IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

MARY TAYLOR, Ohio Superintendent of Insurance, in her capacity as Liquidator of Acceleration National Insurance Company,	:	
	:	**Case No. 00-CV-010534**
Plaintiff,	:	
	:	**Judge Julie M. Lynch**
v.	:	
	:	
Acceleration National Insurance Company,	:	
	:	
Defendant.	:	

MOTION VACATE THE SEPTEMBER 4, 2012 ORDER APPROVING LIQUIDATOR'S AMENDED FINAL REPORT OF CLAIMS, RESERVE AND PAYMENT OF ADMINISTRATIVE EXPENSES AND AUTHORIZING FINAL DISTRIBUTION OF THE ASSETS OF ACCELERATION NATIONAL INSURANCE COMPANY, ETC.

Plaintiff, Mary Taylor, Ohio Superintendent of Insurance, in her capacity as Liquidator (the "Liquidator") of Acceleration National Insurance Company ("ANIC"), requests this Court, pursuant to R.C. 3903.42, 3903.43 and 3903.44 and related sections, for an Order vacating the September 4, 2012 Order entered in this case granting the Liquidator's August 31, 2012 Motion and Application for Order Approving (1) Liquidator's Final Report of Class 1 and Class 2 Claims, Reserve and Payment of Administrative Expenses, Authorizing Final Distribution of the Assets of Acceleration National Insurance Company; (2) Filing of the Unredacted Reports of Claims Under Seal; and (3) Approving the Liquidator's Escheat and Payment of Certain Funds to the Ohio Department of Commerce Division of Unclaimed Funds. The reasons for this Motion are set forth in the attached Memorandum in Support.

Respectfully submitted,

MIKE DEWINE
Attorney General of Ohio

By Special Counsel:
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/s/ Scott R. Mergenthaler

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MEMORANDUM IN SUPPORT

I. Facts

On September 4, 2012, this Court issued an Order in this case granting the Liquidator's August 31, 2012 Motion and Application for Order Approving (1) Liquidator's Final Report of Class 1 and Class 2 Claims, Reserve and Payment of Administrative Expenses, Authorizing Final Distribution of the Assets of Acceleration National Insurance Company; (2) Filing of the Unredacted Reports of Claims Under Seal; and (3) Approving the Liquidator's Escheat and Payment of Certain Funds to the Ohio Department of Commerce Division of Unclaimed Funds (hereafter, the "Final Distribution Motion"). The Order granting the Final Distribution Motion primarily approved the Liquidator's Final Reports of Claims, including the calculation and payment of the final pro-rata distribution percentage and amounts to all allowed Class 2 (policyholder level) claimants. On October 1, 2012, the Liquidator mailed the final distribution checks to allowed Class 2 claimants in this estate in the amounts set forth in the reports of claims filed with the Final Distribution Motion.

On October 3, 2012, the Liquidator discovered that the Final Report of Class 2 Claims filed with the Final Distribution Motion and approved by the September 4, 2012 Order contained an error in the final distribution pro-rata percentage and amounts to be paid to allowed Class 2 claimants. The error arose from the inadvertent oversight and omission from the final distribution of a payment of $97,629.42 owing to one non-IGA Class 2 claimant under a previously allowed and reported proof of claim. On December 5, 2011, this Court entered an order approving payment of this sum to a specific claimant as a second interim distribution. The sum was not paid at that time because the claimant could not be located at that time. Payment of this sum must therefore occur at the time of the final distribution, either to the claimant if he is located before

the final distribution is made (which in this case, he was) or to the Ohio Department of Commerce Division of Unclaimed Funds. In either case, the money is owed per the Court's December 5, 2011 Order and, therefore, payment should have been included in the calculations in the Final Distribution Motion.

If this sum had been properly included in the Final Distribution Motion, then the reported Class 2 liabilities of the estate would have been $97,629.42 higher. This increase in actual liabilities would have resulted in a corresponding decrease in the actual pro-rata percentage distribution to all Class 2 claimants in compliance with R.C. 3903.42 and, thus, a decrease in the amount of each final distribution payment. The correct overall distribution percentage to allowed class to claimants is 84.281%, instead of the 84.7341% authorized in the Order granting the Final Distribution Motion. The decrease in the statutorily authorized payment to each allowed Class to claimant is 0.5161 percent.

Upon discovering the mistake in the Final Reports of Class 2 Claims approved by the Order granting the Final Distribution Motion, the Liquidator immediately issued stop payment orders on all of the October 1, 2012 distribution checks. The Liquidator's staff also contacted all affected claimants by email and/or by telephone. The Liquidator explained the mistake and her need to file motions in this case seeking to vacate the September 4, 2012 Order granting the Final Distribution Motion so that the Liquidator can file corrected Reports of Claims under R.C. 3903.43 reflecting the corrected final distribution percentage and final distribution amounts necessary to comply with the claims priority statute, R.C. 3903.42.

II. Law and Analysis

A. This Court Should Vacate the Order Granting the Final Distribution Motion

The liquidation of an insurance company is a statutory proceeding under Ohio Revised Code ("R.C.") Chapter 3903. Thus, the Liquidator and the Court are bound by the dictates of the statutes and the statutory scheme must be followed.

R.C. 3903.42 is the claims priority statute. It requires that the distribution of the general assets of a liquidated insurer's estate in payment of a claim be made according the priority of the claim as defined in the statute. The statute forbids the establishment of "sub classes" within any class – meaning the payment of claims in the same class at different pro-rata percentages. The statute specifically provides, in relevant part:

> **The priority of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is set forth in this section. Every 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. No subclasses shall be established within any class. The order of distribution of claims shall be:
>
> (A) Class 1. The costs and expenses of administration, including but not limited to the following:
>
> * * *
>
> (B) Class 2. All claims under policies for losses incurred, including third party claims, . . . and all claims of a guaranty association or foreign guaranty association. . . .

The September 4, 2012 Order granting the Final Distribution Motion does not comply with R.C. 3903.42 because it approves Reports of Claims that inadvertently omit a partial payment in the amount of $97,629.42 of one previously allowed Class 2 claim. Omission of the payment of this allowed claim means that "every claim" in Class 2 is not paid in the same pro-rata percentage.

Failure to follow mandatory provisions of a statute may render a judgment void. *See Dohm v. Dohm*, 2011-Ohio-1166 (11th Dist., March 14, 2011) (affirming trial court decision dismissing petition for dissolution because, if the court proceeded to judgment, the judgment may be void because the husband was incarcerated and could not attend the dissolution hearing in person as mandated by R.C. 3016.64(A)); *Sky Bank et al. v. Colley, et al.*, 2012 Ohio 4374 ¶7 (10th Dist., Sept. 25, 2012) ("the authority to vacate a void judgment "is not derived from Civ. R. 60(B), but rather constitutes an inherent power possessed by the court." (*quoting Maple Del Manor v. Peterson*, 11th Dist. No. 93-0-0039, 1994 Ohio App. LEXIS 496 (Feb. 11, 1994) (*citing Patton v. Diemer*, 35 Ohio St. 3d 68 (1998))). The Order granting the Final Distribution may be void because the final distribution approved therein does not comply with the mandatory provisions of R.C. 3903.42 insofar as it omits payment of $97,629.42 owing to one claimant with an allowed Class 2 claim. This court should therefore exercise its inherent authority to vacate that Order so that the Liquidator can file an amended Final Distribution Motion and amended Final Reports of Class 2 Claims that comply with R.C. 3903.42 and R.C. 3903.43.

B. <u>The Order Granting the Final Distribution Motion Is Voidable Under Civ. R. 60</u>

Rule 60(A) governs clerical mistakes and states the following:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

"The basic distinction between clerical mistakes that can be corrected under and substantive mistakes that cannot be corrected is that the former consists of 'blunders in execution' whereas the latter consists of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or, because, on

second thought, it has decided to exercise its discretion in a different manner." *Binder v. Binder*, 2007-Ohio-4038 ¶7 (*quoting* Keuhn v. Keuhn, 55 Ohio App.3d 245(1988). The proper use of is to make changes in judgments to reflect what, in fact, was really decided by the trial court. *Id.* at ¶8.

Here, it is clear from the record in this case that the Liquidator and the Court intended to pay all allowed Class 2 claimants the amounts authorized in December 5, 2011 Order and also to make a later final distribution that pays all allowed Class 2 claimants the same final pro-rata distribution percentage as required by R.C. 3903.42. It is also clear that, through a "blunder of execution," the September 4, 2012 Order Granting the Final Distribution Motion inadvertently approved reports that omit the previously approved $97,629.42 payment owing to a specific claimant. Therefore, the clerical error is subject to correction pursuant to Civ. R. 60(A).

Respectfully submitted,

MIKE DEWINE
Attorney General of Ohio

By Special Counsel:
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *MOTION TO VACATE THE SEPTEMBER 4, 2012 ORDER APPROVING LIQUIDATOR'S AMENDED FINAL REPORT OF CLAIMS, RESERVE AND PAYMENT OF ADMINISTRATIVE EXPENSES AND AUTHORIZING FINAL DISTRIBUTION OF THE ASSETS OF ACCELERATION NATIONAL INSURANCE COMPANY, ETC.* was posted on the Liquidator's website (– Open Liquidations – Acceleration National Ins. Co. – Documents Tab) substantially contemporaneous with the filing of this Motion and served upon the following via Regular U.S. Mail, postage prepaid, on this 5th day of October 2012:

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