act to the claimant or the claimant's attorney. The notice shall set forth the amount of the claim allowed by the liquidator, if any, and the priority class of the claim as established in Section 801. In regard to claims to be allowed pursuant to Section 705, preliminary notice of the amount of the claim determination shall be provided to any reinsurer that is or may be liable in respect to the claim at least forty-five (45) days before notice is provided to the claimant pursuant to this subsection. In regard to claims being allowed other than pursuant to Section 705, the same notice may be provided to any reinsurer that is or may be liable in respect of the claim. If no timely objection is submitted, the determination is binding on the reinsurer upon allowance.

C. Within forty-five (45) days after the date the notice set forth in Subsection B was mailed, the claimant noticed may submit written objections to the liquidator. Any such objections shall clearly set out all facts and the legal basis, if any, for the objections and the reasons why the claim should be allowed at a different amount or in a different priority class. If no timely objection is submitted, the determination is final. The liquidator may accelerate the allowance of claims by obtaining waivers of objections.

D. A claim that is not mature as of the coverage termination date established under Section 502 may be allowed as if it were mature, except it shall be discounted to present value. A claim is not mature if payment on the claim is not yet due.

E. A judgment or order against an insured or the insurer entered after the date of the initial filing of a successful petition for receivership, or within 120 days before the initial filing of the petition, and a judgment or order against an insured or the insurer entered at any time by default or by collusion need not be considered as evidence of liability or of the amount of damages.

F. Claims under employment contracts by directors, officers or persons in fact performing similar functions or having similar powers are limited to payment for services rendered prior to any order of receivership, unless explicitly approved in writing by the commissioner prior to an order of receivership or by the conservator or rehabilitator before the entry of an order of liquidation or by the liquidator after the entry of an order of liquidation.

G. The total liability of the liquidator to all claimants arising out of the same act or policy shall be no greater than the insurer's total liability would have been were the insurer not in liquidation.

H. The liquidator shall disallow claims that are for or determined to be for *de minimis* amounts. A *de minimis* amount shall be any amount equal to or less than a maximum *de minimis* amount approved by the receivership court as being reasonable and necessary for administrative convenience.

I. Claims that do not contain all the applicable information required by Section 702, need not be further reviewed or adjudicated and may be denied or disallowed by the liquidator subject to the notice and objection procedures in this section.

J. The liquidator may reconsider a claim on the basis of additional information and amend the recommendation to the receivership court. The claimant shall be afforded the same notice and opportunity to be heard on all changes in the recommendation as in its initial determination. The receivership court may amend its allowance or disallowance as appropriate.

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K. The liquidator is not required to process claims for any class until it appears reasonably likely that property will be available for a distribution to that class. If there are insufficient assets to justify processing all claims for any class listed in Section 801, the liquidator shall report the facts to the receivership court and make appropriate recommendations for handling the remainder of the claims.

L. Any claim of a lessor for damages resulting from the termination of a lease of real property shall be disallowed to the extent the claim exceeds:

(1) The rent reserved by the lease, without acceleration, for the greater of one year, or fifteen percent (15%), not to exceed three (3) years, of the remaining term of the lease, following the earlier of:

(a) The date of the filing of the petition; and

(b) The date on which the lessor repossessed, or the lessee surrendered, the leased property; plus

(2) Any unpaid rent due under the lease, without acceleration, on the earlier of these dates.

Section 704. Claims under Occurrence Policies, Surety Bonds and Surety Undertakings

A. Subject to the provisions of Section 703, any insured shall have the right to file a claim for the protection afforded under the insured's policy, irrespective of whether a claim is then known, if the policy is an occurrence policy.

B. Subject to the provisions of Section 703, any obligee shall have the right to file a claim for the protection afforded under a surety bond or a surety undertaking issued by the insurer as to which the obligee is the beneficiary, irrespective of whether a claim is then known.

C. After a claim is filed under Subsection A or B, when a specific claim is made by or against the insured or by the obligee, the insured or the obligee shall supplement the claim, and the receiver shall treat the claim as a contingent or unliquidated claim under Section 705.

Section 705. Allowance of Contingent and Unliquidated Claims

A. A claim of an insured or third party may be allowed under Section 703, regardless of the fact that it was contingent or unliquidated if any contingency is removed in accordance with Subsection B and the value of the claim is determined in accordance with Subsection C.

(1) A claim is contingent if the accident, casualty, disaster, loss, event or occurrence insured, reinsured or bonded against occurred on or before the date fixed under Section 501, but the act or event triggering the company's obligation to pay has not occurred as of that date.

(2) A claim is unliquidated if the insurer's obligation to pay has been established, but the amount of the claim has not been determined.

B. Unless the receivership court directs otherwise, a contingent claim may be allowed if:

(1) The claimant has presented proof of the insurer's obligation to pay reasonably satisfactory to the liquidator; or

(2) The claim was based on a cause of action against an insured of the insurer;