

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Liquidation of
MIDLAND INSURANCE COMPANY

Index No. 41294/86


Assigned to:
Hon. Michael Stallman

NOTICE OF MOTION TO
MODIFY INJUNCTION

-----X
PLEASE TAKE NOTICE that upon the annexed affirmation of Vincent J. Proto, dated August 10, 2006, with exhibits, the accompanying Memorandum in Support of Everest Reinsurance Company's Motion to Modify the Injunction to Permit Suit Against the Liquidator, dated August 10, 2006, and the proposed Complaint of Everest Reinsurance Company against Howard Mills, Superintendent of Insurance of the State of New York, as Liquidator of Midland Insurance Company, Everest Reinsurance Company ("Everest") will move this Court, at the Motion Support Office, Room 130, located in the Courthouse, 60 Centre Street, New York, New York 10007, on August 29, 2006, at 9:30 a.m. or as soon thereafter as counsel may be heard, for an order modifying the injunction set forth in the Order of Liquidation, dated and filed April 3, 1986, issued by the Court in this matter, to permit Everest to file and serve its proposed Complaint and prosecute an action against Howard Mills, Superintendent of Insurance of the State of New York, as Liquidator of Midland Insurance Company, and awarding Everest such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 2214, answering affidavits shall be served upon the undersigned at least seven (7) days before the return date of this motion.

Dated: New York, New York
August 10, 2006

By: 
Joseph J. Schiavone
Vincent J. Proto
BUDD LARNER, P.C.
11 Penn Plaza, 5th Floor
New York, New York 10001
(212) 946-2798

Attorneys for Everest Reinsurance
Company

To:

Office of the General Counsel
New York State Insurance Department
25 Beaver Street
New York, New York 10004

Liquidation Bureau
New York State Insurance Department
123 William Street
New York, New York 10004

McCarthy, Leonard, Kaemmerer, Owen, McGovern, Striler & Menghini, L.C.
400 South Woods Mill Road
Suite 250
Chesterfield, Missouri 63017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Liquidation of
MIDLAND INSURANCE COMPANY

Index No. 41294/86

Assigned to:
Hon. Michael Stallman

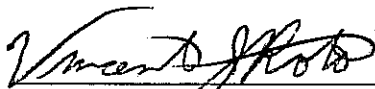
-----X

**AFFIRMATION OF VINCENT J. PROTO IN SUPPORT OF EVEREST
REINSURANCE COMPANY'S MOTION TO MODIFY THE INJUNCTION**

Vincent J. Proto, an attorney duly admitted to practice before the Courts of the State of New York, affirms under penalty of perjury as follows:

1. I am a shareholder of the law firm of Budd Lerner, P.C., counsel for Everest Reinsurance Company f/k/a Prudential Reinsurance Company ("Everest") in this case.
2. I respectfully submit this affirmation in support of Everest's Motion to Modify the Injunction to Permit Suit Against the Liquidator.
3. Annexed hereto as Exhibit A is a copy of the Complaint that Everest will file and serve upon the modification of the injunction set forth in the Order of Liquidation, dated and filed April 3, 1986, issued by the Court in this matter, which enjoins litigation against Midland Insurance Company or its liquidator, the Superintendent of Insurance of the State of New York.
4. Annexed hereto as Exhibit B is a true and correct copy of the Order of Liquidation, dated and filed April 3, 1986, issued by the Court.

Dated: New York, New York
August 10, 2006



VINCENT J. PROTO

Ex A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Liquidation of
MIDLAND INSURANCE COMPANY
-----X

EVEREST REINSURANCE COMPANY,

Plaintiff,

-against-

HOWARD MILLS, Superintendent of Insurance
of the State of New York, as Liquidator of
MIDLAND INSURANCE COMPANY,

Defendant.
-----X

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Index No. _____

Plaintiff Everest Reinsurance Company f/k/a Prudential Reinsurance Company
("Everest") brings this Complaint against defendant Howard Mills, Superintendent of Insurance
of the State of New York, as Liquidator of Midland Insurance Company (the "Liquidator"), and
alleges as follows:

INTRODUCTION

1. This action seeks a comprehensive determination of rights and obligations under
various reinsurance contracts issued by Everest to Midland Insurance Company ("Midland").
The Liquidator seeks and, on information and belief, will seek indemnity payments from Everest
under these various reinsurance contracts for amounts allowed on numerous claims by Midland's
underlying insurance policyholders.

2. The reinsurance contracts between Everest and Midland require, among other
things, that Midland provide Everest with timely notice of every insurance claim that may result

in a loss large enough to trigger Everest's reinsurance obligations and that Midland afford Everest the opportunity to participate in the defense and settlement of insurance claims against Midland that may impact the reinsurance provided by Everest. As successor to Midland, the Liquidator has succeeded to and is required to honor these contractual obligations of Midland.

3. Notwithstanding these contractual provisions, the Liquidator seeks and, on information and belief, will seek reinsurance coverage from Everest for hundreds of claims as to which the Liquidator did not provide Everest with timely notice and/or did not afford Everest an opportunity to participate in the defense or settlement thereof, as required by the reinsurance contracts.

4. In some instances, the Liquidator, without justification and in violation of the terms of the reinsurance contracts, waited more than 15 years to advise Everest of claims that could give rise to liability by Everest.

5. As a result of Midland's failure to provide Everest with timely notice of such claims, Everest has suffered tangible economic injury, including, among other things, the loss of retrocessional recoveries that otherwise would have been available for losses arising from those claims had Everest received timely notice.

6. Despite Everest's protests, the Liquidator has continued to exclude Everest from the settlement and claims-handling process with Midland's policyholders in violation of both Everest's contractual rights and the custom and practice of the reinsurance industry.

7. Indeed, the Liquidator has even refused to honor its contractual obligation to provide Everest with access to its records regarding insurance claims that may impact Everest's reinsurance coverage.

8. This action seeks a ruling that the Liquidator's failure to provide timely notice of insurance claims that may result in losses large enough to trigger Everest's reinsurance obligations relieves Everest from any obligation to indemnify Midland for these claims.

9. This action also seeks a ruling that the Liquidator's actions in reaching settlements with underlying policyholders, the procedures under which the Liquidator allowed various underlying claims, and the Liquidator's failure to provide timely notice of claims breached, *inter alia*, the right-to-participate, the right-to-interpose-defenses, and the access-to-records provisions of Everest's reinsurance contracts and, as a consequence of such breaches, reinsurance is not available for those claims.

10. This action also seeks a ruling that the Liquidator's failure to provide timely notice of claims, as well as its actions in compromising and allowing claims without providing Everest notice and a meaningful opportunity to participate in settlements and the claim determination process, breached the Liquidator's duty of utmost good faith to Everest and, as a consequence of such breaches, reinsurance is not available for those claims.

11. This action also seeks relief arising out of the Liquidator's anticipatory breach of the reinsurance contracts between Midland and Everest.

12. Finally, this action seeks injunctive relief restraining the Liquidator from engaging in any settlement negotiations with any Midland policyholder until Everest is both afforded an opportunity to meaningfully participate in those negotiations and given access to Midland's records as required by the reinsurance contracts issued to Midland.

PARTIES

13. Plaintiff Everest Reinsurance Company is a Delaware corporation with its principal place of business at 477 Martinsville Road, Liberty Corner, New Jersey 07938. Everest was formerly known as Prudential Reinsurance Company.

14. Defendant Howard Mills is the Superintendent of Insurance of the State of New York and the court-appointed Liquidator of Midland.

JURISDICTION AND VENUE

15. This court has jurisdiction pursuant to CPLR §§ 3001 and 6301 *et seq.* and New York Insurance Law § 7401 *et seq.*

16. Venue is proper in this county pursuant to CPLR §§ 503 and/or 505(a) and because Midland's liquidation proceedings have been commenced and are being administered in this county.

FACTUAL BACKGROUND

A. Midland's Insolvency And Liquidation

17. By order entered on April 3, 1986 in the Supreme Court of New York, Midland was adjudicated insolvent and placed into statutory liquidation pursuant to Article 74 of the New York Insurance Law (the "Liquidation Order").

18. The Liquidation Order appointed then Superintendent of Insurance James P. Corcoran and his successors in office as Liquidator of Midland.

19. The Liquidation Order further provided that creditors of the Midland estate, including Midland's policyholders, were required to file proofs of claim with the Superintendent of Insurance, as Liquidator of Midland, within one year -- *i.e.*, by April 3, 1987.

20. According to the Liquidator's October 13, 2005 report on the status of the liquidation of Midland pursuant to N.Y. Ins. Law § 7434 ("Liquidator's Report"), Midland received 27,168 timely proofs of claim, of which 4,956 were voided as duplicate filings, leaving 22,212 proofs of claim that were timely and not voided as duplicates (the "Midland Claims").

21. Among the Midland Claims were proofs of claim filed by Midland's "major policyholders," which the Liquidator has defined as "Fortune 500 companies and other corporate entities" (the "MPHs").

22. According to the Liquidator's Report, "[f]or each MPH policy, where relevant, a proof of claim [was] established for environmental, products, and asbestos coverage."

23. The Liquidator reported that "for many of these MPHs . . . [t]here may be thousands of individual claims for each policy . . . (e.g. asbestos claimants of an asbestos manufacturer)."

24. On information and belief, the Liquidator received what it considers timely proofs of claim from approximately 170 MPHs.

25. To the extent that the Liquidator has recommended any of the claims of those 170 MPHs for allowance, Everest has been excluded from participating in each of those decisions. Moreover, on information and belief, the Liquidator is in the process of considering and/or negotiating additional MPH claims without the participation of Everest.

B. The Midland Reinsurance Contracts

26. From 1974 to 1983, Everest entered into various excess-of-loss reinsurance treaties with Midland (the "Midland Treaties").

27. In addition, from 1972 to 1986, Everest issued to Midland various facultative reinsurance certificates (the “Midland Fac Certs”). The Midland Treaties and the Midland Fac Certs are referred to collectively herein as the “Midland Contracts.”

28. The Midland Contracts set forth when the Liquidator is required to provide notice to Everest of losses that may involve the reinsurance provided by Everest. Specifically, the Midland Treaties provide:

In the event of an occurrence which either results in or appears to be of serious enough nature as probably to result in a loss involving this Agreement, the Company shall give notice *as soon as reasonably practicable* to the Reinsurer (Emphasis added.)

29. Similarly, the Midland Fac Certs require the Liquidator to provide Everest “prompt notice” of an occurrence that “appears likely to involve this reinsurance.”

30. In the event of Midland’s insolvency and liquidation, the Midland Contracts also impose additional notice obligations on the Liquidator:

It is agreed . . . that the liquidator . . . shall give written notice to the Reinsurers of the pendency of a claim against the Company indicating the policy or bond reinsured which claim would involve *a possible liability* on the part of the Reinsurers within a reasonable time *after such claim is filed* in the . . . liquidation proceeding (Emphasis added.)

31. All three notice provisions require the Liquidator to provide timely notice of each specific claim that may trigger reinsurance liability.

32. The Midland Contracts require the Liquidator to provide Everest with specific information concerning the Midland Claims as soon as practicable and, in any event, before settlement negotiations with Midland’s policyholders are commenced with respect to such claims. The specific claims information that the Liquidator is required to provide to Everest includes, without limitation, the following: information concerning the date of loss and location

of loss; a narrative factual summary of the loss/claim details, including date of claim; a description of Midland's insurance coverage at issue, including limits, participation, and attachment points; alleged and/or potential damages; a narrative exposure analysis, including an assessment of coverage defenses; a narrative allocation analysis where the loss/claim may trigger more than one year of coverage; underlying and other-insurance exhaustion analysis where appropriate; a description of inuring reinsurances; copies of reservation of rights letters and policyholder responses; and updates regarding changes in any of the foregoing.

33. The Midland Contracts also expressly provide Everest a right to participate in the handling of those underlying claims against Midland that may implicate the reinsurance provided by Everest. For example, the Midland Contracts provide that:

during the pendency of such claim, the Reinsurer may investigate such claim and interpose, at its own expense, in the proceedings where such claim is to be adjudicated any defense or defenses that it may deem available to the Company or [its] liquidator.

34. In addition to the right to investigate and interpose defenses, the Midland Fac Certs expressly afford Everest the right to associate in the defense and control of any claim, suit or proceeding which may involve Everest's reinsurance obligations. The Midland Fac Certs state that Everest:

shall . . . have the right and be given the opportunity to associate with the Company and its representatives . . . in the defense and control of any claim, suit or proceeding which may involve this reinsurance with the full cooperation of the Company.

35. In addition to its duties to provide Everest with timely notice and the opportunity to participate in the defense of claims, the Liquidator is required under the Midland Contracts to timely provide Everest with substantively adequate evidence of losses and other information material to the possible payment of reinsurance proceeds.

36. For example, the Midland Treaties require “reasonable evidence of the amount paid or payable” by Midland before Everest’s reinsurance obligations are triggered.

37. Similarly, the Midland Fac Certs provide that the reinsurance provided by Everest is “predicated upon receipt by it of a satisfactory proof of such loss”

38. The Midland Contracts also provide Everest with an express contractual right to access Midland’s books and records to obtain any information concerning the subject matter of the Midland Contracts, including information concerning the Midland Claims. Pursuant to the access-to-records clause in the Midland Contracts, Everest shall have:

free access to the books and records of the Company at all reasonable times for the purpose of obtaining information concerning this Agreement or the subject matter thereof.

39. Further, because the reinsurance provided by Everest under the Midland Treaties responds only after Midland exhausts all “other reinsurances,” collectible or not, the Liquidator is required to provide Everest information concerning all “other reinsurances” that responded to the Midland Claims.

40. In addition to the contract provisions cited above, the Liquidator, as successor to Midland under the Midland Contracts, owes Everest a duty of utmost good faith, which requires the Liquidator, among other things, to treat the reinsurance relationship with Everest as an “honorable engagement.” This duty requires the Liquidator to disclose to Everest all facts that materially affect the reinsured risk. It also requires the Liquidator to independently investigate claims for coverage and to independently make reasonable, good faith determinations as to whether claims are covered under Midland’s policies, and, therefore, should be allowed.

C. The Liquidator’s Failure To Provide Timely Notice To Everest

41. Despite its obligations under the Midland Contracts, the Liquidator failed to provide Everest timely notice of many of the Midland Claims.

42. In some cases, the Liquidator, without justification and in violation of the requirements and provisions of the Midland Contracts, waited more than 15 years after receiving claims for coverage to advise Everest of losses that could give rise to liability under the Midland Contracts.

43. Although the underlying insurance claims against Midland date back to the 1980s, the Liquidator first began notifying Everest of claims in or about May, 2004. Indeed, almost all of the claims made by the 170 MPHs were first submitted by the Liquidator to Everest from May, 2004 through May, 2005.

44. On information and belief, the Liquidator knew or should have known that these Midland Claims would involve a possible liability on the part of Everest sufficient to trigger Midland's notice obligations long before it actually provided notice of the claims to Everest.

45. When the Liquidator began to belatedly provide notice to Everest of the MPHs' claims beginning in 2004, the notice the Liquidator provided was broad, general, and lacking in the particularized, claim-by-claim, specificity mandated by the Midland Contracts.

46. On information and belief, the Liquidator did not implement adequate routine practices and controls to ensure that Everest was timely notified of claims as required by the Midland Contracts.

47. Indeed, the Liquidator's failure since 1987 to adopt and implement reasonable standards for the proper investigation of claims arising under the insurance policies issued by Midland to its policyholders, as well as other deficiencies in the Liquidator's claim handling process, repeatedly violated the standards of New York's unfair claim settlement practices law, New York Insurance Law § 2601.

48. The Liquidator's failure to provide Everest with timely notice in accordance with the Midland Contracts has economically prejudiced Everest because, among other things, Everest lost retrocessional recoveries that would have been available for those losses had Everest been provided with timely notice of the claims.

49. The Liquidator's failure to provide Everest with timely notice in accordance with the Midland Contracts has also economically prejudiced Everest because, among other things, it deprived Everest of the ability to properly post reserves for the claims in question.

50. The Liquidator's failure to provide Everest with timely notice in accordance with the Midland Contracts also deprived Everest of the ability to participate in the evaluation and defense of claims in a timely manner.

D. The Liquidator's Failure To Provide Information To Everest

51. Despite repeated requests by Everest, the Liquidator has failed to provide Everest with satisfactory proof or reasonable evidence of the losses allegedly associated with many of the Midland Claims.

52. For example, the Liquidator has failed to provide information concerning "other reinsurances" that inure to the benefit of Everest under the Midland Contracts, also known as "inuring reinsurance." Inuring reinsurance is reinsurance coverage that would respond to losses associated with the Midland Claims before the reinsurance coverage afforded by Everest under the Midland Contracts would respond.

53. Despite repeated requests by Everest, the Liquidator has failed to provide Everest with information concerning inuring reinsurance as required by the Midland Contracts. Such information is needed to determine whether Midland has exhausted all "other reinsurances" as required by the Midland Contracts.

54. Notwithstanding Everest's unconditional right to access information concerning the Midland Claims that the Liquidator alleges are reinsured by the Midland Contracts, the Liquidator has placed unreasonable and unwarranted restrictions on Everest's access to Midland's books and records in clear violation of the terms and conditions of the Midland Contracts and the custom and practice of the reinsurance industry.

55. For example, in response to Everest's request to conduct a claim review in or about 2004, the Liquidator conditioned Everest's access to Midland's claims documents on obtaining a guarantee from Everest that it would pay all outstanding billings on the claims subject to the review immediately after the audit.

56. After numerous requests by Everest, in June 2006, the Liquidator belatedly agreed to make available for Everest's review a small selection of claim files pertaining to 34 of the 170 MPHs. Permitting Everest access to this selection of materials so late in time – indeed, after the Liquidator made determinations whether to allow the claims of many of the policyholders whose files would be made available for review – does not cure the Liquidator's failures to provide timely notice and information as required by the Midland Contracts.

57. More recently, however, the Liquidator withdrew Everest's access to the aforementioned records, after Everest had already at substantial cost arranged for a third-party contractor to travel to New York, set up equipment at the offices of the New York Liquidation Bureau, and copy the files the Liquidator made available. After copying only six files, Everest's contractor was told to pack up and leave.

58. The Liquidator could not provide Everest with a consistent or coherent reason for its decision to change course and deny Everest access to claim files in violation of Everest's contractual rights. The excuse stated by the Liquidator and/or its agents for denying Everest's

access to claim files has alternated from the purported need to reshelve the subject files for review by another reinsurer to the assertion that Everest's review was taking up space needed for other purposes (in the otherwise vacant offices of the New York Liquidation Bureau) to the claim that the presence of Everest's agent was disturbing the relationship between the Liquidator's consultant and the New York Liquidation Bureau.

59. Everest proposed to move its contractor to another vacant space in the building and to coordinate its activities with those of any other reinsurer reviewing files by arranging to image and review file materials on a rolling basis. The Liquidator rejected these simple solutions without explanation and without making any attempt to accommodate Everest.

60. Other than the six files copied by Everest (two of which are files for claims that already have been allowed), Everest currently does not have any access to any of the files relating to current or potential claims against Everest under the Midland Contracts.

E. The Critical Change In The Relationship Between Everest And Midland

61. As is customary in a cedent-reinsurer relationship, the interests of Midland and Everest in proper and efficient claim-handling were, prior to Midland's insolvency, generally aligned to the extent that both entities, for example, shared an interest to deny meritless insurance claims.

62. As soon as Midland was adjudged insolvent and the Liquidator was appointed, the traditional protections of Everest's interests arising from the cedent and reinsurer being similarly situated with respect to insurance claims no longer existed.

63. Unlike a solvent insurance company, a liquidator overseeing the run-off of an insolvent insurance company has strong incentives to allow claims that should not be paid under

the insurance policies, either because the claims are not covered at all or because the claims are inflated.

64. For example, reinsurance recoveries for allowed claims, when covered by reinsurance, are to be paid into the estate at one hundred cents on the dollar, even though the policyholder may ultimately receive a small fraction of the allowed amount of the claim in a subsequent distribution from the estate. As a result, a liquidator seeking to maximize the estate's assets has an incentive to settle or allow claims of dubious value and then seek to force payment from the reinsurers under the "follow the fortunes" doctrine.

65. Because of the critical change in the relationship between a cedent and reinsurer after the cedent is rendered insolvent, and the absence of the protections the reinsurer once had, the Insolvency Clause in the Midland Contracts specifically allows Everest to participate in the claims-handling process and to interpose defenses against policyholder claims that Everest believes are available to Midland.

66. Following the appointment of the Liquidator to administer the Midland Estate, the Liquidator saw its primary objective to be the maximization of the assets of the Midland Estate for the benefit of Midland's policyholders.

67. Indeed, as set forth on its website, the mission statement of the New York Liquidation Bureau is to "maximize assets and resolve liabilities."

68. According to the Liquidator, the largest potential asset of the Midland Estate is its recoverable reinsurance.

69. According to the Liquidator's stated intentions (and as demonstrated by its past conduct), after a Midland policyholder's claim is "allowed" by the Court, the Liquidator bills reinsurers for the entire allowed amount that the Liquidator contends impacts the respective

reinsurance contracts. That reinsurance, when payable, is paid into the Midland Estate at one-hundred cents on the dollar even though the Midland Estate, in all likelihood, will only pay the policyholder a small percentage of that amount in subsequent distributions. As a result, the larger the allowance obtained by the Liquidator, the larger the reinsurance recovery from its reinsurers.

70. On information and belief, the Liquidator is attempting to maximize its recoveries from Midland's reinsurers, including Everest, without regard to the terms, conditions and warranties contained in the Midland policies.

71. In addition, a direct conflict exists in connection with the Liquidator's retention of the law firm of McCarthy, Leonard, Kaemmerer, Owen, McGovern, Striler & Menghini, L.C. (the "McCarthy Firm") to represent the Liquidator in both defending the interests of Midland against claims by the MPHs and obtaining reinsurance recoveries for the Midland Estate.

72. As coverage counsel for the Liquidator, the McCarthy Firm's duties include the evaluation, investigation, and vigorous defense of claims for coverage under the Midland Policies. In this role, the McCarthy Firm has an ethical and professional obligation to defend the Midland Estate against meritless claims.

73. As reinsurance recovery counsel for the Liquidator, the McCarthy Firm has a duty to maximize reinsurance recoveries in connection with the very same underlying claims against which the McCarthy Firm must vigorously defend. Therefore, a direct conflict is presented by the McCarthy Firm's representation of the Liquidator for the dual purposes of defending against claims while seeking to maximize reinsurance recoveries for those same claims.

F. The Liquidator's Improper Claim Handling Through Its Agent, Navigant

74. When the Liquidator, through its agent, Navigant Consulting, Inc. ("Navigant"), provided Everest with untimely notices of the MPH claims in 2004-2005, the Liquidator and Navigant advised that they would conduct a coverage analysis and assert available coverage defenses once they obtained sufficient underlying information from Midland's policyholders.

75. However, not only were these untimely notices inconclusive with respect to the Liquidator's plans for dealing with specific MPH claims, they also were misleading. While the notices advised of the Liquidator's intent to assert coverage defenses, the Liquidator subsequently failed to assert those coverage defenses, without advising Everest of this material change in position.

76. For example, in 2004, the Liquidator advised Everest that the decision in *In re Liquidation of Midland Insurance Company*, 709 N.Y.S.2d 24 (2000) ("*LAQ*"), was the controlling law in the Midland Estate and that the Liquidator would enforce the *LAQ* decision to the fullest extent possible as a defense to coverage.

77. In *LAQ*, the Appellate Division ruled, in connection with a claim for coverage under a Midland policy, that (i) the underlying claimant must prove contact with the injury-causing agent during the policy period and (ii) all other solvent insurance must be exhausted.

78. On information and belief, the Liquidator subsequently abandoned its position that it would enforce *LAQ*, without advising Everest.

79. On information and belief, in the course of alleged negotiations with various of Midland's policyholders, the Liquidator has repeatedly failed and/or refused to assert the rulings in *LAQ* as a defense to coverage.

80. On information and belief, the Liquidator has repeatedly and consistently failed to conduct reasonable claim investigations and to assert coverage defenses available to Midland.

81. On information and belief, after the Liquidator obtains claim information from an individual MPH, the Liquidator through Navigant solicits a settlement demand from the MPH, in direct contravention to the statements in its notices to reinsurers that the Liquidator would conduct a coverage analysis and assert all available defenses. Thus, abandoning any effort to assert legitimate defenses to coverage, the Liquidator through Navigant merely asks the MPH to state the amount of the claim that should be allowed.

82. After Navigant receives a target settlement amount from an MPH, the Liquidator and/or Navigant may or may not conduct an “audit” of the underlying claims paid by the MPH. If such an audit does take place, its purpose is, on information and belief, merely to confirm that the MPH paid claims that were filed against it. It is not the purpose of the audit to evaluate the validity of those claims.

83. The Liquidator and/or Navigant then retains a third-party company to allocate the claims paid by the MPH to the relevant Midland policies and/or policy periods, soliciting a report that includes an opinion regarding whether the allocation company considers the MPH’s settlement demand to be “reasonable.”

84. On information and belief, the aforementioned audit report and allocation report are prepared solely for the purpose of supporting the allowance of the full amount of the MPH’s settlement demand.

85. On information and belief, Navigant then recommends a settlement range to the Liquidator based on the MPH’s settlement demand, the audit report (if one has been prepared), and the allocation report.

86. On information and belief, with respect to each MPH claim allowed to date, the amount demanded by the MPH has always fallen within the settlement range recommended by Navigant.

87. On information and belief, each settlement recommended by Navigant and, in turn, recommended for allowance by the Liquidator, is based largely (if not exclusively) on the entire amount of the initial MPH settlement demand made many years prior to the allowance recommendation. The settlement recommendation is thus based on outdated and insufficiently scrutinized information. It is not based on a reasonable investigation of the claims or a proper coverage analysis.

88. For example, the Liquidator advised that it intended to recommended full payment of the claims of two MPHs without conducting a separate audit of those claims. On information and belief, instead of conducting an audit of those claims, the Liquidator relied solely on an analysis conducted years ago in connection with the separate liquidation of an unrelated insurance company, Transit Casualty Company (“Transit”).

89. The Liquidator has advised that it intends to recommend for allowance claims against the Midland Estate based on the manner in which such claims were treated in the Transit liquidation, without conducting an independent investigation and analysis of those claims under the Midland policies. Such a position is wholly improper and is tantamount to a breach of, *inter alia*, the Liquidator’s obligation to preserve the Midland Estate’s assets.

90. On information and belief, the Liquidator has repeatedly failed to require MPHs to produce complete, adequate, or sufficient documentation of the underlying liability claims against the MPHs.

91. Moreover, in the course of its settlement negotiations with MPHs, the Liquidator has repeatedly failed to assert defenses to coverage that would bar coverage for some or all of the underlying claims in question.

92. As a result, the Liquidator has reached settlement agreements with MPHs that resulted in the allowance of claims for which coverage should not lie under the Midland policies.

93. For example, with respect to claims by various MPHs for coverage of underlying breast implant liabilities, the Liquidator failed to assert viable defenses, including that breast implant claimants cannot demonstrate compensable injury in cases where no rupture and/or silicone leakage takes place.

94. The Liquidator failed to assert the aforementioned defenses even though the Liquidator has recognized, in various of its claim summary reports, that these are defenses to coverage of underlying breast implant claims.

95. Everest has asked the Liquidator to allow Everest, in accordance with the Midland Contracts, to participate in settlement negotiations with MPHs and to interpose applicable coverage defenses, including the *LAQ* decision. As set forth herein, the Liquidator has without justification refused to allow Everest to do so.

96. A liquidator is not free to disregard its obligation to reinsurers to conduct, in good faith, a reasonable investigation and defense of coverage claims. For example, in a situation strikingly similar to that presented here, a court recently determined that the failure of the liquidator of the estate of Integrity Insurance Company (“Integrity”) to independently investigate and defend against coverage claims in a reasonable and businesslike manner amounted to gross incompetence and, as a result, a reinsurer was not required to provide reinsurance for certain

allowed claims. *See Suter v. General Accident Ins. Co.*, Civ. No. 01-2686 (WGB), 2006 U.S. Dist. LEXIS 48209 (D.N.J. July 14, 2006) (“*Suter*”).

97. In *Suter*, the reinsurer argued that Integrity’s liquidator improperly allowed certain heart valve claims against Pfizer for coverage under policies issued by Integrity. The court heard evidence concerning the liquidator’s claims review process over the course of a multi-week trial and found, *inter alia*, that the liquidator’s allowance of those claims was “grossly incompetent.” *Id.* at *3.

98. *Suter* is particularly on point here because, by letter dated May 8, 2006, the Midland Liquidator advised Everest that it intends to allow millions of dollars of those same Pfizer heart valve claims against the Midland Estate based in large part on the same inadequate analysis and the same incorrect and “misleading” legal advice at issue in *Suter*. Indeed, the Liquidator here appears to have made the same mistakes that the *Suter* court found that the Integrity liquidator made.

99. In *Suter*, the court detailed numerous errors that were made by Integrity’s liquidator in his acceptance of the Pfizer heart valve claims, including:

- The liquidator failed to “make an independent assessment of whether all underlying coverage had been exhausted.” *Id.* at *45.
- The liquidator improperly relied on an “opinion letter” from the McCarthy Firm that was “misleading” and “inaccurate,” including statements concerning a California coverage case relating to the Pfizer heart valve claims. (The same McCarthy Firm that is counsel to the Midland Liquidator was counsel to another insolvent carrier, Transit, that had also issued coverage to Pfizer.) *Id.* at *57; *see also id.* at *63 (it was not the “custom and practice in the industry” for the Integrity liquidator to have relied on the claims investigation performed by the Transit estate).
- The liquidator failed to follow-up on his request to Pfizer for medical documentation concerning the heart valve claims. *Id.* at *56-59.
- The liquidator “should have retained medical advice as to when bodily injury actually occurred.” *Id.* at *60.

- The liquidator erred in failing to account for Pfizer's self-insured retentions or SIRs in calculating Integrity's attachment point. *Id.* at *65-66.
- Actions taken by the deputy liquidator were not "a substitute for [the liquidator's] failure to properly investigate Pfizer's claims. *Id.* at *67-68.

100. The *Suter* court concluded that Integrity's liquidator "was grossly incompetent under the circumstances of this case not to retain competent coverage counsel and to have made an allowance on a claim of this type without obtaining medical information to support it." *Id.* at *62. In particular, the *Suter* court noted:

It doesn't take an insurance expert to conclude, as [reinsurer's expert] did, that industry practices would have required a claims handler to make an effort to get a copy of the [California Pfizer heart valve] decision, read it, and understand what was at stake and retain the assistance of outside coverage counsel. [The liquidator] never bothered to explore the insurers' [c]overage defenses when it was apparent that carriers settled for less than their policy limits. When [the liquidator] examined Transit's files he did not determine whether there was any bodily injury claims that occurred during any policy period that validly exhausted all of the underlying carriers below the attachment point of Integrity's policy. [The liquidator] repeated the error of the McCarthy [Firm] opinion on the outcome of the [California coverage decision].

Id. at *61-62. In addition, the court noted that the liquidator had permitted Pfizer to lead him "down the proverbial prim rose path" (*id.* at *79), and that the liquidator should have "retained insurance coverage counsel before cavalierly dismissing" the significance of the California coverage decision (*id.* at *82).

101. Here, the Liquidator's May 8, 2006 Supplemental Report to reinsurers, including Everest, concerning Midland's proposed settlement and allowance of the Pfizer heart valve claims demonstrates that, on information and belief, the Liquidator is making some of the same exact mistakes made by the Integrity liquidator. For example:

- on information and belief, no evidence exists that the Midland liquidator conducted "an independent assessment of whether all underlying coverage had been exhausted."

- the Liquidator's misinterpretation of the California coverage case concerning the Pfizer heart valve claims mirrors the McCarthy Firm's advice criticized by the court in *Suter* (although the McCarthy Firm's misleading "opinion letter" described in *Suter* is not specifically referenced in the Midland Liquidator's May 8, 2006 Supplemental Report, the McCarthy Firm is the Liquidator's counsel).
- on information and belief, no evidence exists that the Liquidator retained medical advice as to when bodily injury actually occurred.
- on information and belief, the Liquidator relied upon the claims investigation performed by the Transit estate.

102. Despite the foregoing failures, on information and belief, the Liquidator intends to recommend many of the Pfizer heart valve claims for allowance.

103. Like the liquidator in *Suter*, the Liquidator here has failed to independently investigate claims for coverage and make reasonable determinations in good faith as to whether claims should be allowed.

G. The Liquidator's Exclusion of Everest from the Claim-Handling Process

104. To the extent that the Liquidator has engaged, is engaging, or will engage in negotiations with Midland's policyholders to settle any of the Midland Claims that the Liquidator alleges are reinsured by the Midland Contracts, Everest has the right under the Midland Contracts to participate in those negotiations.

105. Nonetheless, and notwithstanding its duties and obligations under the Midland Contracts, the Liquidator has engaged in settlement negotiations with Midland's policyholders without providing notice to Everest and without affording Everest a meaningful opportunity to participate in the analysis of these claims and any related settlement negotiations.

106. Despite Everest's questioning of the Liquidator's practices, on information and belief, the Liquidator has continued to engage in, and intends to continue engaging in, settlement negotiations with Midland's policyholders without (i) first reasonably and adequately evaluating

the claims to determine whether coverage is actually available under the Midland policies, (ii) providing notice to Everest, and (iii) without affording Everest a meaningful opportunity to participate in any settlement negotiations.

107. The Liquidator has failed to provide Everest with a reasonable opportunity to participate in the handling of the Midland Claims by, *inter alia*, failing to timely provide Everest information concerning the Midland Claims and by failing to provide Everest with any notice of settlement negotiations between the Liquidator and Midland's policyholders until after the settlements have been evaluated, negotiated, and/or approved by the Court.

108. For example, in or about 2004, the Liquidator negotiated settlements with three of Midland's MPHs. Not only did the Liquidator fail to advise Everest that settlement negotiations were taking place, the Liquidator also failed to provide Everest with detailed information concerning those MPHs' claims until the Liquidator submitted reinsurance billings to Everest, which was long *after* those claims were settled and, upon information and belief, recommended by the Liquidator for allowance.

109. Not only has the Liquidator engaged in settlement negotiations without affording Everest notice or an opportunity to participate, but the Liquidator has also engaged and, on information and belief, is continuing to engage, in settlement negotiations with Midland's MPHs based on grossly inadequate factual information, inadequate investigation, and improper claims analyses, resulting in settlements that far exceed the value (if any) of the MPHs' claims.

110. Despite Everest's repeated requests, the Liquidator has denied Everest the opportunity to conduct reasonable claim investigations and/or assert coverage defenses available to Midland. The Liquidator's improper and inadequate claim handling procedure demonstrates

either an inability to investigate and defend against claims with sufficient vigor and/or the Liquidator's unreasonable objective to maximize reinsurance recoveries at all costs.

H. The Liquidator's Exclusion of Everest from the Claim Allowance Process

111. Not only has the Liquidator deprived Everest of its right to participate in the underlying claim-handling process and, in particular, the settlement negotiations between the Liquidator and Midland's policyholders, but Everest has also been precluded from participating in the procedure established by the Liquidator to obtain Court approval of the settlements negotiated by the Liquidator, in further violation of Everest's participation rights under the Midland Contracts.

112. The "allowance procedure" established by the Liquidator provides that, after proofs of claim against the Midland estate were filed in April, 1987, the Liquidator would evaluate each claim and recommend to the Court whether it should be "allowed" or "disallowed" from sharing in a distribution of assets of the Midland estate, which determinations are ultimately subject to Court approval -- all without notice to Everest.

113. The allowance procedure does not afford Everest advance notice of, or an opportunity to participate in, the process by which the Liquidator determines whether to allow a claim.

114. The allowance procedure contains several steps. First, following its review of what it considers to be "timely-filed" proofs of claim, the Liquidator is required to serve each Midland claimant with a "Notice of Determination" advising the claimant that the claimant's claim has been recommended by the Liquidator to be either disallowed or allowed by the Liquidator in the amount set forth in the notice.

115. The allowance procedure does not provide for notice to Everest of the Liquidator's Notices of Determination and the Liquidator has not provided such notice to Everest with respect to the Midland Claims.

116. The allowance procedure provides that, if the claimant accepts the Liquidator's recommendation for allowance, the claimant need not take any further action and the Liquidator shall submit an *ex parte* application to the Supreme Court of New York that "will be approved by the Court," without exception.

117. The allowance procedure does not even provide for notice to Everest that the Liquidator is seeking Court approval of a Notice of Determination, and, in fact, the Liquidator has not provided such notice to Everest with respect to the Midland Claims.

118. The allowance procedure further provides that, if the claimant disputes the amount recommended for allowance, the claimant may object by serving a written notice to the Liquidator and, if that occurs, the Liquidator will refer each disputed claim to a referee appointed by the Court, and either party may move to confirm or set aside the referee's determination of the dispute pursuant to CPLR 4403.

119. The allowance procedure does not afford Everest notice of a disputed Notice of Determination or an opportunity to participate in any way in the referee's adjudication of a disputed Notice of Determination. To date, Everest has not been afforded any such opportunity.

120. Because the undisputed recommendations for allowance are submitted by the Liquidator to the Court *ex parte*, Everest is not afforded notice or an opportunity to review, comment on, or object to the Liquidator's recommendations before they are approved by the Court.

121. Because the Liquidator's *ex parte* allowance procedure forms the basis of the Liquidator's reinsurance billings to Everest, Everest has been, and continues to be, prejudiced by the *ex parte* approval of the Liquidator's settlement recommendations that are based on inadequate information, inadequate investigation, and improper claims analysis by the Liquidator and/or Navigant.

122. The Liquidator has steadfastly ignored Everest's requests to participate in settlement negotiations with Midland policyholders and the claims allowance process, despite Everest's protests. The Liquidator's refusal to permit Everest to participate in settlement negotiations and the claims allowance process is, was, and will continue to be a breach of the Liquidator's duties under the Midland Contracts.

123. An actual controversy exists between Everest, on the one hand, and the Liquidator, on the other hand, concerning their respective rights and obligations with respect to whether, or to what extent: (a) Everest has or could have any obligation to provide reinsurance for Midland Claims, based on the terms of the Midland Contracts and the actions taken by the Liquidator as detailed herein; and (b) the Liquidator's obligations to provide Everest with access to its records and notice of, and an opportunity to participate in, the claim settlement and allowance process.

CAUSES OF ACTION

AS AND FOR A FIRST CAUSE OF ACTION

DECLARATORY RELIEF REGARDING DEFENDANT'S BREACH OF THE MIDLAND CONTRACTS BY FAILING TO PROVIDE EVEREST WITH TIMELY NOTICE OF CLAIMS

124. Everest incorporates by reference the allegations set forth in paragraphs 1 through 123 above.

125. Pursuant to the terms of the Midland Contracts, the Liquidator was required to provide Everest with timely notice of the Midland Claims.

126. The Liquidator failed to provide Everest with timely notice of the Midland Claims.

127. The Liquidator failed to implement adequate routine practices and controls to ensure timely notice to Everest of the Midland Claims.

128. The Liquidator breached the Midland Contracts by failing to provide Everest with timely notice of the Midland Claims.

129. As a direct result of the Liquidator's untimely notice of claims, Everest has been harmed.

130. As a direct result of the Liquidator's untimely notice of claims, Everest has suffered economic prejudice.

131. On information and belief, the Liquidator will contest the foregoing contentions by Everest.

AS AND FOR A SECOND CAUSE OF ACTION

DECLARATORY RELIEF REGARDING DEFENDANT'S BREACH OF THE MIDLAND CONTRACTS BY FAILING TO PROVIDE EVEREST WITH AN OPPORTUNITY TO PARTICIPATE IN SETTLEMENT NEGOTIATIONS AND THE CLAIM-ALLOWANCE PROCESS

132. Everest incorporates by reference the allegations set forth in paragraphs 1 through 131 above.

133. Pursuant to the Midland Contracts, Everest has the right to participate in the claims-handling and claims-adjudication process with respect to the Midland Claims, including direct participation in both (a) settlement negotiations between the Liquidator and Midland's policyholders and (b) the claim-allowance process.

134. The Liquidator has failed to provide Everest with notice or an opportunity to participate in the settlement negotiations between itself and Midland's policyholders arising out the Midland Claims.

135. The Liquidator has also failed to provide Everest with notice or an opportunity to participate in the process of submitting the Liquidator's recommendations for "allowance" or "disallowance" of claims to the Court for approval.

136. The Liquidator has also failed to provide Everest with claims information until after the Liquidator has evaluated, negotiated, and/or obtained court approval of settlements between the Liquidator and Midland's policyholders.

137. The Liquidator's failures to provide Everest with notice or an opportunity to participate in settlement negotiations or the claim-allowance process constitute breaches of the Midland Contracts.

138. As a direct result of the Liquidator's failures to provide Everest with notice or an opportunity to participate in settlement negotiations or the claim-allowance process, Everest has been harmed.

139. On information and belief, the Liquidator will contest the foregoing contentions by Everest.

AS AND FOR A THIRD CAUSE OF ACTION

DECLARATORY RELIEF REGARDING DEFENDANT'S BREACHES OF THE DUTY OF UTMOST GOOD FAITH

140. Everest incorporates by reference the allegations set forth in paragraphs 1 through 139 above.

141. The Liquidator owes Everest a duty of utmost good faith.

142. The Liquidator has engaged in settlement negotiations with Midland's policyholders based on inadequate factual information, inadequate investigation, and improper claims analyses.

143. The Liquidator has failed to independently investigate and defend against coverage claims in a reasonable and businesslike manner.

144. The Liquidator has also negotiated unreasonable settlements with Midland's policyholders that exceed the value of the policyholders' claims.

145. The Liquidator has also failed to implement adequate routine practices and controls to ensure timely notice to Everest of the Midland Claims.

146. The Liquidator has also failed to provide Everest with timely notice of claims as to which the Midland Contracts may be called upon to respond and has failed to afford Everest an opportunity to participate in settlement negotiations and/or the subsequent claim-allowance process.

147. The Liquidator has also failed to give Everest reasonable access to its records relating to the Midland Claims.

148. In connection with the foregoing activities, the Liquidator has failed to disclose to Everest all facts that may materially affect the risks subject to reinsurance under the Midland Contracts.

149. As a direct result of its actions described herein, the Liquidator breached its duty of utmost good faith to Everest.

150. As a direct result of the Liquidator's breach of its duty of utmost good faith to Everest, Everest has been harmed.

151. On information and belief, the Liquidator will contest the foregoing contentions by Everest.

AS AND FOR A FOURTH CAUSE OF ACTION

**DECLARATORY RELIEF REGARDING PLAINTIFF'S RIGHT TO
PARTICIPATE IN DETERMINATIONS OF WHAT COVERAGE DEFENSES
AND CASE LAW APPLY TO UNDERLYING CLAIMS**

152. Everest incorporates by reference the allegations set forth in paragraphs 1 through 151 above.

153. Pursuant to the Midland Contracts, Everest has the right to participate in the claims-handling and claims-adjudication process with respect to the Midland Claims, including direct participation in both (a) settlement negotiations between the Liquidator and Midland's policyholders and (b) the claim-allowance process.

154. In the course of settlement negotiations between the Liquidator and Midland's policyholders and the claim-allowance process, the Liquidator has failed and/or refused to assert various defenses to coverage applicable to the underlying claims.

155. For example, and without limitation, the Liquidator has failed and/or refused to assert the rulings set forth in *In re Liquidation of Midland Insurance Company*, 709 N.Y.S.2d 24 (2000) ("*LAQ*") as defenses to coverage of various underlying claims.

156. The Liquidator's failure and/or refusal to assert various applicable coverage defenses, including, *inter alia*, the *LAQ* decision, has resulted in the allowance of claims for which coverage should not have been available under policies issued by Midland.

157. The Liquidator has also failed and/or refused to permit Everest to participate in determinations of what defenses to coverage, including the *LAQ* decision, apply to the underlying claims as to which Midland's policyholders seek coverage from the Midland estate.

158. The Liquidator's failures and/or refusals to permit Everest to participate in determinations of what defenses to coverage, including the *LAQ* decision, apply to the underlying claims constitute breaches of the Midland Contracts.

159. As a direct result of the Liquidator's failures and/or refusals to permit Everest to participate in determinations of what defenses to coverage, including the *LAQ* decision, apply to the underlying claims, Everest has been harmed.

160. The Liquidator has failed and/or refused to permit Everest to interpose defenses to coverage, including the *LAQ* decision, in settlement negotiations with Midland's policyholders and in the claim-allowance process.

161. The Liquidator's failures and/or refusals to permit Everest to interpose defenses to coverage, including the *LAQ* decision, in settlement negotiations with Midland's policyholders and in the claim-allowance process constitute breaches of the Midland Contracts.

162. As a direct result of the Liquidator's failures and/or refusals to permit Everest to interpose defenses to coverage, including the *LAQ* decision, in settlement negotiations with Midland's policyholders and in the claim-allowance process, Everest has been harmed.

163. On information and belief, the Liquidator will contest the foregoing contentions by Everest.

AS AND FOR A FIFTH CAUSE OF ACTION

DECLARATORY RELIEF REGARDING DEFENDANT'S ANTICIPATORY BREACH OF THE MIDLAND CONTRACTS

164. Everest incorporates by reference the allegations set forth in paragraphs 1 through 163 above.

165. On information and belief, the Liquidator is currently engaged in and will continue to engage in settlement negotiations with Midland's policyholders without affording

Everest notice or an opportunity to participate in those negotiations or the subsequent allowance process, in further breach of the Midland Contracts.

166. The Liquidator has indicated that it will engage in settlement negotiations with Midland's policyholders without affording Everest notice or an opportunity to participate in those negotiations or the subsequent allowance process.

167. The Liquidator's repudiation of its obligations to afford Everest notice and an opportunity to participate in settlement negotiations and the allowance process constitutes an anticipatory breach of the Midland Contracts.

168. As a direct result of the Liquidator's repudiation of its obligations to afford Everest notice and an opportunity to participate in settlement negotiations and the allowance process, Everest will be harmed.

169. On information and belief, the Liquidator will contest the foregoing contentions by Everest.

AS AND FOR A SIXTH CAUSE OF ACTION

PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF AGAINST THE DEFENDANT

170. Everest incorporates by reference the allegations set forth in paragraphs 1 through 169 above.

171. The traditional protections of Everest's interests arising from the cedent-reinsurer relationship no longer exist with respect to claims for coverage under the Midland policies. The primary objective of the Liquidator is to maximize the assets of the Midland Estate for the benefit of Midland's policyholders.

172. Taking into account the possibility of this fundamental shift in the relationship between Everest and Midland, the Midland Contracts impose additional notice obligations on Midland's statutory liquidator in the event of Midland's insolvency and liquidation.

173. Notwithstanding these and other contractual obligations, the Liquidator has failed to provide Everest with timely and sufficient notice of the Midland claims.

174. The Liquidator has also improperly and without justification deprived Everest of its contractual right to participate in past settlement negotiations with Midland policyholders.

175. On information and belief, the Liquidator is currently engaged in settlement negotiations with Midland's policyholders, but is not giving Everest notice of, or an opportunity to participate in, those negotiations.

176. On information and belief, the Liquidator will continue in the future to refuse to allow Everest to participate in settlement negotiations with Midland's policyholders and/or in the claim-allowance process.

177. The past, current, and anticipated future activities of the Liquidator have caused, are causing, and will continue to cause Everest irreparable harm.

178. The Liquidator has repeatedly and consistently failed to conduct reasonable claim investigations. On information and belief, the Liquidator intends to continue handling claims in the same, deficient manner.

179. The Liquidator has also repeatedly and consistently failed to assert valuable and legitimate coverage defenses available to Midland for various claims, including, for example, and without limitation, (i) the *LAQ* decision, (ii) that breast implant claimants cannot demonstrate compensable injury in cases where no rupture and/or silicone leakage takes place, and (iii) that there can be no coverage of potentially fraudulent and illegitimate asbestos claims.

On information and belief, the Liquidator intends to continue to fail to assert coverage defenses available to Midland.

180. In addition, an apparent conflict exists in connection with the Liquidator's retention of the McCarthy Firm to represent Midland in both its reinsurance recoveries and in defending the interests of Midland against claims by the MPHs.

181. As coverage counsel for the Liquidator, the McCarthy Firm's duties include the evaluation, investigation, and vigorous defense of claims for coverage under the Midland Policies. As reinsurance recovery counsel for the Liquidator, the McCarthy Firm has a duty to maximize reinsurance recoveries in connection with the very same underlying claims against which the McCarthy Firm must vigorously defend. Therefore, a direct conflict is presented by the McCarthy Firm's representation of the Liquidator for the dual purposes of defending against claims while seeking to maximize reinsurance recoveries for those same claims.

182. On information and belief, the Liquidator has been and will continue to recommend for allowance claims for which coverage should not lie under the Midland policies.

183. Because the Liquidator has excluded, and on information and belief will continue to exclude, Everest from the wholly improper and insufficient claim review and allowance process of the Liquidator and Navigant, Everest will be deprived of any opportunity to protect its interests.

184. Everest has express contractual rights under the Midland Contracts to participate in any settlement discussions that take place between the Liquidator and the Midland policyholders as well as to participate in the subsequent claim allowance process.

185. Unless it is afforded a meaningful opportunity to exercise its participation rights under the Midland Contracts, Everest does not have, and will not have, any other opportunity to participate in the adjudication and/or settlement of Midland Claims.

186. Everest will be irreparably harmed if the Liquidator proceeds to negotiate settlements with Midland policyholders and/or to allow claims without allowing Everest to meaningfully participate in such negotiations or the claim-allowance process. If Everest is not permitted to participate in the adjudication and/or settlement of claims, it will have been forever and completely deprived of its contractual rights to participate in the resolution of the very claims that the Liquidator will then demand Everest to indemnify under the Midland Contracts. Further, while the Liquidator may contend that, for purposes of Everest's obligations under the Midland Contracts, such settlements and claim-allowance determinations are binding on Everest, it may be extremely difficult, after the fact, to replicate the circumstances existing at the time such determinations are made.

187. The balance of the equities favors granting the injunctive relief requested here because Everest has the rights under Midland Contracts to have timely notice of Midland Claims and to participate in any settlement of Midland Claims that the Liquidator expects Everest to indemnify under the Midland Contracts.

188. The preliminary injunctive relief requested here is also appropriate because Everest is likely to succeed on the merits.

189. Under the circumstances, Everest lacks an adequate remedy at law.

190. Accordingly, unless the Liquidator expressly and irrevocably disclaims any right to seek reinsurance from Everest of any portion of the costs of any settlement of any Midland

Claim, Everest is entitled to preliminary and permanent injunctive relief restraining the Liquidator from:

- (a) participating in any further settlement discussions or negotiations with any representatives or purported representatives of Midland policyholders,
- (b) agreeing to any settlement,
- (c) making allowance determinations,
- (d) referring disputed Notices of Determination to the court-appointed referee in accordance with the Liquidator's claim-allowance process, or
- (e) submitting any further *ex parte* applications to the Court for approval of the Liquidator's allowance recommendations,

unless the conflict-of-interest arising from the McCarthy Firm's dual representation of the Midland Estate as insurance coverage defense counsel and reinsurance recovery counsel is resolved; and, further, the Liquidator provides Everest with timely notice and information relating to the claims at issue as required by the Midland Contracts; and, further, the Liquidator permits Everest to participate meaningfully in such discussions, negotiations, determinations, and claim-allowance procedures to the full extent of Everest's contractual rights.

PRAYER FOR RELIEF

WHEREFORE, Everest respectfully requests that the Court enter the following relief:

1. A declaration that Everest has the right, pursuant to the Midland Contracts, to timely notice of claims for insurance coverage pursuant to the Midland Contracts;
2. A declaration or declarations that the Liquidator breached the Midland Contracts by failing to provide Everest with timely notice of Midland Claims and, therefore, that Everest is not required to provide reinsurance for, or with respect to, such untimely noticed claims;

3. A declaration or declarations that (a) Everest has the right, pursuant to the Midland Contracts, to timely notice of and an opportunity to participate in settlement negotiations between the Liquidator and Midland's policyholders in connection with the Midland Claims; (b) Everest has the right, pursuant to the Midland Contracts, to timely notice of and an opportunity to participate in the claim-allowance process; and (c) the Liquidator is obligated, pursuant to the Midland Contracts, to provide Everest with specific information concerning the Midland Claims as soon as practicable and, in any event, before settlement negotiations with Midland's policyholders are commenced with respect to such claims, including, without limitation, the following information:

- Date of loss,
- Location of loss,
- Narrative factual summary of the loss/claim details, including date of claim,
- Description of Midland's insurance coverage at issue, including limits, participation and attachment points,
- Alleged and/or potential damages,
- Narrative exposure analysis, including an assessment of coverage defenses,
- Narrative allocation analysis where the loss/claim may trigger more than one year of coverage,
- Underlying and Other Insurance exhaustion analysis where appropriate,
- Description of inuring reinsurances,
- Copies of reservation of rights letters and Policyholder responses, and
- Updates regarding changes in any of the above;

4. A declaration or declarations that (a) the Liquidator breached the Midland Contracts by failing, with respect to Midland Claims, to provide Everest with (i) timely and sufficient claim information concerning those claims, (ii) an opportunity to participate in settlement negotiations with Midland policyholders, and/or (iii) an opportunity to participate in the claim-allowance process; and therefore, that (b) Everest is not required to provide reinsurance for, or with respect to, such claims;

5. A declaration or declarations that the Liquidator has breached its duty of utmost good faith to Everest with respect to Midland Claims and, therefore, that Everest is not required to provide reinsurance for, or with respect to, such claims in connection with which the Liquidator breached its duty of utmost good faith;

6. A declaration or declarations that Everest has the right, pursuant to the Midland Contracts, to participate in the Liquidator's determination of what defenses to coverage (including for example and without limitation the decision in *In re Liquidation of Midland Insurance Company*, 709 N.Y.S.2d 24 (2000)) apply to each of the underlying claims for which insurance is sought under policies issued by Midland;

7. A declaration or declarations that Everest has the right, pursuant to the Midland Contracts, to interpose defenses to coverage (including for example and without limitation the decision in *In re Liquidation of Midland Insurance Company*, 709 N.Y.S.2d 24 (2000)), in the Liquidator's settlement negotiations with Midland's policyholders and the claim-allowance process;

8. A declaration or declarations that the Liquidator's repudiation of its obligations to afford Everest notice and an opportunity to participate in either the settlement negotiations or the allowance-of-claims process constitutes an anticipatory breach of the Midland Contracts; and,

therefore that Everest is not required to provide reinsurance for, or with respect to, any future Midland Claims as a result of aforesaid anticipatory breach;

9. A declaration that Everest is not required to provide reinsurance for, or with respect to, any Midland Claims;

10. Preliminary and permanent injunctive relief restraining the Liquidator (unless the Liquidator expressly and irrevocably disclaims any right to seek reinsurance from Everest of any portion of the costs of any settlement of any Midland Claim) from:

- (a) participating in any further settlement discussions or negotiations with any representatives or purported representatives of Midland policyholders,
- (b) agreeing to any settlement,
- (c) making allowance determinations,
- (d) referring disputed Notices of Determination to the court-appointed referee in accordance with the Liquidator's claim-allowance process, or
- (e) submitting any further *ex parte* applications to the Court for approval of the Liquidator's allowance recommendations,

unless the conflict-of-interest arising from the McCarthy Firm's dual representation of the Midland Estate as coverage defense and reinsurance recovery counsel is resolved; and, further, the Liquidator provides Everest with timely notice and information relating to the claims at issue as required by the Midland Contracts; and, further, the Liquidator permits Everest to participate meaningfully in such discussions, negotiations, determinations, and claim-allowance procedures to the full extent of Everest's contractual rights; and

11. For such other and further relief as may be necessary or proper, including the attorneys' fees and costs Everest has incurred and will continue to incur in bringing this action.

DATED: New York, New York
_____, __, 2006

Respectfully submitted,

Joseph J. Schiavone
Vincent J. Proto
BUDD LARNER, P.C.
11 Penn Plaza, 5th Floor
New York, New York 10001
(212) 946-2798

Attorneys for Plaintiff Everest Reinsurance
Company

Ex B

At the Ex-Parte Office of the
Supreme Court of the State of
New York, County of New York
60 Centre Street, in the Bor-
ough of Manhattan, City and
State of New York, on the 3,
day of April, 1986.

P R E S E N T :

HON. *Thomas J. Hughes*

JUSTICE.

-----x
In the Matter of
the Application of

Index No. *41294/191*

ORDER OF LIQUIDATION

JAMES P. CORCORAN, as Superintendent
of Insurance of the State of New York,
for an order to take possession of and
liquidate the business and affairs of

MIDLAND INSURANCE COMPANY
-----x

Now upon reading the Petition of JAMES P. CORCORAN,
Superintendent of Insurance of the State of New York, verified
the *2nd* day of April, 1986 and exhibits annexed thereto in sup-
port of the petition, and it appearing to my satisfaction (i)
that MIDLAND INSURANCE COMPANY (hereinafter referred to as
"MIDLAND") was incorporated under the laws of the State of New
York on October 29, 1959 and licensed as a stock casualty insur-
in the State of New York on December 31, 1959; (ii) that it is

amenable to the Insurance Law of the State of New York and particularly to Article 74 thereof; (iii) that it is impossible to reinsure in whole or in part the existing policy obligations of MIDLAND pursuant to Section 7405 (c) of the Insurance Law; (iv) that the corporate charter as well as any rights and interest in licenses or certificates of authority to write insurance be vested in the Superintendent of Insurance; (v) that MIDLAND is insolvent, that it is in such condition that its further transaction of business would be hazardous to its policyholders, creditors or to the public, that it is to their best interests that this application should be granted and MIDLAND liquidated under and pursuant to Article 74 of the Insurance Law;

NOW, on motion of Hon. ROBERT ABRAMS, Attorney General of the State of New York, it is

ORDERED ~~AND IT IS FURTHER ORDERED~~, that the petition of the Superintendent is granted; and it is further

ORDERED ~~AND IT IS FURTHER ORDERED~~, that JAMES P. CORCORAN, the Superintendent, or any successor in office as Superintendent, is hereby appointed Liquidator of MIDLAND, and is hereby authorized and directed forthwith to take possession of the property and liquidate the business and affairs of MIDLAND pursuant to Article 74 of the Insurance Law and to deal with the property and busi-

less affairs of MIDLAND in his name as Superintendent, and is vested with title to all of the property, licenses, corporate charters, contracts and rights of action of MIDLAND pursuant to Section 7405 of the Insurance Law; and it is further

ORDERED ~~AND ADJUDGED~~, that the notice of the aforesaid be given by publication in the national editions of The New York Times and The Journal of Commerce, commencing on or about the 16th day of April, 1936, and thereafter once a week for two successive weeks; and it is further

ORDERED ~~AND ADJUDGED~~, that notice of liquidation be given by publication of such notice in one newspaper in Washington, D.C., San Juan, Puerto Rico, the United States Virgin Islands and in all the Capital Cities of the States in the United States and the Capital of Canada, and in the newspapers in other cities to be selected by the Liquidator in his discretion, by publication of such notice once a week for two successive weeks within the period allowed for the filing of claims; and it is further

ORDERED ~~AND ADJUDGED~~, that the notice prescribed is sufficient notice to all persons interested in the assets of MIDLAND; and it is further

ORDERED ~~AND ADJUDGED~~, that notice of the making and entry of this order be given by the Superintendent, as Liquida-

ter, to the extent it can be reasonably ascertained, by mail to all policyholders, creditors and all other persons having any unsatisfied claims or demands of any character against the corporation in the possession of the Superintendent, as Liquidator, at the last known address of such persons as disclosed by said records and in such other manner and form as he in his discretion may find desirable, demanding that all persons indebted to MIDLAND render accounts of their indebtedness and pay any sums due to the Superintendent, as Liquidator; and giving notice to present proofs of claim with the Superintendent, as Liquidator, at a place specified in such notice within twelve months from the date of the entry of this Order and no later than the *7th* day of *April* 1987; and that such notice may contain such other rule regulations and information as the Superintendent, as Liquidator may deem necessary for the purpose of this proceeding in fixing and determining all lawful and valid claims and demands against the corporation; and it is further

ORDERED ~~AND ADJUDGED~~, that in the event one or more Insurance Departments and/or Guaranty Funds or Associations of foreign States that have adopted the Uniform Insurers Liquidation Act in which respondent was licensed to do business, desire to give formal notice to policyholders and creditors in their respective states to present proofs of claim to the respective State Insurance Department or Guaranty Fund or Association, the Superintendent, as Liquidator, may permit the giving of such

notice as he in his discretion may find desirable; and it is further

ORDERED ~~AND RESOLVED~~, that all outstanding policy and other insurance obligations as well as surety bonds and obligations thereunder of MIDLAND terminate and all liability thereunder cease and be fixed as of 12:01 A.M. Eastern Daylight Savings Time, 30 days after the signing of this Order, or prior thereto upon the procurement by policyholders of new insurance covering their risks insured thereby, as well as procurement by principals of new surety bonds covering the obligations thereunder and notice thereof shall be given as hereinabove set forth and it is further

ORDERED ~~AND RESOLVED~~, that all other subsisting contracts, leases, tax sharing agreements, individual labor contracts and other obligations of MIDLAND and all liability thereunder cease and be fixed as of the date of the entry of this Order; and it is further

ORDERED ~~AND RESOLVED~~, that the Superintendent, as Liquidator, is relieved of the provisions set forth in Section 7405 (c) of the Insurance Law, to wit: to reinsure in whole or in part the policy obligations of MIDLAND; and it is further

ORDERED ~~AND RESOLVED~~, that JAMES P. CORCORAN, the Superintendent or any successor in office as Superintendent, is hereby authorized, permitted and allowed to sell, assign and

transfer any and all stocks, bonds and securities in his possession or which may hereafter come into his possession belonging to MIDLAND, in liquidation, at market price or better, or when there is no market price, at the best price obtainable, at private sale and at such times and upon such terms and conditions as in his discretion he deems for the best interests of the creditors of MIDLAND, in liquidation, and that he be authorized, permitted and allowed to take such steps and to make and execute such agreements and other papers as may be necessary to effect and carry out such sales, transfers and assignments; and it is further

ORDERED ~~as above~~, that JAMES P. CORCORAN, the Superintendent or any successor in office as Superintendent, is hereby authorized, permitted and allowed to sell, assign and transfer the Corporate Charter of MIDLAND and any and all insurance licenses or certificates of authority to write insurance in such a method and manner as is to be approved by the Court; and it is further

ORDERED ~~as above~~, that the Superintendent of Insurance, as Liquidator of MIDLAND, be permitted in his discretion to continue contract negotiations for the sale of MIDLAND PROPERTY AND CASUALTY INSURANCE COMPANY in the present manner and format as has been already entered into by MIDLAND prior to this Order and that the consummation of the transaction be subject to a further order of the Court; and it is further

ORDERED ~~AND RECORDED~~ that MIDLAND, its officers, directors, trustees, policyholders, agents and employees and all other persons having any property or records belonging to MIDLAND, are hereby directed to assign, transfer and deliver to the Superintendent, as Liquidator, all of such property in whomever the same may be, and that any persons, firms or corporations having any books, papers or records relating to the business of said corporation shall preserve the same and submit them to the Superintendent, as Liquidator, for examination at all reasonable times; and it is further

ORDERED ~~AND RECORDED~~, that the officers, directors, trustees, policyholders, agents and employees of MIDLAND, and all other persons are enjoined and restrained from the further transaction of business or from dealing with or disposing of the property or assets of said corporation, or doing or permitting to be done any act or thing which might waste its property or assets or allow or suffer the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against said corporation, or its estate while in the possession and control of the Superintendent, as Liquidator; and it is further

ORDERED ~~AND RECORDED~~, that the officers, directors, trustees, policyholders, agents and employees of MIDLAND, and all other persons, including but not limited to claimants, plaintiffs and petitioners who have claims against MIDLAND, are per-

manently enjoined and restrained from bringing or further prosecuting any action at law, suit in equity, special or other proceeding against the said corporation or its estate, or the Superintendent and his successors in office, as Liquidator thereof, or from making or executing any levy upon the property or estate of said corporation, or from in any way interfering with the Superintendent, or any successor in office, in his possession or in the discharge of his duties as Liquidator thereof, or in the liquidation of the business of said corporation; and it is further

ORDERED ~~AND RECORDED~~, that all parties to law suits in this State and all other states and territories of the United States, are hereby enjoined and restrained from proceeding with any pre-trial conference, trial, application for judgment, or proceeding on judgments or settlements in such actions at law, suits in equity, special or other proceedings in which MIDLAND is obligated to defend a party insured or any other persons it is legally obligated to defend by virtue of its insurance contract for a period of 180 days from the date hereof; and it is further

ORDERED ~~AND RECORDED~~, that those persons who may have first party or New York Comprehensive Automobile Insurance Reparations Act (No-Fault) policyholder loss claims against MIDLAND coming within the purview of Article 76 of the Insurance Law,

are enjoined for 90 days from the date hereof from presenting and filing such formal claims in this proceeding pursuant to Section 7432 of the Insurance Law; and it is further

ORDERED ~~that~~, that all parties to Administration Hearings before the Workers' Compensation Board coming within the purview of Article 76 of the Insurance Law (Property and Casualty Security Fund) and Section 107 of the Workers' Compensation Law (Stock Workers' Compensation Security Fund) are hereby enjoined and restrained from proceeding with conferences, hearings, applications for judgments or proceedings on said judgments or other proceedings in which MIDLAND is legally obligated to defend an insured employer or any other person by virtue of their Workers' Compensation Contract for a period of 90 days from the date hereof; and it is further

ORDERED ~~that~~, that all parties to conferences before the Commissioner of the United States Department of Labor at various district offices in the United States, or Hearings before Administrative Law Judges of the Department of Labor and any ensuing appeals therefrom are hereby enjoined and restrained from proceeding with conferences, hearings, applications for judgments or proceedings on said judgments or other proceedings in which MIDLAND is legally obligated to defend or represent an insured employer or any other persons by virtue of their Longshore and Harbor Workers' Compensation Contract for a period of

90 days from the date hereof; and it is further

ORDERED ~~AND ADJUDGED~~, that all further papers in this proceeding shall bear the caption and be entitled:

"SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of
the Liquidation of
MIDLAND INSURANCE COMPANY"

in place and stead of the caption as heretofore used; and it is further

ORDERED ~~AND ADJUDGED~~, that the Superintendent, as Liquidator, may at any time make further application for such further and different relief as he sees fit.

E N T E R

151 T. J. H.
J. S. C.

DAILEY

I hereby certify that the foregoing
paper is a true copy of the original
thereof, filed in my office on the

3rd day of April, 1986

[Signature]

County Clerk and Clerk of the
Supreme Court New York County
NO FILE - OFFICIAL USE

Filed
4/13/86

New York County

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Liquidation of
MIDLAND INSURANCE COMPANY

Index No. 41294/86

Assigned to:
Hon. Michael Stallman

AFFIDAVIT OF SERVICE

-----X
STATE OF NEW YORK :
:ss:
COUNTY OF NEW YORK :

I, LOUIS T. GUARINO, being duly sworn, depose and say:

1. I am over 18 years of age and am a paralegal with the law firm of Budd Lerner, P.C., attorneys for Everest Reinsurance Company.

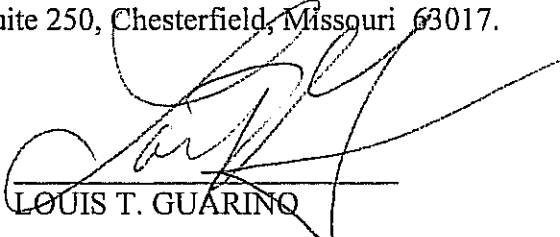
2. On August 10, 2006, I caused to be served the foregoing Notice of Motion to Modify Injunction and Affirmation of Vincent J. Proto in Support of Everest Reinsurance Company's Motion to Modify the Injunction to be served by hand delivery upon the following:

Office of the General Counsel
New York State Insurance Department
25 Beaver Street
New York, New York 10004

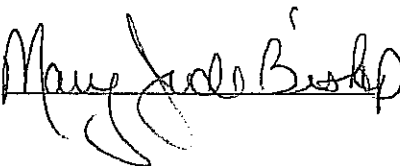
Liquidation Bureau
New York State Insurance Department
123 William Street
New York, New York 10004

3. On August 10, 2006, I caused to be served the foregoing Notice of Motion to Modify Injunction and Affirmation of Vincent J. Proto in Support of Everest Reinsurance Company's Motion to Modify the Injunction to be served by overnight, Fed Ex courier,

addressed to James C. Owen, Esq., McCarthy, Leonard, Kaemmerer, Owen, McGovern, Striler
& Menghini, L.C., 400 South Woods Mill Road, Suite 250, Chesterfield, Missouri 63017.


LOUIS T. GUARINO

Sworn to before me this
10th day of August, 2006.



MARY JUDE BISHOP
NOTARY PUBLIC, STATE OF NEW YORK
NO. 0160180005
QUALIFIED IN WESTCHESTER COUNTY
COMMISSION EXPIRES 8/27/2007

607860w