

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

MARY JO HUDSON,
SUPERINTENDENT OF INSURANCE,
OHIO DEPARTMENT OF INSURANCE, IN
HER CAPACITY AS LIQUIDATOR OF THE
P.I.E. MUTUAL INSURANCE COMPANY,

Plaintiff,

v.

THE P.I.E. MUTUAL INSURANCE
COMPANY,

Defendant.

) CASE NO. 97CVH12-10867

) JUDGE JOHN F. BENDER

FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
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CLERK OF COURTS-CV

**MOTION OF THE LIQUIDATOR FOR APPROVAL OF (I) THE
ALLOWANCE OF THE CLAIM OF THE KENTUCKY INSURANCE GUARANTY
ASSOCIATION ARISING OUT OF THE MALPRACTICE CASE AND (II) THE
SETTLEMENT AND RELEASE AGREEMENT ENTERED INTO BY AND BETWEEN
THE LIQUIDATOR OF THE P.I.E. MUTUAL INSURANCE COMPANY AND THE
KENTUCKY INSURANCE GUARANTY ASSOCIATION**

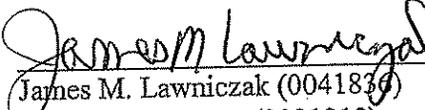
Plaintiff Mary Jo Hudson, Superintendent of Insurance, State of Ohio, in her capacity as Liquidator ("the Liquidator") of The P.I.E. Mutual Insurance Company ("P.I.E."), moves (the "Motion") the Court for an Order approving (i) allowance of the claim of the Kentucky Insurance Guaranty Association ("KIGA") in the PIE Liquidation Case arising out of its settlement of Gordon, et al. v. Kemper, et al., Jefferson (KY) Circuit Court Action Case No. 97-CI-003774 (the "Malpractice Case") and (ii) the settlement and release agreement (the "Settlement Agreement") entered into by and between the Liquidator and the KIGA resolving that portion of KIGA's proof of claim in the P.I.E. Liquidation Case arising out of KIGA's settlement of the claims of Barry D.

Gordon, Executor of the Estate of Lori J. Gordon, on behalf of himself, Lori J. Gordon, Stuart Gordon and Samantha Gordon (collectively the "Claimants") and Frank W. Kemper, M.D. (the "Provider") asserted in the Malpractice Case and as proofs of claims in the P.I.E. Liquidation Case. A copy of the Settlement Agreement is attached hereto as Exhibit A. The grounds for this Motion are described more fully in the attached Memorandum in Support.

Respectfully Submitted,

RICHARD CORDRAY
Attorney General, State of Ohio

By Special Counsel:
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Claim and the Kemper Claim, the "Claims"). Given the nature of the Claims asserted by the parties and the anticipated fees and expenses necessary to litigate a resolution of the Claims, and the ever present risk of an adverse result, the proposed Settlement Agreement represents a reasonable resolution of the Claims.

II. BACKGROUND

A. The Claims.

a. The Pre-Liquidation Malpractice Case

Prior to P.I.E.'s liquidation, Claimants filed the Malpractice Case against P.I.E. insured, Frank W. Kemper, M.D. (the "Provider"), a Kentucky physician, and other health care providers. Claimants averred approximately five claims for wrongful death and survivorship against Provider and claims against the other defendants arising out of the alleged medical malpractice of the defendants in failing to diagnose and treat Lori Gordon, deceased, for gastric cancer. The Provider is the only defendant who was insured by P.I.E.

On March 23, 1998, this Court issued an order (the "Liquidation Order") placing P.I.E. in liquidation pursuant to Chapter 3903 of the Ohio Revised Code and appointing the Ohio Superintendent of Insurance as the Liquidator. Generally speaking, when a liquidation order is entered declaring an insurance company insolvent, applicable insurance guaranty associations ("IGA") assume the insolvent insurer's obligations and rights with respect to insureds and third party claimants for liability purposes only. IGAs provide insurance coverage (defend and/or pay claims) to eligible claimants when no other coverage is available to pay valid, "covered claims" under the applicable IGA statute and up to the IGA's statutory cap. The IGA, not the Liquidator, is required to first pay "covered claims" up to the applicable statutory cap of \$300,000. That claims payment ordinarily confers to the IGA a class 2 claim in the liquidation.

As a result of this statutory scheme, the Liquidation Order triggered the responsibility of KIGA in the Malpractice Case. KIGA became statutorily obligated to direct and fund the costs associated with the defense and settlement of all claims in the Malpractice Case against the Provider, as the P.I.E. insured, up to KIGA's statutory cap of \$300,000. KIGA has therefore been defending the Provider in the lengthy Malpractice Case that P.I.E. itself would have defended under the terms of its malpractice insurance policy issued to the Provider. KIGA has maintained this jurisdiction, responsibility and control of the Malpractice Case throughout the P.I.E. Liquidation Case, and has not yet returned the claims to the Liquidator, because KIGA has not yet reached its statutory cap.

After entry of the Liquidation Order, all of the defendants, except the Provider settled prior to the first jury trial or prior to the jury returning a complete defense verdict. Thereafter, both the Kentucky Court of Appeals (Gordon v. Kemper, No. 2002-CA-001983-MR, 2005 WL 678535 (Ky. App. Mar. 25, 2005)) and the Kentucky Supreme Court reversed the judgment for the defendants and ordered a new trial, although they did so on different grounds. The Kentucky Supreme Court concluded that the Claimants are entitled to a new trial on the grounds that the trial judge improperly excluded certain evidence, primarily the Plaintiff's cross-examination of the Provider's expert witness, Dr. John, about his allegedly inconsistent opinions in a previous and unrelated case captioned Landrum v. Falls. See Kemper v. Gordon, 272 S.W.3d 146, 155-156 (2008). Thus, the Malpractice Case is poised to be tried again with the Provider as the only remaining Defendant. On August 24, 2009, a status conference was held in the case, wherein the Claimants were granted leave to amend the original Complaint to add KIGA as a defendant. A new trial date has not been set because the parties agreed to attempt to settle the case. Claimants counsel made a \$300,000 settlement demand to fully resolve the Malpractice Case, which settlement would include a release

of KIGA, the Liquidator and withdrawal of all Claimants' and Provider's proof of claims (the "POC") in the P.I.E. Liquidation Case summarized below.

2. The Post-Liquidation Proofs of Claims

The Liquidation Order provided for the filing of proofs of claims, and specifically ordered that no claim shall be recognized against P.I.E. unless it was filed on or before March 23, 1999 (the "bar date"). On February 17, 1999, this Court extended the bar date to September 23, 1999 (the "absolute final bar date"), and further ordered that "[a]ll contingent and future claims, as defined in the notice, will be forever barred and foreclosed after September 23, 1999."

a. Provider's Proof of Claim

On March, 24, 1999, the Provider filed a proof of claim in the P.I.E. Liquidation Case in connection with his claim for a defense of the then ongoing Malpractice Case, which the Liquidator identified as POC #1609101. The amount of the POC is for \$450,000, which is broken down as \$300,000 under a policy and \$150,000 for unpaid legal expense.

The Liquidator forwarded the claims to the KIGA, as explained above. As a result, the Liquidator's determination letter to Claimants dated December 28, 2008 classified the claim as a Class 2 claim but valued it in the amount of \$0 because this claim is the responsibility of KIGA up to its statutory cap, for the reasons set forth above. Neither the Provider nor his counsel filed objections to the determination letter.

b. Claimants' Proof of Claim

On January 11, 1999, Claimants filed a proof of claim in the P.I.E. Liquidation Case, asserting the claims in the Malpractice Case which the Liquidator identified as POC #1609100. The amount claimed on the POC is \$13,200,000. The Liquidator forwarded the claims to the KIGA, as explained above. As a result, the Liquidator's determination letter to Claimants dated March 31,

2009 classified the claim as a Class 2 claim but valued it in the amount of \$0 because (i) this claim is being handled under Liquidator #16009100 Seq. 1 (the Provider's POC discussed above) and (ii) this claim is the responsibility of KIGA up to its statutory cap, for the reasons set forth above. On April 9, 2009, Claimants' counsel objected to the determination of the claim as having zero value on the basis that the claims have not been resolved by jury trial and that, in her view, the jury verdict could exceed the \$300,000 claim limitation. The Liquidator was advised that an objection hearing is premature because the claims are still within KIGA's statutory cap and being handled by KIGA.

(C) KIGA's Proof of Claim Arising Out of the Malpractice Case.

KIGA also filed a proof of claim in the P.I.E. Liquidation Case, which the Liquidator identified as POC #97078379. The proof of claim asserts Class 1 and Class 2 claims exceeding \$28 million for all PIE matters KIGA has handled, which sum includes approximately \$165,000 of the fees and expenses it has incurred in the Malpractice Case and the \$300,000 KIGA will pay in settlement of the Malpractice Case if the Settlement Agreement between the Liquidator and KIGA that is the subject of this Motion is approved. KIGA has withdrawn all of its objections to the Liquidator's determination of its proof of claim.

B. Resolution of the Claims

KIGA and the Claimants entered into settlement discussion, wherein the Claimants made a settlement demand of \$300,000 to fully and finally resolve the Malpractice case, derivatively, the Provider's, the Claimants' and KIGA's proofs of claims in the P.I.E. Liquidation Case arising out of the Malpractice Case. The KIGA rejected the Claimants offer, and made a counteroffer of \$200,000, which was rejected by the Claimants.

In attempt to protect the P.I.E. estate's interest, the Liquidator retained medical

malpractice legal counsel in Kentucky. Counsel has determined that \$300,000 is a reasonable settlement payment for KIGA to pay to resolve the Malpractice Case and also the Provider's and the Claimants' proofs of claims in the P.I.E. Liquidation Case. The Liquidator requested that KIGA accept the Claimants' settlement proposal and informed KIGA that the Liquidator would allow KIGA's resulting claim against the P.I.E. Estate for reimbursement of its payment of the \$300,000 statutory cap as a Class 2 claim. KIGA declined this request, thus creating a dispute between KIGA and the Liquidator regarding that portion of KIGA's proof of claim related to the Malpractice Case that KIGA is still handling. KIGA and the Liquidator entered into a Settlement Agreement on October 27, 2009 in an effort to resolve that dispute between the Liquidator and KIGA, a copy of which is attached hereto as Exhibit A. The Settlement Agreement is expressly contingent upon this Court's approval of the terms thereof.

C. Summary Of The Settlement Agreement Terms

Negotiations between KIGA and the Liquidator resulted in the proposed Settlement Agreement between them that is attached hereto as Exhibit A. The Settlement Agreement sets forth the complete terms of the settlement, however, in summary, to resolve the Claims asserted by the KIGA arising from the Malpractice Case and KIGA's resolution of the associated proofs of claim by the Claimants and the P.I.E. Insured for which KIGA has responsibility. KIGA has agreed to fully and completely settle the Gordon Claim for a \$300,000 settlement payment, if in return, the Liquidator will grant the KIGA an allowed Class 2 Claim pursuant to R.C. § 3903.42 in the total amount of Two Hundred Thousand Dollars (\$200,000) and an allowed Class 1 Claim pursuant to R.C. § 3903.42 in the total amount of One Hundred Thousand Dollars (\$100,000) (the "Allowed Claim"). In consideration for the settlement of the Claims, KIGA has agreed to withdraw any and all objections it may file with respect to the Claims and also committed to secure a broad release

and withdrawal of all claims and proofs of claims filed by the Claimants and Provider. If approved, the Allowed Claim shall be in full satisfaction of all claims asserted by the Claimants, KIGA and the P.I.E. Insured against P.I.E., as well as any other claims whether now existing or hereinafter arising.

Pursuant to Chapter 3903 of the Ohio Revised Code, the resolution of the Malpractice Action by the KIGA would ordinarily result in the KIGA having a Class 2 claim in the P.I.E. liquidation for the total sum paid in settlement. If KIGA had agreed to settle the Malpractice Case for \$300,000 absent the terms of the Settlement Agreement (which KIGA has not agreed to do), then KIGA would receive an allowed Class 2 claim for the \$300,000. Like all other Class 2 claims, KIGA's claim would be paid in a final distribution in the same percentage as all other class 2 claims, which the Liquidator has previously estimated will be 70-72% of the amount of the allowed claim. Using the 70% figure for ease of calculations purposes, that means, the KIGA would have been entitled to a distribution of about \$210,000 on a \$300,000 Class 2 claim. If this Court were to approve the Settlement Agreement and the Allowed Claim, then KIGA would agree to settle the Malpractice Case for \$300,000, but KIGA will receive a Class 1 distribution of \$100,000 and a Class 2 distribution of about \$140,000, thus giving KIGA a total claim payment of about \$240,000, which is a difference of about \$30,000. While unique, the Liquidator has determined that the Settlement Agreement is the best method to eliminate the potential additional cost to her associated with the KIGA's continuation of the Malpractice Case and potentially additional litigation if there is no settlement, as well as the risk to her being unable to close the P.I.E. estate by year end. Moreover, the P.I.E claimants would be forced to wait an undetermined amount of time until after the Malpractice Case is resolved to receive their final distribution. In this regard, it is important to note that the KIGA Claim and the Gordon Claims are the only open and unresolved claims

remaining in the P.I.E. estate. The proposed settlement with KIGA facilitates a final pro-rata distribution of assets to claimants in the P.I.E. estate and the eventual final closing of the P.I.E. estate by the end of the year. For these and other reasons set forth below, the Liquidator has therefore determined that, under these unique circumstances, the Settlement Agreement is reasonable, fair and in the best interest of the P.I.E. estate. Therefore, the Liquidator requests that the court approve the Settlement Agreement.

III. APPLICABLE AUTHORITY AND STANDARD OF REVIEW

The Liquidator now requests that this Court approve the Settlement Agreement attached hereto as Exhibit A. Pursuant to R.C. § 3903.21(A)(6)(b), the Liquidator has the power to compromise claims of the estate “upon such terms and conditions as he considers best.” No Ohio insurance insolvency case law or, indeed, any case law from any other state, has been found which sets forth any standards to guide this Court in determining whether this settlement agreement should be approved. Throughout the P.I.E. case and other liquidation cases in Ohio, this Court has referenced guidelines established under the federal Bankruptcy Code for its evaluation of a settlement within the context of a federal bankruptcy proceeding, which is a similar process to an insurance company liquidation.

In In re Energy Cooperative, Inc., 886 F.2d 921, 927 (7th Cir. 1989), the court stated: “The benchmark for determining the propriety of a bankruptcy settlement is whether the settlement is in the best interests of the estate.” Id. at 927. The U.S. Supreme Court in Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968), established the following criteria to be examined in order to determine whether a settlement is in the best interests of a debtor’s estate:

- (a) the probability of success in the litigation;

- (b). the difficulties, if any, to be encountered in the matter of collection;
- (c). the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and
- (d). the paramount interests of the creditors and a proper deference to their reasonable views.

Id. at 424. See also In re Arden v. Motel Partners, 176 F.2d 1226, 1228 (9th Cir. 1999). In Anderson, the Supreme Court also discussed the extent to which a court should examine the above-mentioned criteria. The Court held that a court's role is not to conduct a trial or "mini-trial," or to decide the merits of individual issues. Rather, the court's role is to determine whether the settlement, as a whole, is fair and equitable. Id. at 424.

IV. JUSTIFICATION FOR SETTLEMENT

A. Probability Of Success In The Litigation.

After the Liquidator's review of the all the information related to the Gordon Action, the Gordon Claim, the KIGA Claim and Kemper Claim, and considering the costs that will exceed \$30,0000 at issue and risks of litigating the Malpractice Case once a new trial order is entered in that matter, the Liquidator has determined that proposed Settlement Agreement provides the best option to disposing of the Claims. The Settlement Agreement also eliminates a roadblock to closing of the P.I.E. liquidation by the end of 2009 for a cost of no more than \$30,0000, which is ultimately in the best interests of the estate.

B. Complexity Of The Litigation Involved, And The Expense, Inconvenience And Delay Necessarily Attending It.

Litigation of the Malpractice Case once a new trial order is entered setting the matter for trial and preparing the case for presentation to a jury would require a substantial expenditure of resources by the parties, and could delay the Liquidator's plan to close this estate by the end of 2009. This settlement offers an immediate and fair resolution of the Claims at a lower cost and

within KIGA's statutory limits. Further, resolving this matter will result in an immediate savings by avoiding the payment of legal fees in excess of \$30,000 at issue in the dispute between KIGA and Liquidator for KIGA to continue the prosecution of the Malpractice Case. On balance, the Liquidator believes that the settlement of this matter pushes the estate one-step closer to closing at year end.

C. Paramount Interests Of The Creditors And A Proper Deference To Their Reasonable Views.

The Liquidator is first and foremost striving to maximize the net assets of the estate so as to obtain the greatest possible distribution to **all** creditors and claimants. Based on all of the factors discussed above, resolution of the Malpractice Case meets this objective. The settlement agreement is in the best interests of the creditors because KIGA will not agree to increase its \$200,000 settlement offer on terms that result in a Class 2 claim exceeding \$200,000. If the Malpractice Case continues to be litigated, KIGA will incur in excess of \$30,000 in fees and expenses, even if the Provider prevails again. This could result in a Class 1 claim in excess of \$30,000. Further, creditors of the P.I.E. estate will have the opportunity under the continuous hearing procedures to file any comments or objections to this motion and the attached Settlement Agreement. Those objections, if any, can be considered at the hearing on this matter.

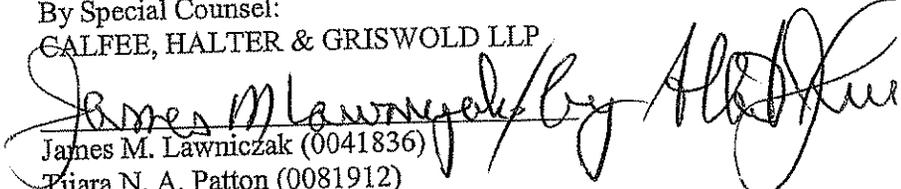
V. CONCLUSION

For the foregoing reasons, the Liquidator requests that this Court: (a) grant this Motion; (b) approve the Settlement Agreement attached hereto as Exhibit A; and (c) authorize the Liquidator to consummate that Settlement Agreement.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2009, I caused the Motion to be served by Federal Express upon the parties listed below, except to Douglas Morris to which the Motion was mailed first class mail, postage pre-paid, via the United States Postal Service:

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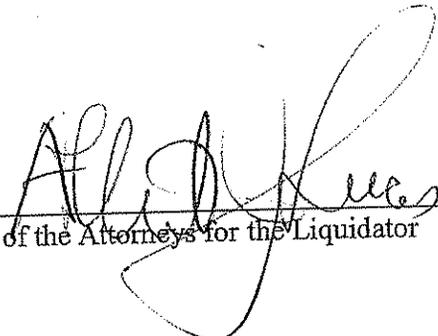
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