

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

COMMISSIONER OF THE)
DEPARTMENT OF FINANCIAL)
REGULATION)
PLAINTIFF,)

v.)

EMERGENCY PHYSICIANS INSURANCE)
EXCHANGE RISK RETENTION GROUP)
RESPONDENT.)
_____)

CIVIL DIVISION

DOCKET NO. 21-cv-348 Wncv

LIQUIDATOR'S MOTION FOR INTERIM DISTRIBUTION ON
ALLOWED PRIORITY CLASS 3 CLAIMS

Kevin J. Gaffney, Commissioner of the Vermont Department of Financial Regulation (“Commissioner”), in his capacity as Liquidator (“Liquidator”) of Emergency Physicians Insurance Exchange Risk Retention Group (“EPIX” or the “Company”), hereby submits this Motion for an Order Authorizing Interim Distributions on Allowed Priority Class 3 Claims (“Motion”) authorizing the Liquidator to make an interim distribution on allowed priority class 3 claims and setting 55% as the rate for the interim distribution.

1. On February 26, 2021, EPIX was placed in rehabilitation by the Court’s Order for Rehabilitation. Pursuant to the Plan of Rehabilitation, the Court authorized a 40% distribution for defense and indemnity claims during rehabilitation. On February 1, 2024, the Commissioner filed a Petition for Order of Liquidation (“Liquidation Petition”) that anticipated requesting authority to make a distribution at the same time as the first report of claims. See Liquidation Petition ¶ 25. The Liquidation Petition noted EPIX’s insolvency and proposed a Plan of Liquidation. The Court approved the Plan of Liquidation pursuant to the Order of Liquidation

entered on February 6, 2024. Affidavit of J. David Leslie, Special Deputy Liquidator, in Support of Motion For Interim Distribution on Allowed Priority Class 3 Claims (“Leslie Interim Distribution Aff., ¶ __”), ¶ 1.

2. The Plan of Liquidation states that “[i]n connection with the first report of claim determinations, the Liquidator will request authority to make an interim distribution on allowed priority class 3 claims. If approved, that distribution will be at the rate approved by the Court and will be paid after setoff for any previous distributions made in rehabilitation.” See id., at ¶ 2.d.

3. The Liquidator’s First Status Report, Annual Accounting, and First Report of Claims (“First Status Report”), filed herewith, advises that 11 claims have become finally determined, that all of these are recommended for allowance in priority class 3, and with a recommended collective valuation of \$5,226,058. By his Motion for Order Approving the First Report of Claims, the Liquidator requests that the Court allow those claims in the recommended priority class and amounts. The First Status Report also shows that the EPIX estate has significant liquid assets which the Liquidator believes are sufficient to permit a material interim distribution pursuant to 8 V.S.A. § 7083. The Liquidator therefore requests authorization to make an interim distribution on allowed priority class 3 claims at a 55% distribution percentage subject to setoff for any previous distributions made in rehabilitation. Leslie Interim Distribution Aff., ¶ 3.

Interim Distribution Analysis

4. EPIX’s insolvency has imposed a significant economic burden on the Company’s policyholders due to the fact that, when EPIX was placed in rehabilitation in 2021, management and defense of claims by EPIX ceased and each policyholder became responsible for claims management and paying all defense costs. See Plan of Liquidation, ¶ 1. Pursuant to the Court’s

orders, in rehabilitation EPIX was able to make partial distributions (at a 40% rate) of defense and indemnity. See id. The transition to liquidation increases this burden for policyholders with open claims because payment in the ordinary course is no longer possible. See id. That effect can be offset in significant part, however, by promptly initiating an interim distribution in liquidation and by increasing the distribution percentage. See id., ¶ 2.d; Leslie Interim Distribution Aff., ¶ 4.

5. The insurance laws provide that, “[u]nder the direction of the court, the liquidator shall pay distributions in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims.” 8 V.S.A. § 7083; see 8 V.S.A. § 7081 (with regard to priorities, “[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.”). The analytical steps in considering the possibility of an interim distribution on allowed priority class 3 claims are therefore to ascertain the assets of the insolvent insurer, reserve funds for the payment of claims falling in higher priority classes and establish a distribution percentage that reasonably balances the interest of creditors with allowed claims and the interests of creditors with unliquidated/undetermined claims. In conducting this analysis, the Liquidator must adopt conservative estimates so as to avoid the risk of creating a subclass by distributing more now to creditors with currently allowed claims than can be distributed in future to creditors whose claims have not yet been determined. See 8 V.S.A. § 7081 (“No subclass shall be created within any class.”); Leslie Interim Distribution Aff., ¶ 5.

6. Practically, the distribution statute requires that estate liabilities be projected for each priority class. Recognition of priorities for higher classes can then be assured by making distribution on the allowed claims and establishing reserves sufficient to ensure that all

remaining claims expected to fall in that priority class can be paid in full. See 8 V.S.A. § 7081. If estimated liabilities in a priority class exceed the assets expected to be available, an interim distribution may be made on allowed claims so long as it is at a level (i.e. a distribution percentage) that is conservative and ensures there will be sufficient funds available to make similar payment on undetermined/unliquidated claims when they are eventually resolved. See 8 V.S.A. § 7083. Leslie Interim Distribution Aff., ¶ 6.

7. *Estate Assets.* The Liquidator has reported the current financial condition of EPIX in his First Status Report, including \$12.9 million of assets. See First Status Report, ¶ 16. For purposes of calculating an interim distribution, however, the Liquidator cannot assume the collection of funds not yet received (e.g. reinsurance recoveries) or credit for amounts that cannot necessarily be recovered in offset (e.g. distributions made in rehabilitation on claims not submitted in liquidation.) See *id.* In evaluating the possibility of an interim distribution, therefore, the Liquidator considers only assets actually collected and credits that can be taken for rehabilitation distributions on determined claims. On this conservative basis, the EPIX estate has \$9.4 million in assets available for consideration consisting of \$6.5 million in cash and invested assets and \$2.9 million in recoverable credits. Leslie Interim Distribution Aff., ¶ 7.

8. *Claims in Higher Priority Classes.* By statute, the “costs and expenses of administration” fall in priority class 1. See 8 V.S.A. § 7081(1). The Liquidator estimates that the \$1.9 million reserve established by the Rehabilitator should be sufficient for administrative expenses in this proceeding as well and has therefore rolled the original reserve forward.¹ This reserve has been drawn down as expenses are incurred and stands at \$1.04 million as of August 31, 2024. Risk retention groups such as EPIX are prohibited by federal statute from participating

¹ Because of the statutory mandate to “assure the proper recognition of priorities”, this \$1.9 million reserve is intended to be conservative. See 8 V.S.A. § 7083. Any funds not needed for the payment of administrative expense will be released at the close of the proceeding and become available to pay claims falling in priority class 3.

in the guaranty fund system so priority class 2 – the administrative expenses of guaranty associations – will be empty in this proceeding. See 8 V.S.A. § 7081(2); see also 15 U.S.C.A. § 3902(a) (risk retention groups excluded from guaranty fund system) and 8 V.S.A. § 6054(a) (conforming to federal law). Leslie Interim Distribution Aff., ¶ 8.

9. *Claims Falling in Priority Class 3.* The liquidation statutes require that, where there are insufficient funds to ensure that all claims within a priority class are paid in full, the Liquidator balance the interests of creditors with allowed claims (who benefit from accelerated distribution) and the interest of creditors with unliquidated/undetermined claims (who benefit from the reservation of assets to satisfy their claims). See 8 V.S.A. § 7083; see also 8 V.S.A. § 7081 (prohibiting the establishment of subclasses). This can be done by establishing a conservative interim distribution percentage that ensures the estate will retain sufficient assets to make equal distribution to all creditors with priority class 3 claims as their claims are determined and allowed. It is therefore necessary to estimate the likely total value of claims falling in priority class 3 which fall into two categories:

a. Allowed Claims. The Liquidator is charged with reviewing all claims filed in the liquidation, making such investigation as he deems necessary, and issuing a determination as to whether the claim should be denied or approved. For approved claims, the determination will also identify an amount and priority classification. “Within 60 days from the mailing of the notice [of determination], the claimant may file objections with the liquidator” and “[i]f no such filing is made the claimant may not further object to the determination.” 8 V.S.A. § 7078(a). After the 60-day period has run (or been waived) the claim is deemed to be “finally determined” and the Liquidator will report it to the Court with his recommendations. See 8 V.S.A. § 7082(a). The Court may then approve, disapprove, or modify the Liquidator’s report. 8 V.S.A. § 7082(b). If the

Court approves the Liquidator's First Report of Claims (filed as Exhibit B to the First Status Report), there will be \$5,226,058 in allowed priority class 3 claims. See First Status Report, ¶ 21.

b. Other Claims. The Liquidator has provisionally identified 39 claims as likely to fall within priority class 3 although they have not yet been finally determined. Of these claims, there are 6 claims for which the Liquidator has issued a notice of determination but for which the determination has not yet become final (\$2.4 million). The remaining claims may be divided into two categories: i) claims that have been filed and which the Liquidator is still investigating; and, ii) claims of which the Liquidator is aware (e.g. claims on which payments were made in rehabilitation) but for which the creditor has not yet submitted a claim in the liquidation proceeding. The ultimate value of the claims in these categories is subject to significant uncertainty. Accordingly, for purposes of interim distribution analysis, the Liquidator considers a "pessimistic scenario" which reflects the upper end of the reasonably expected value range for these EPIX obligations. The "pessimistic scenario" values for the undetermined policy-related claims total \$7.8 million.

For purposes of establishing a distribution percentage, the Liquidator values all priority class 3 exposure at \$15.4 million consisting of \$5.2 million in reported/allowed claims, \$2.4 million of determined but not yet reported claims, and \$7.8 million of undetermined claims valued on a "pessimistic scenario" basis. Leslie Interim Distribution Aff., ¶ 9.

10. *Distribution Calculation.* The Liquidator believes that the \$1.04 million balance of the administrative expense reserve (described in ¶ 8) is adequate to ensure that all claims in priority class 1 can be paid in full. See 8 V.S.A. § 7081. Setting those funds aside from the \$9.4 million of estate assets described above (see ¶ 7) leaves approximately \$8.4 million available for

distribution on priority class 3 claims estimated at approximately \$15.4 million on a “pessimistic scenario” basis. In light of these figures, the Liquidator believes that a 55% interim distribution on allowed priority class 3 claims will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims. See 8 V.S.A. § 7083. The Liquidator therefore requests that the Court authorize a distribution on allowed priority class 3 claims and set the interim distribution rate at 55%. Leslie Interim Distribution Aff., ¶ 10.

WHEREFORE, the Liquidator requests that the Court enter an order:

- (a) Granting this Motion for an Order Authorizing Interim Distributions on Allowed Priority Class 3 Claims;
- (b) Authorizing the Liquidator to make an interim distribution on all allowed priority class 3 claims;
- (c) Establishing a 55% interim distribution rate on allowed priority class 3 claims; and,
- (d) Granting such other and further relief as justice may require.

Dated in Montpelier, Vermont, this 14th day of October, 2024.

KEVIN J. GAFFNEY, COMMISSIONER
DEPARTMENT OF FINANCIAL REGULATION
AS LIQUIDATOR OF ELITE
TRANSPORTATION RISK RETENTION
GROUP, INC.

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A proposed form of order accompanies this Motion