

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, MARCH 25, 2019

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COMMONWEALTH OF VIRGINIA, *ex.rel.*

STATE CORPORATION COMMISSION

CASE NO. INS-2019-00036

v.

HOW INSURANCE COMPANY, A
RISK RETENTION GROUP,
HOME WARRANTY CORPORATION,
and HOME OWNERS WARRANTY
CORPORATION,

Defendants

SCHEDULING AND PROCEDURAL ORDER

On March 1, 2019, Scott A. White, Commissioner for the State Corporation Commission's ("Commission") Bureau of Insurance, in his capacity as Deputy Receiver of HOW Insurance Company, a Risk Retention Group ("HOWIC"), Home Warranty Corporation ("HWC") and Home Owners Warranty Corporation ("HOW") (collectively, the "HOW Companies"), in receivership for liquidation, submitted in this docket an Application for Final Order in Aid of Continuing Liquidation ("Application") requesting an order from the Commission that would approve notice procedures, establish response procedures, and set a contingent hearing ("Contingent Hearing") on the Application, to be held only in the event that written opposition to the Application is timely filed.¹

¹ Doc. Con. Cen. No. 190310037. Certain documents related to the HOW Companies' receivership may be found at: <http://www.howcorp.com>. Orders, pleadings, and other documents filed with the Commission may be found by entering the case number at the following page on the Commission's web site, <http://www.scc.virginia.gov/docketsearch>, and then clicking on the "Search Documents" tab.

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On November 30, 2004, the Deputy Receiver filed an Application for Orders Setting Hearing on Plans of Liquidation of HOW Insurance Company, a Risk Retention Group, Home Owners Warranty Corporation, and Home Warranty Corporation, Establishing Response Date, Approving Plans of Liquidation, Approving Claims Bar Date, and Related Matters ("Liquidation Application").² On June 13, 2005, the Commission entered its Order Approving Plans of Liquidation³ ("Liquidation Order") which, *inter alia*, determined that further efforts to rehabilitate the HOW Companies would be useless, and the HOW Companies should be liquidated pursuant to the plans of liquidation proposed by the Deputy Receiver, as modified by the Liquidation Order to allocate 25% of the residual assets on a per capita basis, or fixed component, and 75% of the residual assets based on the profitability contributions, or variable component.⁴

By this Application currently before the Commission in Case No. PUR-2019-00036, the Deputy Receiver seeks a final order: (i) ratifying the actions and conduct heretofore in this receivership of the Deputy Receiver, his predecessors, the Special Deputy Receiver, and their deputies, counsel, and consultants in furtherance of the ongoing liquidation of the HOW Companies pursuant to the Liquidation Order; (ii) approving the current Application's Exhibit I-

² *Commonwealth of Virginia ex rel. State Corporation Commission v. HOW Insurance Company, a Risk Retention Group, Home Warranty Corporation, and Home Owners Warranty Corporation*, Case No. INS-1994-00218, Doc. No. 349743, Application for Orders Setting Hearing on Plans of Liquidation for HOW Insurance Company, a Risk Retention Group, Home Owners Warranty Corporation, and Home Warranty Corporation, Establishing Response Date, Approving Plans of Liquidation, Approving Bar Date, and Related Matters (Nov. 30, 2004).

³ The "Plans of Liquidation" consist of the HOWIC Plan of Liquidation and the HOW/HWC Plan of Liquidation.

⁴ *Commonwealth of Virginia ex rel. State Corporation Commission v. HOW Insurance Company, a Risk Retention Group, Home Warranty Corporation, and Home Owners Warranty Corporation*, Case No. INS-1994-00218, 2005 S.C.C. Ann. Rept. 58, Order Approving Plans of Liquidation (June 13, 2005).

4F as the final and exclusive list of "Builder Distributees"⁵ to whom to distribute the residual assets of the HOW Companies ("Residual Assets"), as well as any remainder of the reserve established pursuant to paragraph 9 of the HOW/HWC Plan of Liquidation ("Reserve for Final Expenses and Contingencies"), according to the percentages shown on Exhibit I-4F of the pending Application; (iii) authorizing the Deputy Receiver to complete the escheatment of unclaimed distributions of Residual Assets and of any remainder of the Reserve for Final Expenses and Contingencies, or to do so through the use of a trustee ("Trustee") of a liquidating trust ("Liquidating Trust" or "Trust") established pursuant to paragraph 13 of the HOW/HWC Plan of Liquidation,⁶ or through the use of an escrow arrangement ("Escrow"), or by any combination of the foregoing as the Deputy Receiver deems necessary or appropriate, in the manner proposed in the Application (including providing that if the Deputy Receiver were to estimate that the costs of distributing any remainder of the Reserve for Final Expenses and Contingencies pro rata to Builder Distributees would exceed the amount of those remaining assets, those remaining funds shall instead be paid to the Treasurer of the Commonwealth of Virginia; and (iv) directing the Deputy Receiver, notwithstanding the reference to termination of a Trust in paragraph (14) of the Liquidation Order, to file a request in Case No. INS-1994-00218 for the Commission's approval to terminate and close the receivership proceedings when, for reasons such request would explain, the Deputy Receiver believes that the purposes of the

⁵ The term "Builder Distributees" is used herein as defined in paragraph (8) of the Liquidation Order (*i.e.*, builders who were HOWIC insureds as of October 14, 1994, the date of the Receivership Order entered by the Circuit Court of the City of Richmond in *Commonwealth of Virginia ex rel. State Corporation Commission v. Home Warranty Corporation, Home Owners Warranty Corporation, and HOW Insurance Company, a Risk Retention Group*, Case No. CH94E01059-00.

⁶ The Application states that any Trust would be subject to the supervision of the Deputy Receiver and the Commission, and the Deputy Receiver would have the power to remove the Trustee and to appoint a successor Trustee.

liquidation proceeding have been accomplished (whether or not the use of a Trust proves necessary).

In support of his Application, the Deputy Receiver describes developments since entry of the Liquidation Order. Specifically, on June 12, 2008, pursuant to paragraph (3) of the Liquidation Order, the Deputy Receiver: (a) filed the Report of Deputy Receiver, advising the Commission of the receipt of an actuarial projection that HOWIC had sufficient assets to satisfy its liabilities and to declare a dividend to HWC sufficient to satisfy its liabilities, including the refund of all vested capital contributions;⁷ and (b) issued the Seventh Directive of Deputy Receiver (Implementing the HOWIC Plan of Liquidation), which among other things established the period for filing proofs of claim against the HOW Companies (from July 12, 2008, to the claims Bar Date of January 12, 2009).⁸ Mail and publication notice of the claims filing period and Bar Date were provided to all interested persons prior to the commencement of the claims filing period.

On January 11, 2011, by Order of this Commission, Jacqueline K. Cunningham succeeded Alfred W. Gross as Commissioner of Insurance and Deputy Receiver of the HOW Companies.⁹

⁷ *Commonwealth of Virginia ex rel. State Corporation Commission v. HOW Insurance Company, a Risk Retention Group, Home Warranty Corporation, and Home Owners Warranty Corporation*, Case No. INS-1994-00218, Doc. No. 398411, Report of Deputy Receiver (June 12, 2008).

⁸ Available at <http://www.howcorp.com/documents/default.html>.

⁹ *Commonwealth of Virginia ex rel. State Corporation Commission v. HOW Insurance Company, a Risk Retention Group, Home Warranty Corporation, and Home Owners Warranty Corporation*, Case No. INS-1994-00218, 2011 S.C.C. Ann. Rept. 70, Amendment to Second Order in Aid of Receivership (Jan. 11, 2011).

On March 11, 2013, at the Deputy Receiver's request, the United States released and discharged the Deputy Receiver, prior Deputy Receivers, the Special Deputy Receiver, and the HOW Companies' estate from any and all liability under 31 U.S.C. § 3713(b) in connection with the HOW Companies receivership, except only for possible federal tax, fraud, or criminal liabilities, or reimbursement liabilities and penalties arising under 42 U.S.C. § 1395y(b).

On May 14, 2014, the last petition pending against the HOW Companies in the Commission was resolved, and that judgment became final and no longer appealable on June 13, 2014, such that as of that date all claims, litigation, and appeals against the receivership had been resolved. HOWIC was dissolved and its liquidation completed in 2014. This Commission issued HOWIC's certificate of termination effective February 11, 2015.

On March 2, 2015, pursuant to paragraph (5) of the Liquidation Order, the Deputy Receiver issued the Deputy Receiver's Eighth Directive (Implementing HOW/HWC Plan of Liquidation).¹⁰ As of March 5, 2015, HOW also had been dissolved, the Deputy Receiver had caused HOWIC and HOW to distribute all their remaining assets to HWC, and the Deputy Receiver had caused HWC to assume all the remaining liabilities of HOWIC and HOW. On July 23, 2015, the Deputy Receiver issued the Deputy Receiver's Ninth Directive (regarding the calculation of interest on claims for the refund of vested capital call contributions).¹¹ As of September 11, 2015, the Deputy Receiver had completed paying all approved claims filed before the Bar Date, plus interest.

In the Deputy Receiver's discretion pursuant to the Residual Assets Allocation Memorandum, as modified and approved by the Liquidation Order, the Deputy Receiver

¹⁰ Available at <http://www.howcorp.com/documents/default.html>.

¹¹ Available at <http://www.howcorp.com/documents/default.html>.

determined that: (a) the Main Distribution of Residual Assets would be the ultimate distribution and that there would be no interim distributions; and (b) the Main Distribution would be calculated as of the Claims Resolution Date (*i.e.*, December 31 of the calendar year immediately following the year in which the last outstanding HOWIC insurance/warranty claim would be finally settled or adjudicated). This would allow for more certainty in the calculation of the allocation of Residual Assets among the Builder Distributees. Because the final HOWIC claim was resolved in 2014, the Main Distribution was calculated as of December 31, 2015, the Claims Resolution Date.

As of February 10, 2016, the Deputy Receiver had completed paying all approved claims for refund of vested capital contributions to Eligible Builders, plus interest. On July 26, 2016, in Case No. INS-2016-00196, the Deputy Receiver filed an Application for Final Order Approving and Ratifying Record Retention Schedule,¹² which the Commission granted by final order entered in that case on December 28, 2016.¹³ Documents continue to be destroyed when permitted under the Record Retention Schedule.

On January 5, 2018, by Order of this Commission, Scott A. White succeeded Jacqueline K. Cunningham as Commissioner of Insurance and Deputy Receiver of the HOW Companies.¹⁴

¹² *Application of the Deputy Receiver of HOW Insurance Company, a Risk Retention Group, Home Warranty Corporation, and Home Owners Warranty Corporation for Final Order Approving and Ratifying Record Retention Schedule*, Case No. INS-2016-00196, Doc. Con. Cen. No. 160740217, Application for Final Order Approving and Ratifying Record Retention Schedule (July 26, 2016) (attaching proposed Record Retention Schedule).

¹³ *Application of the Deputy Receiver of HOW Insurance Company, a Risk Retention Group, Home Warranty Corporation, and Home Owners Warranty Corporation for Final Order Approving and Ratifying Record Retention Schedule*, Case No. INS-2016-00196, 2016 S.C.C. Ann. Rept. 127, Final Order Approving and Ratifying Record Retention Schedule (Dec. 28, 2016).

¹⁴ *Commonwealth of Virginia ex rel. State Corporation Commission v. HOW Insurance Company, a Risk Retention Group, Home Warranty Corporation and Home Owners Warranty Corporation*, Case No. INS-1994-00218, Doc. Con. Cen. No. 180110062, Order Appointing Scott A. White as Deputy Receiver for Rehabilitation or Liquidation (Jan. 5, 2018).

On March 21, 2018, the Deputy Receiver authorized the dissolution of HWC.

On March 29, 2018, the Deputy Receiver filed HWC's certificate of dissolution with the Delaware Secretary of State Division of Corporations.

As approved by the Liquidation Order, the Deputy Receiver established the \$10 million Reserve for Final Expenses and Contingencies pursuant to paragraph 9 of the HOW/HWC Plans of Liquidation.

The Application requests that the Commission ratify the actions and conduct heretofore in this receivership of the Deputy Receiver, his predecessors, the Special Deputy Receiver, and their deputies, counsel, and consultants in furtherance of the ongoing liquidation of the HOW Companies pursuant to the Commission's June 13, 2005 Liquidation Order.

The pending Application states that in 2005, the Deputy Receiver provided, for purposes of the hearing on the Liquidation Application, a provisional listing of 6,026 Builder Distributees by builder number (which was referred to as Exhibit I-4). As clarified by witness testimony at the hearing, the list of Builder Distributees was at that time a changing population, and the primary purpose of Exhibit I-4 was to illustrate the then-proposed methodology for allocating Residual Assets among the Builder Distributees.

The pending Application states that Exhibit I-4F attached thereto is the final list of Builder Distributees by the names and builder numbers as were found in the HOW Companies' records, as well as each Builder Distributee's percentage allocation calculated as of the Claims Resolution Date of December 31, 2015, pursuant to the methodology approved with modification by the Liquidation Order.

The pending Application states that if approved by final order of the Commission as requested, Exhibit I-4F attached thereto would be the final and exclusive list of Builder

Distributees, to whom (or to whose legal successors) would be distributed the Residual Assets, as well as any remainder of the Reserve for Final Expenses and Contingencies, pursuant to the percentages shown on Exhibit I-4F.¹⁵

The only revisions to the names or percentages on Exhibit I-4F permitted after the Commission's final order is no longer appealable would be made by the Deputy Receiver based on the receipt, review, and approval, prior to distribution or escheatment of a Builder Distributee's distribution of Residual Assets (or of any remainder of the Reserve for Final Expenses and Contingencies), of acceptable proof that one or more persons is, or are, the Builder Distributee's legal successor(s).

The Application states that it is too soon to know what will be the exact combined dollar amount of: (a) Residual Assets to be distributed; and (b) any remainder of the Reserve for Final Expenses and Contingencies to be distributed at a future date pursuant to the same allocation percentages. However, barring possible contingencies (*e.g.*, assessment by the Internal Revenue Service of additional federal income taxes on open tax years), the total could be approximately \$90 to \$100 million.

The Application explains how the liquidation is affected by certain provisions of federal tax law and state unclaimed property laws and provides an indication of how many years it will likely take, absent any intervening change in applicable law, to complete the escheatment of unclaimed distributions of Residual Assets, to distribute any remainder of the Reserve for Final Expenses and Contingencies, and to escheat any unclaimed distributions thereof. The Application notes that although the unclaimed property laws of a number of states make no

¹⁵ The Application states that when the final order requested thereby is no longer appealable, the Deputy Receiver will begin sending letters requesting I.R.S. Form W-9s from Builder Distributees to whom such letters have not already been sent.

express provision for early escheatment, many states have an informal practice of permitting it in certain circumstances (*e.g.*, liquidation of the holder of unclaimed property). The Application states that in an effort to expedite closure of this receivership and the distribution of any remainder of the Reserve for Final Expenses and Contingencies, the Deputy Receiver intends to request permission for early escheatment from the unclaimed property fund administrator of every state in which early escheatment of an unclaimed distribution would not be statutorily permitted without the need to make any such request.

The Deputy Receiver seeks authority for the Deputy Receiver or the Trustee (if any), if deemed necessary or appropriate, to transfer unclaimed distributions of Residual Assets or of any remainder of the Reserve for Final Expenses and Contingencies to Escrow paid in advance to distribute them if properly and timely claimed (or otherwise to escheat them when permitted under applicable unclaimed property laws).

The Application notes that paragraph (14) of the Liquidation Order provides that, upon completion of the liquidation and termination of the Trust, the Deputy Receiver shall file a request in Case No. INS-1994-00218 for the Commission's approval to terminate and close the receivership proceeding. The Application further notes that if, as requested by the Application, the Commission were to give the Deputy Receiver the options of dispensing with the use of a Trust, or using Escrow (in conjunction with, or in lieu of, a Trust), there might never be a Trust to terminate. Therefore, the Application requests that the final order requested by this Application provide that, notwithstanding the reference to termination of a Trust in paragraph (14) of the Liquidation Order, the Deputy Receiver shall file a request in Case No. INS-1994-00218 for the Commission's approval to terminate and close the receivership proceedings when, for reasons such request would explain, the Deputy Receiver believes that the

purposes of the liquidation proceeding have been accomplished (whether or not the use of a Trust proves necessary).

NOW THE COMMISSION, upon consideration of this matter, is of the opinion that a Contingent Hearing on the Application should be set.

Accordingly, IT IS ORDERED THAT:

(1) This matter is docketed and assigned Case No. INS-2019-00036.

(2) In accordance with § 12.1-31 of the Code and 5 VAC 5-20-120 of the Commission's Rules of Practice and Procedure, 5 VAC 5-20-10 *et seq.*, a Hearing Examiner hereby is appointed, on behalf of the Commission, to conduct any Contingent Hearing that may be held in this matter.

(3) A Contingent Hearing solely to consider the relief requested in the Application is hereby set for August 15, 2019, at 10 a.m. in the courtroom of the State Corporation Commission, Tyler Building, 2nd Floor, 1300 East Main Street, Richmond, Virginia 23219.

(4) All persons opposing the relief requested by the Application shall file with the Commission, and simultaneously shall serve upon the Deputy Receiver and all other parties of record, a Notice of Opposition no later than June 12, 2019. Each Notice of Opposition shall contain: (i) a precise statement of the interest of the person; (ii) a statement of the specific relief sought to the extent then known; and (iii) the factual and legal basis for the opposition.

(5) Each person filing a Notice of Opposition shall be required to present the objections at the Contingent Hearing, or the Notice of Opposition will be deemed withdrawn.

(6) All persons who timely file a Notice of Opposition and who wish to appear at the Contingent Hearing in opposition to the Application shall file with the Commission and simultaneously shall serve upon the Deputy Receiver, no later than July 12, 2019, the prepared

testimony and exhibits of each witness expecting to present direct testimony in opposition to the Application on that person's behalf, or the Notice of Opposition will be deemed withdrawn.

(7) All Notices of Opposition, and all other pleadings or related documents, shall be filed with the Commission either electronically, in the manner prescribed by the SCC Guidelines for Electronic Document Filing at <http://www.scc.virginia.gov/clk/efiling/Guidlines.aspx>, or by delivering an original and fifteen (15) copies to Joel H. Peck, Clerk of the Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218.

(8) Service of all Notices of Opposition and other documents upon the Deputy Receiver shall be directed to Donald C. Beatty, Deputy Commissioner, State Corporation Commission, 1300 E. Main Street, Richmond, Virginia 23219, and to the Deputy Receiver's counsel, Patrick H. Cantilo, Cantilo & Bennett, L.L.P., 11401 Century Oaks Terrace, Suite 300, Austin, Texas 78758. Service also must be provided to counsel for the Deputy Receiver on the day of filing by electronic mail to service@cb-firm.com.

(9) In the event that no party timely files a Notice of Opposition, or if no party who timely files a Notice of Opposition thereafter timely files the prepared testimony and exhibits of each witness expecting to present direct testimony on that party's behalf in opposition to the Application, the Contingent Hearing shall not be held, and the Commission may decide the matter without holding a hearing.

(10) These proceedings shall be subject to the Commission's Rules of Practice and Procedure, 5 VAC 5-20-10, *et seq.*, to the extent not modified by order of the Commission.

(11) On or before May 13, 2019, Counsel for the Deputy Receiver shall provide written notice by first class mail, in a form reasonably calculated to provide sufficient notice of the hearing, to the last known address on the books and records of the HOW Companies, if not

known to be inaccurate, to all builders who were enrolled as HOW Builders at some point in the HOW Program, whether they meet the definition of Builder Distributees (such that they are therefore listed on the pending Application's Exhibit I-4F as entitled to the indicated allocation of Residual Assets, and of any remainder of the Reserve for Final Expenses or Contingencies), or do not meet the definition of Builder Distributees (such that they are not listed on Exhibit I-4F and are not entitled to any allocation of Residual Assets or of any remainder of the Reserve for Final Expenses and Contingencies). The mailed notice shall provide brief descriptions of the pending Application, its Exhibit I-4F and this Scheduling Order, as well as instructions for accessing them on the receivership web site or requesting copies, and shall indicate: (a) the builder's name as was found in the HOW Companies' records and shown on the pending Application's Exhibit I-4F; (b) the HOW builder number associated with that builder and shown on Exhibit I-4F; and (c) the percentage allocation of Residual Assets (and of any remainder of the Reserve for Final Expenses and Contingencies) indicated on Exhibit I-4F as distributable to that builder name and number combination (if a Builder Distributee), or "Not Eligible" in lieu of a percentage (if not a Builder Distributee and therefore not listed on Exhibit I-4F); provided, however, that Counsel for the Deputy Receiver need not cause notice to be mailed to a person if Counsel reasonably believes that the last known address of that person is no longer valid.

(12) On or before May 13, 2019, Counsel for the Deputy Receiver also shall publish notice of the Application and this Scheduling Order for one day each week for two consecutive weeks in the *Richmond Times-Dispatch*, *The Wall Street Journal*, and *USA Today*. The publication notice shall be of a form reasonably calculated to provide sufficient notice to all former HOW Builders who do not receive mailed notice of the Application and Scheduling

Order pursuant to the preceding paragraph, and shall include instructions for obtaining further information.

(13) The mailed and publication notices shall satisfy the requirements to provide notice of the Application and this Scheduling Order. Copies of the Application and this Scheduling Order also shall be posted on the receivership web site at <http://www.howcorp.com>.

(14) On or before May 23, 2019, Counsel for the Deputy Receiver shall provide proof of notice as required by Ordering Paragraphs (11) and (12) of this Scheduling Order.

(15) This case is continued.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the State Corporation Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219.