

issue notice to the person attempting to file said claim advising that the claim will NOT be considered by the Liquidator and shall be treated as if no claim was filed and that the claimant attempting to present such a late-filed claim after the Final Bar Date shall not be entitled to any further consideration;

(e) establishes that a proof of claim may be Perfected, as hereafter defined in the Motion, notwithstanding that the liability before or after setoff has not been determined and/or the amount thereof has not been liquidated by the Final Bar Date. A creditor shall be entitled to submit additional information to the Liquidator relating to the underlying claim as such information is developed over time; and, that Liquidator will take such information into account in making an appropriate determination pursuant to R.C. 3903.36 et seq. of the final amount of liability, both before and after setoff;

(f) approves the form of notice, attached hereto as Exhibit A, regarding establishment of the Final Bar Date among other things (“Notice”);

(g) orders that the notice regarding the Final Bar Date be sent to the various insurance guaranty associations and insurance departments of the applicable states, and all known LMI policyholders, as defined in the Motion, creditors and claimants, by first class U.S. mail; and

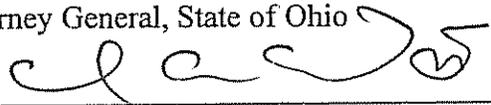
(h) further orders that if any notice sent to the last known address provided by the policyholder or claimant to the Liquidator is returned as undeliverable, the Liquidator shall have no further obligation to attempt to locate another address, and

(i) orders that with respect to the operation and effect of the forgoing, the Liquidator shall comply with the provisions of R.C. 3903.35 (C).

This Motion is supported by the attached Memorandum in Support.

Respectfully submitted,

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LMI Insurance Company

MEMORANDUM IN SUPPORT

I. The LMI Proof of Claim Bar Date

On May 23, 2000, this Court entered its Final Order of Liquidation and Appointment of Liquidator (the "Liquidation Order"), finding that LMI was insolvent and appointing the Liquidator to take possession of all LMI assets and administer them pursuant to the provisions of the Insurers Supervision, Rehabilitation, and Liquidation Act, under R.C. Chapter 3903 (the "Liquidation Act").

On June 6, 2000, the Court entered its Order Approving Notice of Liquidation, Continuing Hearing and Time for Filing Proofs of Claim with the Liquidator of LMI (the "Bar Date Order") and this Court set May 23, 2001, as the date by which all Proofs of Claim ("POCs") must be filed with the Liquidator in the LMI liquidation proceedings (the "Bar Date"). The Court also approved the form of notice to all creditors of the LMI liquidation of the procedures for filing a POC and the Bar Date (the "Notices"). Pursuant to R.C. 3903.22, the Liquidator mailed the Notices to all persons known or reasonably expected to have claims against LMI, including all policyholders with policy effective dates of January 1, 1996 and forward. In pertinent part, the Notices informed insureds, policyholders, claimants that:

The Liquidation Court has further ordered that all persons having claims against the assets of LMI must file such claims with the Liquidator on Proof of Claim forms on or before May 23, 2001. Any person filing claims with the Liquidator after such date may receive no distribution or a distribution less than they would have otherwise received. Any and all outstanding claims, including those presented to LMI prior to its having been placed in liquidation, must be submitted to the Liquidator on Proof of Claim forms approved and provided by the Liquidator. If the records of LMI indicate you are a creditor of LMI, you will be mailed a Proof of Claim form within the next 120 days to be used in filing a claim in the liquidation proceedings. A Proof of Claim form must be used for making a claim for any amounts owed to you by LMI. If

you believe you have a claim against LMI and you do not receive a Proof of Claim form, please request one in writing and state the nature of your claim. THE DEADLINE FOR COMPLETING AND FILING A PROOF OF CLAIM WITH THE LIQUIDATOR IS MAY 23, 2001.

This notice process was intended to inform and notify as many known and unknown claimants as possible of the LMI liquidation and of the Bar Date so that they could take appropriate action to protect their own interest. In this case, more than 69,505 notices were mailed, publication was made in 11 newspapers nationwide; postings were made on the Internet; and, information and publicity concerning this case has circulated through the media in Ohio and other states. The Liquidator also believes that by compliance with R.C. 3903.22, all reasonable and required steps have been taken to ensure that the vast majority of LMI's insureds, policyholders, claimants and other creditors have been informed of the Bar Date. Therefore, the Liquidator believes that essentially all potential claimants of LMI have received notice of the liquidation and Bar Date.

Subsequent to the mailing of the Notices, the Liquidator also mailed POC forms with filing instructions and further notice of the Bar Date to in excess of 69,505¹ potential claimants of LMI.

For purposes of this Motion, the Liquidator sets forth the following defined terms. Definitions may include defined terms. Defined terms are capitalized.

POC—A “POC” is a proof of claim form distributed by the Office of the Ohio Insurance Liquidator in connection with the liquidation of LMI Insurance Company.

Blanket Proof of Claim—A “Blanket Proof of Claim” is a timely-filed POC that includes the following features: (1) the claimant did not provide specific information relating to a claim or cause of action; and (2) the claimant evidences

¹ In addition to the POC forms with filing instructions mailed before the POC filing bar date of May 23, 2001, the Liquidator has mailed an additional 36,080 POC forms with filing instructions to claimants.

some intent that the POC covers or asserts a claim that might occur or arise after the submission of the Blanket Proof of Claim, including a Future Claim.

Unspecified Claim—An “Unspecified Claim” is a demand or right of action, whether or not the claimant asserts that it has been reported to the Liquidator under a POC or Blanket Proof of Claim, that includes: (a) demands that are not capable of being Perfected by June 30, 2009; (b) rights of action that have accrued but the liability has not been determined or the amount thereof liquidated and the claimant has not Perfected the claim by June 30, 2009; (c) demands where the LMI insured or Liquidator has received reports or notices, whether or not formal demands for payment were included, on the basis that a demand or claim may mature at some point; (d) demands asserted in litigation with the LMI insured that are reopened and reported after June 30, 2009; and/or (e) claims of minors not asserted or Perfected on or before June 30, 2009.

An “Unspecified Claim” does not include a contingent claim described under R.C. 3903.37, provided that on or before December 31, 2008 the Liquidator is provided with sufficient information under R.C. 3903.36 for the Liquidator to determine and allow the contingent claim.

Future Claim—A “Future Claim” is a claim that may be filed in the future that includes one or more of the following features: (a) the claim arises after June 30, 2009; (b) the facts surrounding the claim are presently unknown to the Liquidator and/or the claimant whether or not intended to be set forth within a Blanket Proof of Claim; (c) the claim has yet to be asserted against a LMI insured and/or the Liquidator. Future Claims often appear in the form of long-tail liability claims, such as workers compensation, pollution, products liability, asbestos contamination, or similar claims, and, once asserted, it is common for such claims to take many years to develop, through litigation, before damages are determined.

Perfected—“Perfected” means that claimants have provided to the Liquidator sufficient information and documentation describing the facts of the claim, including but not limited to: (a) a detailed statement describing the claim; (b) a detailed statement describing the dollar value of the claim; (c) documents evidencing damage; and (d) all other information or documents helpful to proving the claim, all as required by R.C. 3903.36 and the instructions to the POC form.

The instructions for completion and filing of the LMI POC forms specifically required, pursuant to R.C. 3903.36(A), that claimants submit a detailed statement in support of the claim and supporting information to certify the claim. (See “Instructions for Completing and Filing Proof of Claim”, ¶¶ 3, 7.) Despite these instructions, certain claimants timely-filed Blanket

Proofs of Claim. No express provision is made in R.C. 3903.36 or elsewhere in Chapter 3903 for an individual to file a Blanket Proof of Claim whether or not asserting an Unspecified or Future Claim. Such filings are contrary to paragraph 3 of the Instructions, which provides:

. . . Do not file a proof of claim unless you are aware of a specific claim and can factually support it. If you do not have a claim at this time, you should keep the Proof of Claim form and submit it, together with supporting documentation, should you become aware of a claim made, or to be made against you. **IF YOU FAIL TO ADEQUATELY DESCRIBE AND DOCUMENT YOUR CLAIM, YOUR PROOF OF CLAIM MAY BE REJECTED OR DENIED.**

More than eight (8) years have passed LMI was placed into liquidation. The Liquidator continues to receive notice of new claims that are submitted under Blanket Proofs of Claim or other POCs timely-filed with the Liquidator.

If Unspecified or Future Claims are permitted to be asserted after June 30, 2009, the LMI liquidation could remain open indefinitely until all new claims are determined and all litigation is resolved. This indeterminate delay would certainly prejudice the orderly administration of the LMI liquidation because the Liquidator would be unable to calculate the amount of any pro-rata distribution until the value of all claims was determined. Further, the Liquidator would never know at what point in time with any degree of certainty that all Unspecified or Future Claims have been made, since conceivably, they could be submitted for many years to come.

II. The Bar Date and Discretion to Accept Late-Filed Claims

R.C. 3903.35(A) specifies: "Proof of all claims shall be filed with the Liquidator in the form required by section 3903.36 of the Revised Code on or before the last day for filing specified in the notice required under 3903.22 . . ." R.C. 3903.36 specifies that "Proofs of claim shall consist of a statement signed by the claimant that includes . . . [t]he particulars of the claim"

(emphasis added). Pursuant to R.C. 3903.38(B), an insured claimant who does not file a claim with the Liquidator by the Bar Date is an “unexcused late-filer.”

Under the statutory scheme, the initial Bar Date is not, in effect, an “absolute and final” bar date. Under R.C. 3903.35(B), the Liquidator is given some discretion. R.C. 3903.35(B) and (D) provide under certain circumstances that the Liquidator “may” permit a creditor who has filed a claim after the bar date to participate in distributions, but only “to the extent that any such payment will not prejudice the orderly administration of the liquidation.”²

Establishing an absolute and final bar date, after which claims no longer will be accepted, is fundamental and integral to the comprehensive and complex scheme under the Liquidation Act for liquidation of insolvent insurance companies. Only following the final bar date is the Liquidator able to quantify, by class, all claims made against the assets of the estate, determine the validity and the value of all such claims and make distributions in accordance with the provisions of R.C. 3903.36 through 3903.45.

Accepting late-filed claims can create an enormous additional administrative expense in any liquidation proceeding and particularly in this liquidation. Permitting late-filed claims would prolong the liquidation process, usually for many years. Such a delay would not only be costly and deplete assets that would otherwise be available for distribution, but would also be prejudicial to the holders of timely-filed liquidated claims, which will comprise the vast majority of all insureds, claimants and creditors in this liquidation estate. The Liquidator has determined that it is time to establish the Final Bar Date and that to allow any late-filed claims after the Final Bar Date would indeed prejudice the orderly administration of this liquidation. Further, the Liquidator has determined it is in the best interest of the LMI liquidation estate that she will not

² In any event, R.C. 3903.38 appears to preclude the Liquidator from considering any late-filed claims by an insured, because insureds are designated as “unexcused late filers.” If this Motion is granted, the Liquidator will not consider any attempt by an insured to file a claim after the Final Bar Date.

exercise her discretion under R.C. 3903.35(B) and (D) and will not accept any late-filed POCs in the LMI liquidation proceedings after the Final Bar Date requested herein.

III. Why Claim Submissions Should Not Be Accepted After the Final Bar Date

A. General Rationale

In all liquidation proceedings, a firm cut-off date must, at some time, be established after which no further claims will be permitted, including unspecified claims and future claims that could potentially be presented under timely-filed Blanket Proofs of Claim. Otherwise, it could be many a year until the Liquidator could make a final distribution because all creditors must wait for their distribution until all claims in their priority classification are determined. This is because until all claims are known, quantified and finally determined as to total liabilities, a liquidator is not able to calculate the appropriate pro rata distribution per priority class under R.C. 3903.42, and thus the precise distribution to each creditor.

Determining claims at the earliest possible date in the liquidation proceedings will benefit nearly all policyholders, claimants and creditors, because the Liquidator will be able to make a distribution sooner. As in all liquidations, some persons may be disadvantaged (*i.e.*, potential claimants who failed to file a POC). In this particular case, the only other persons who will apparently be disadvantaged by the establishment of the Final Bar Date and the Liquidator's determination not to exercise her discretion to allow late-filed claims will be any potential claimants who have claims that first become known after the Final Bar Date. However, as shown below, those potential claimants are policyholders or third party claimants who have had notice and an opportunity to protect their interests. Balancing these interests, the Liquidator believes it would be inequitable to the vast majority of policyholders, creditors and claimants to

not establish a Final Bar Date or to accept late-filed claims thereafter and thereby delay further the determination of the total number and amounts of the POCs.

The purpose of the Liquidation Act, as in part set forth in R.C. 3903.02(D), is the protection of the interests of insureds, claimants, creditors and the public generally through, among other things, enhanced efficiency and economy of liquidation and clarification of the law to minimize legal uncertainty and litigation. That purpose will be advanced in this case if this Motion is granted and a Final Bar Date is established.

B. Balancing of Interests

Substantial effort and administrative expense has been incurred to ensure that essentially all LMI insureds, claimants and creditors have notice of the Bar Date. To date, 2,914 POCs were timely-filed by the Bar Date. Another 3,032 POCs were received by the Liquidator after the Bar Date and will, therefore, be classified as Class 7 late-filed claims

The only potential claimants who did not file their claims by the Bar Date, or who will be unable to submit documents supporting their claims by the Final Bar Date, will be potential claimants who have no legitimate claims by the time of the Final Bar Date, but who might have Future Claims and Unspecified Claims.

If untimely-filed claims, including Unspecified Claims and Future Claims, were to be considered and allowed after the Final Bar Date, it would adversely impact legitimate, timely-filed claimants. In this regard, the date for distribution would likely be extended by several years, and quite possibly longer, if late-filed claims were to be accepted after the Final Bar Date. Moreover, additional administrative expense would likely be incurred. The overhead administrative expenses of the Liquidator's office and employees, as well as the administrative expense of any guaranty funds accepting such late-filed claims, could be extended for several

years. Late-filed claims which are in the beginning stages of litigation may require that the Liquidator's staff evaluation and determination of those claims to await the outcome of the litigation or settlement. If the Liquidator's determination of the value of the late-filed claim was disputed, litigation with the creditor would be likely.

Because of the large number of creditors in this liquidation, an absolute determination at this stage in the liquidation as to how POCs will be handled, from a timing standpoint, is deemed to be important by the Liquidator to the orderly administration of the LMI liquidation proceedings. It appears inequitable to delay for a significant period the distribution to a large majority of creditors for the benefit of a relatively small number of "potential" future creditors, who may or may not have claims develop after the Final Bar Date, which will be more than eight (8) years after entry of the Liquidation Order. For these reasons, the Liquidator believes permitting late-filed claims more than eight (8) years after the orders of liquidation would create prejudice to the orderly administration of the liquidation.

C. Limited Guaranty Fund Coverage

Ohio and most other states recognize that insureds of an insolvent insurer should not be able to rely indefinitely upon guaranty fund coverage for unspecified claims. R.C. 3955.08(A)(1) provides that the guaranty association shall, in no event, be liable for any claim filed after the "final date" set by this Court for filing claims in the liquidation proceeding or eighteen months after entry of the Liquidation Orders, whichever is earlier. Thus, the Ohio Insurance Guaranty Association ("OIGA") and other state insurance guaranty associations ("Guaranty Funds") are not liable to pay any possible Future Claims filed after the Bar Date. Moreover, the Guaranty Funds are not liable to pay any late-filed claims even if the Liquidator were to exercise discretion to allow such late-filed claims. *Lake Hospital System, Inc. v. Ohio Ins. Guaranty Ass'n* (1994) 69

Ohio St.3d 521, 634 N.E.2d 611. One effect of R.C. 3955.08(A)(1) is to encourage insureds to obtain alternate coverage and not to rely indefinitely upon Guaranty Fund coverage.

IV. Case Law Supports Approval of the Liquidator's Decision Not to Exercise her Discretion to Accept Late-Filed Claims after the Final Bar Date.

A. The Trend Toward Absolute Bar Dates

While one of the Liquidator's goals is to distribute all the funds and close out the estate, administration of an estate of an insolvent insurer is complex and time-consuming. In general, property and casualty insurance company liquidations have been, by far, among the longest of any liquidation proceedings in this country. It is not uncommon for a distribution to be made ten or more years following entry of the order of liquidation.

One of the reasons that insurance company liquidations have historically taken so long to complete is the reluctance to cut off claims. However, courts have begun a trend toward finality so that insurance cases can be resolved in less time and more efficiently. This Court should join the trend toward more efficient insurance company liquidations. In the Franklin County Ohio Common Pleas Court, similar final bar dates for filing POCs were previously established in the following liquidations: The P.I.E. Mutual Insurance Company, The American Druggists' Insurance Company, Proprietors' Insurance Company, The Oil & Gas Insurance Company, Credit General Insurance Company and Credit General Indemnity Company.

In *Lake Hospital System, Inc. v. Ohio Ins. Guaranty Ass'n.* (1994), 69 Ohio St.3d 521, 634 N.E.2d 611, the court held that R.C. 3955.08(A)(1) prevents the OIGA from accepting any claim presented after the original bar date, even if the liquidator accepted the late-filed claim. Although this case dealt with bar dates as they apply to the OIGA and not the liquidator, the language the court used in reaching its decision is very instructive.

First the court noted the “trend in other jurisdictions [is] to preclude recovery for late-filed claims, even for equitable reasons.” 69 Ohio St.3d at 525, 634 N.E.2d at 614. Then the court emphasized the necessity of a timely conclusion to liquidation proceedings, despite the potential prejudice to some parties with late-filed claims, as follows:

There must be some degree of finality to the liquidation proceedings. The allowance of delinquent claims would unnecessarily prolong distribution of the insolvent insurer’s assets to the detriment of other claimants and the guaranty association.
69 Ohio St.3d at 526, 634 N.E.2d at 615.

This language directly supports the position that the Liquidator is advancing in this case. The allowance of delinquent, late-filed claims here would substantially prolong the distribution in this case to the detriment of creditors and the guaranty associations. *See, Lorain County Board of Commissioners v. United States Fire Ins. Co.* (1992), 81 Ohio App.3d 263, 268, 610 N.E.2d 1061, 1064 (“It is commonly accepted that upon the liquidation of an insolvent insurer, a firm date must be set after which no more claims against the company will be received.”); *Ohio Ins. Guaranty Ass’n v. Berea Roll & Bowl, Inc.*(1984), 19 Ohio Misc.2d 3, 5, 182 N.E.2d 995, 998 (“The purpose of permitting the court to set a date beyond which no claim shall be presented allows the early liquidation of the insolvent insurance company and, therefore, benefits the claimants and policyholders of the insolvent company. . . Without this provision, a liquidation and distribution could not be effected until all potential statutes of limitations have run.”).

Ohio is not alone in recognizing this trend toward finality in insurance company liquidations. Similar results and similar language as in the Ohio Supreme Court case of *Lake Hospital System, Inc.* exist in opinions in a number of other states. *See, e.g., Whitehouse v. Rumford Property & Liability Ins. Co.*, 658 A.2d 506, 508 (R.I. 1995) (“although we can appreciate the appearance of inequity that results from not allowing an occurrence policyholder

to file a claim even though the notice of the claim was not received before the bar date, such a situation is distinguishable from a case in which the claimant failed to receive notice of the bar date” -- also noting the requirement that there be a “degree of finality to liquidation proceedings”); *Union Gesellschaft Fur Metal Industrie Co. v. Illinois Ins. Guaranty Ass’n*, 190 Ill. App.3d 696, 700, 546 N.E.2d 1076, 1079 (1989) (the filing of a contingent claim is not sufficient to avoid the effect of the bar date); *Jason v. Superintendent of Insurance*, 67 A.D.2d 850, 413 N.Y.S.2d 17 (1979) (a late-filed claim should not have been allowed to share in distributions); *Satellite Bowl, Inc. v. Michigan Property & Casualty Guaranty Ass’n*, 165 Mich. App. 768, 773, 419 N.W.2d 460, 462 (1988) (“allowance of delinquent claims would prolong distribution of the insolvent company assets to the detriment of other claimants”).

B. The Liquidator’s Discretion

It is the Liquidator to whom R.C. 3903.35(B) and (D) gives the discretion to determine whether or not to accept late-filed claims. Under those subparagraphs, it is the Liquidator who determines whether there would be “prejudice to the orderly administration of the liquidation” if late-filed claims are allowed. The Liquidator has carefully analyzed the situation present in this liquidation, applied her experience in insurance company liquidations and reached the reasoned judgment that accepting late-filed claims, eight (8) years following inception of the Liquidation and the Notice, on a discretionary basis would subject the estate to significant additional expense, unduly delay distribution and disrupt the orderly and efficient administration of this estate. This Court should give deference to the Liquidator’s discretionary determination that late-filed claims should not be permitted.

In *Ratchford v. Proprietors’ Ins. Co.* (1989), 47 Ohio St.3d 1, 3, 546 N.E.2d 1299, 1300, the Ohio Supreme Court held that the legislative intent in enacting the Liquidation Act “was to

give a liquidator broad general authority and responsibility to dispose of assets of an insolvent insurance company subject only to judicial review to assure that there is no fraud or abuse of discretion in the process.” That comment is equally applicable to the instant situation. This Court should give great weight to the reasonable determination of the Liquidator as to the late-filed claim issue.

V. Additional Benefit to Establishing an Absolute and Final Bar Date

As indicated above, R.C. 3903.02(D)(3) provides that one of the purposes of the Liquidation Act is to “minimize legal uncertainty and litigation.” In order to achieve that laudable goal, the Liquidator asks that this Court specifically order that one result of the establishment of the Final Bar Date and approval of the Liquidator’s related decision not to exercise her discretion to accept late-filed claims is that any late-filed claim after the Final Bar Date will not be recognized, accepted or considered in the liquidation proceeding. Thus, no denial of the claim under R.C. 3903.39 shall be required and the claimant attempting to present a late-filed claim will be notified that their claim is finally and absolutely barred.

This will reduce litigation and result in achieving the goals of the statute and the cases cited above—as early a distribution as possible in this case. The remedy for any party aggrieved by this process would be by challenge to this Court’s final order so holding. Consequently, the Liquidator further requests that this Court include a Civil Rule 54(B) certification that no just reason for delay exists in the order approving this Motion, so that this important issue may be immediately appealable and finally resolved.

VI. Notice to Claimants of the Decision Not to Accept Late-Filed Claims

The proposed form of Notice that the Liquidator asks the Court to approve is attached hereto as Exhibit A. The Liquidator believes that this Notice is calculated to provide the

necessary information to potential claimants that the Liquidator will not exercise her discretion to accept any late-filed claims after the Final Bar Date, that June 30, 2009 will be the absolute final bar date, and that any and all unperfected Unspecified Claims and any and all Future Claims are barred thereafter.

The Notice, once approved, would be mailed to the applicable Guaranty Funds and Insurance Departments and all known policyholders, creditors and claimants as reflected on LMI's records, as well as all those who filed a POC. Although it will be expensive to mail this notice, the Liquidator believes that such notice is proper. The Liquidator also asks the Court to approve, as an administrative matter, that if any of the Notices sent to the last known address, as provided to the Liquidator or in the companies records, are returned as "undeliverable," because the addressee has moved without forwarding address, the Liquidator shall have no further obligation to attempt to locate a correct address. This is also critical to a proper and efficient administration of this case, as otherwise limited staff resources would be utilized in trying to locate creditors who have failed to keep the Liquidator informed of their whereabouts.

VII. Conclusion

For the reasons stated above, the Liquidator asks that this Court issue an order in the form submitted herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Liquidator's Motion for Order Establishing June 30, 2009 as the Absolute and Final Bar Date for the Filing of Any Proofs of Claim in these Liquidation Proceedings and Related Orders was served upon and all interested parties, via Regular Mail, postage prepaid, on this 2nd day of December, 2008.



Carl A. Aveni II