THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2021-0211

Appeal of Zurich Insurance plc, German Branch

INTERLOCUTORY APPEAL PURSUANT TO RULE 8 FROM AN ORDER OF THE MERRIMACK COUNTY SUPERIOR COURT

AMENDED OPENING BRIEF OF THE APPELLANT, ZURICH INSURANCE PLC, GERMAN BRANCH

September 13, 2021

ZURICH INSURANCE PLC,
GERMAN BRANCH

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Zurich Insurance plc, German Branch requests fifteen minutes of oral argument before the full court, to be presented by Peter Steffen

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

New Hampshire Cases

Federal Cases

Other State Cases

New Hampshire Statutes

Other Authorities

QUESTIONS PRESENTED

1. Did the trial court act within its discretion in granting the Liquidator's motion and approving the Claim Amendment Deadline on the law, facts and circumstances presented? (Zurich's Motion for Reconsideration, Appendix, Vol. I at 114)

2. Did the trial court act within its discretion in concluding that the Claim Amendment deadline strikes "a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims" in accordance with RSA 402-C:46, I? (Zurich's Motion for Reconsideration, Appendix, Vol. I at 121)

STATUTORY PROVISIONS

N.H. RSA 402-C:1, IV – Insurers Rehabilitation and Liquidation – Title, Construction, and Purpose

IV. Purpose. The purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors, through:

(a) Early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures, neither unduly harsh nor subject to the kind of publicity that would needlessly damage or destroy the insurer;

(b) Improved methods for rehabilitating insurers, by enlisting the advice and management expertise of the insurance industry;

(c) Enhanced efficiency and economy of liquidation, through clarification and specification of the law, to minimize legal uncertainty and litigation;

(d) Equitable apportionment of any unavoidable loss;

(e) Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process, and by extension of the scope of personal jurisdiction over debtors of the insurer outside this state; and

(f) Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business.

N.H. RSA 402-C:46, I – Insurers Rehabilitation and Liquidation – Distribution of Assets

I. Payments to Creditors. Under the direction of the court, the liquidator shall pay dividends in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims. Distribution of assets in kind may be made at valuations set by agreement between the liquidator and the creditor and approved by the court.

N.H. RSA 402-C:48, I – Insurers Rehabilitation and Liquidation – Termination of Proceedings

I. Liquidator's Application. When all assets justifying the expense of collection and distribution have been collected and distributed under this chapter, the liquidator shall apply to the court for discharge. The court may grant the discharge and make any other orders deemed appropriate, including an order to transfer to the state treasury for the credit of the insurance department any remaining funds that are uneconomic to distribute.

STATEMENT OF FACTS AND OF THE CASE

A. Statutory Background

RSA Ch. 402-C, the Insurers Rehabilitation and Liquidation Act, governs the powers granted to the New Hampshire Commissioner of Insurance when intervening in the affairs of financially troubled insurance companies. Specifically, the Act is designed to "protect the interests of insureds, creditors, and the public generally," by, among other things, providing for the "***equitable apportionment of any unavoidable loss***." RSA 402-C:1, IV (emphasis added).

Section 46 of the Act specifically provides that, under the direction of the Superior Court, "the liquidator shall pay dividends in a manner that will assure the proper recognition of priorities and ***a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims***, including third party claims." RSA 402-C:46, I (emphasis added).

Liquidators may apply to the court to terminate the liquidation once "***all assets justifying the expense of collection and distribution have been collected and distributed*** under this chapter." RSA 402-C:48, I (emphasis added).

B. The Home Liquidation

The Home Insurance Company ("Home") is a New Hampshire-domiciled insurance company that wrote insurance and reinsurance throughout the United States, as well as abroad. In the United Kingdom, Home's unincorporated branch operation wrote business as a member of the American Foreign Insurance Association ("AFIA"). Home and its

subsidiaries stopped writing all business in 1995. Apx. Vol. I[1] at 206-07, ¶ 3.

By an Order of Liquidation entered June 13, 2003, the Superior Court for Merrimack County declared Home insolvent and appointed the Insurance Commissioner as Liquidator to liquidate the company pursuant to the Insurers Rehabilitation and Liquidation Act, RSA Ch. 402-C ("the Act"). Apx. Vol. I at 164. The Order of Liquidation established a deadline for the initial filing of claims on June 13, 2004, though filed claims could continue to be amended after that date. *Id.* at 171.

According to the Liquidator's July 31, 2019 Motion for a Claim Amendment Deadline (the "Motion"), as of the time of the Motion, the Liquidator had approximately $808.4 million in cash and invested assets under its control and had an annual budget for its activities of $13.5 million. *Id.* at 209-11, ¶¶ 11, 15.

C. The Appellant

Zurich Insurance plc, German Branch ("Zurich"), is the successor-in-interest to Agrippina Versicherung Aktiengesellschaft, a member of a group, or "pool," of insurance companies that underwrote insurance and reinsurance risks from 1962 to 1967 through the M.E. Rutty Underwriting Agency Limited (the "Rutty Pool") in the United Kingdom. *Id.* at 264, ¶ 5. In 1977, Home, through its United Kingdom branch and AFIA, entered into reinsurance contracts with Zurich and other Rutty Pool members whereby Home reinsured 100% of the Rutty Pool liabilities of the various AFIA

[1] The two-volume Interlocutory Appeal Statement Appendix is cited herein as "Apx."

companies (the "AFIA Cedents").[2] *See In re Liquidation of Home Ins. Co.*, 154 N.H. 472, 474 (2006).

In 1984, as part of the Insurance and Reinsurance Assumption Agreement between Insurance Company of North America ("INA"), Home, and the AFIA Cedents, INA agreed to reinsure 100% of Home's reinsurance obligations for the Rutty Pool liabilities. *See id.* Thus, 100% of the liability for the underlying risks was to reside with INA, not Zurich, and not Home. Since that time, INA and its successor Century Indemnity Company, both member companies of the Chubb Group ("Chubb"), have been obligated to pay Home for its reinsurance obligations to the AFIA Cedents, including Zurich. *Id.* at 475.

On June 3, 2004, Zurich timely filed its proof of claim for recovery for any underlying claims made or to be made that are covered by its reinsurance agreement with Home. Apx. Vol. I at 272-78.

D. The AFIA Agreement with the Liquidator

After Home's liquidation proceedings commenced in 2003, the Liquidator proposed and entered into an agreement with Zurich and the other AFIA Cedents (the "AFIA Agreement"), under which each AFIA Cedent undertook to continue submitting all of its Rutty Pool claims to the Liquidator, who in turn would submit them to Chubb and other reinsurers of Home. *See* Apx. Vol. II at 332. This provided a great benefit to the Liquidator. Without the AFIA Agreement, AFIA Cedents would have no incentive to submit claims to the estate, because their claims were of a low

[2] Several AFIA Cedents have filed notices of interest in this appeal in support of Zurich's position.

"Class V" priority, unlikely to ever receive reimbursement, but the Liquidator could use their claims to collect reinsurance for the benefit of higher priority creditors. *See* Apx. Vol. II. at 54-55, ¶¶ 2-4.

In 2006, the Liquidator informed the New Hampshire courts that he would be able to recover an estimated $231 million of reinsurance from Home's reinsurers on AFIA claims for the enormous benefit of Home's priority creditors. *See In re Liquidation of Home Ins. Co.*, 154 N.H. at 477. This $231 million figure specifically included actuarial estimates for claims that were incurred but not yet reported ("IBNR"), a figure that Home advised the courts that it expected to increase. Apx. Vol. II at 55, ¶ 3 and fn.

In exchange for the filing of these claims by Zurich and other AFIA Cedents, the Liquidator undertook to distribute half of the net reinsurance recoveries (estimated in 2006 to be $69 million) to the AFIA Cedents, including Zurich, as Class I administrative expenses, and use the remainder to pay Home's priority creditors pursuant to the priority distribution order of creditors set forth under New Hampshire law. *See In re Liquidation of Home Ins. Co.*, 154 N.H. at 477. Thus, part of Zurich's bargained-for consideration when it entered into the AFIA Agreement was the recovery of a substantial percentage of its IBNR claims (for which it received priority Class I status), in exchange for providing claims on which Home could collect reinsurance and distribute that to its creditors.

Chubb objected to the agreement, but the New Hampshire Supreme Court ruled in 2006 that the AFIA Agreement was fair and reasonable. *In re: the Liquidation of the Home Insurance Company*, 154 N.H. 472 (2006). The Supreme Court found that "[Chubb] would reap a substantial windfall

in the absence of the proposed agreement by depriving Home's creditors of the amounts they would have paid but for Home's insolvency. This would frustrate the legislative purpose of obtaining full payment from reinsurers despite an insurer's insolvency." *In re: the Liquidation of the Home Insurance Company*, 154 N.H. at 488 (citing RSA 402–C:36 and RSA 405:49, I).

Further, the Court found that "the purpose of RSA Ch. 402–C is to protect preferred creditors by reserving assets for them, including people insured by Home, and people with claims against those insured by Home . . . . [New Hampshire law] provides that the statute should be 'liberally construed' to effectuate this purpose." *Id.* at 488 (citing RSA 402-C:1, IV; RSA 402-C:1, III). Moreover, the Court concluded, "the AFIA Cedents' claims are significant, totaling approximately $231 million. The substantial dollar amount of these claims suggests that ***it is reasonable to assume that collection proceedings would be lengthy, complex, and difficult***. Most importantly, as the superior court properly concluded, ***the agreement benefits the Class II claimants to Home's estate since it increases the likelihood that their claims will be paid.***" *Id.* at 490 (emphasis added).[3] Thus, the New Hampshire Supreme Court upheld the AFIA Agreement over the reinsurer's objection.

[3] The Court also noted that the AFIA Agreement would enable the Liquidator to "marshal assets to be distributed to creditors which would otherwise be unavailable." *Id.* at 483.

E. The Scheme of Arrangement

Pursuant to the AFIA Agreement, a scheme of arrangement between Home and the AFIA Cedents (the "Scheme") was implemented in 2004 pursuant to § 425 of the English Companies Act of 1985. *See* the Scheme, Apx. Vol. II at 59. The Scheme creates a dynamic to secure the Liquidator's recovery of reinsurance of AFIA Cedents' claims from Chubb and other reinsurers, which to date has resulted in many millions of dollars of recoveries for Home (and which in turn have been distributed to Home's priority creditors and to the AFIA Cedents). *Id.*

Pursuant to the Scheme, the Liquidator may enter into compromises with reinsurers of Home, including Chubb, with input from the AFIA Cedents. Apx. Vol. II at 113, ¶ 2.12. The Scheme can only terminate upon one of a defined set of termination events, such as the agreement of the Scheme Creditors' Committee (*i.e.*, the AFIA Cedents) or the discharge of Home's liabilities to the Scheme Creditors in full. *Id.* at 136, ¶ 7.1. None of those events have occurred, and none are proposed.

When the Scheme began, the Liquidator recognized that the potential for recoveries made reinsurance one of Home's "most valuable assets in relation to AFIA." *Id.* at 77, ¶ 8. This remains true today.

Due to the long-tail nature of much of the Rutty Pool business, which includes liability for asbestos, pollution and other types of long-tail claims, injured parties continue to file claims against the policyholders and ceding insurers of the Rutty Pool members, including Zurich, and those claims are reinsured by Home and, in turn, Chubb. *See* Apx. Vol. I at 264, ¶ 8. Via the Scheme, Home continues to receive reinsurance recoveries that are then used to pay Home's priority creditors and the bargained-for

consideration due to the AFIA Cedents. Indeed, the Liquidator reported to the Superior Court on September 17, 2020 that ***"[t]he collection of reinsurance is the principal remaining asset-marshaling task of the Liquidator."*** *See* Apx. Vol. II at 271, ¶ 16 (emphasis added).

F. Zurich's Separate Settlement Agreement with the Liquidator

Additionally, Home (as supervised by the Liquidator) entered into a settlement agreement specifically with Zurich, under which Home committed itself to investigate, adjust and admit or refute liability for all claims brought by policyholders and cedent insurance companies insured and reinsured by Zurich (and then Home) through the Rutty Pool. See Apx. Vol. I at 264, ¶ 7. Home obligated itself to "***do all things necessary*** to have [Home's] obligations admitted into Home's estate." *Id*. at 295, ¶ 6.3.2 (emphasis added). Home is thus contractually bound to handle Zurich's claims, do all things necessary to have them admitted into Home's estate, collect reinsurance recoveries, and distribute a portion of such recoveries to Zurich, with the remainder available to pay Class II creditors.

G. The Motion for a Claim Amendment Deadline

On July 31, 2019, the Liquidator filed the Motion at issue asking the Superior Court to impose a final claim amendment deadline of 150 days after the entry of the Court's order granting the Motion. Apx. Vol. I at 180. The Motion is an obvious prelude to the ultimate termination of the liquidation. The Motion sought, among other things, to cut off IBNR claims of Home's remaining creditors and to set a definitive date for creditors to report to the Liquidator their final remaining non-contingent claims. After such a deadline is in place, Zurich would no longer be able to

update its proof of claim to reflect the new reporting of underlying claims that would otherwise be covered by Zurich's reinsurance agreement with Home.

Zurich and other AFIA Cedents, however, as well as policyholder creditors of Home, still have substantial amounts of contingent IBNR claims that have yet to be submitted to the Liquidator but which will eventually crystallize and become non-contingent claims. As this Court set forth in 2006, reinsurance recoveries on these claims will continue to benefit Home's priority creditors and will prevent Chubb from gaining an unfair windfall to the detriment of those creditors.

Zurich, along with several other AFIA Cedents and other parties, objected to the Motion. Apx. Vol. I at 224. Following oral argument, the Superior Court granted the Motion. Add.[4] at 47, 64. Zurich then moved for reconsideration of the Court's Order. Apx. Vol. I at 114. While the Superior Court did correct several errors in its first order by removing an incorrect analysis of a supposed ability of the Liquidator to disavow contracts and an inaccurate reference to the conclusion of statutes of limitation for a specific kind of long-tail claim (sex abuse) that had not yet concluded, it ultimately denied Zurich's Motion. Add. at 65, 72-73.

This interlocutory appeal followed.

[4] The Addendum attached to this brief containing the two Superior Court rulings at issue is cited herein as "Add."

SUMMARY OF THE ARGUMENT

The Superior Court acted outside of its discretion in approving a claim amendment deadline based both upon the requirements of New Hampshire law and the specific circumstances of the objections launched by Zurich and others.

New Hampshire law requires a "reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims." RSA 402-C:46, I. It further requires the collection and distribution of all assets (when justified by expense) prior to termination of a liquidation and the equitable apportionment of any unavoidable loss. RSA 402-C:48, I; RSA 402-C:1, IV. The claim amendment deadline approved by the Superior Court, however, would prematurely end Home's liquidation proceeding far earlier than other large insurance company liquidation proceedings and thereby: 1) forfeit assets in the form of reinsurance recoveries that would benefit priority creditors of Home and 2) bar claims by Home's policyholders that will become ripe for filing over the next several years for losses arising from asbestos, pollution, talc, and other long-tail liabilities of Home that have already been incurred, but are not yet reported.

The Superior Court approved the deadline without engaging in a proper balancing as required by New Hampshire law, because the Liquidator never provided the Superior Court with estimations of the monetary amount of claims that will be cut off by the deadline or the reinsurance assets yet to be recovered by Home. Enactment of the claim amendment deadline now will result in unliquidated claims being

completely unprotected, unavoidable losses apportioned no recovery, and assets of Home's estate left uncollected. In each respect, these consequences of a premature claim amendment deadline run afoul of New Hampshire law and demonstrate the Superior Court's abuse of its discretion.

Furthermore, the Superior Court's order abruptly ends the process set forth in the AFIA Agreement approved by the New Hampshire Supreme Court in 2006 that bestows Class I status on amounts due Zurich and other AFIA Cedents in order that reinsurance recoveries can be made to benefit priority creditors of Home. The order also ignores Home's specific contractual duty to Zurich to do "all things necessary" to ensure Zurich's claims are admitted into Home's estate.

For each of these reasons, the Superior Court acted outside its discretion and Zurich respectfully requests that this Honorable Court reverse the Superior Court's order and remand it for further proceedings consistent with this Court's order.

ARGUMENT

I. Standard of Review

The standard of review by this Court involves both factual and legal questions. This Court will uphold the findings of the Superior Court unless they are "an unsustainable exercise of discretion." *Bennett v. ITT Hartford Grp., Inc.*, 150 N.H. 753, 760 (2004) (insurance coverage case setting forth standard of review of matters within discretion of trial court). In making such a determination, this Court considers "whether the record establishes an objective basis sufficient to sustain the discretionary decision made." *State v. Mitchell*, 166 N.H. 288, 291 (2014). However, this Court "review[s] the trial court's application of the law to the facts *de novo*." *DuPont v. Nashua Police Dep't*, 167 N.H. 429, 434 (2015). "Statutory interpretation is a question of law, which [the Court] review[s] *de novo.*" *Everett Ashton, Inc. v. City of Concord*, 169 N.H. 40, 44 (2016); *Balise v. Balise*, 170 N.H. 521, 523 (2017) (the New Hampshire Supreme Court is the "final arbiter" of legislative intent and begins its examination by ascribing the "plain and ordinary meaning" of statutory language).

II. Approving a Claim Amendment Deadline Without Quantification of the Estate's Assets and Liabilities Is an Unsustainable Exercise of Discretion that Fails to Reasonably Balance Competing Interests as Required by New Hampshire Law

The fundamental question in this appeal is whether the Superior Court was correct in determining that a claim amendment deadline is justified at this stage of the liquidation in the absence of evidence regarding the estate's assets and liabilities. Under New Hampshire law, such a deadline must respect the "reasonable balance" that must exist between the

expeditious completion of the liquidation and the protection of unliquidated and undetermined claims. RSA 402-C:46, I. Here, though, the Liquidator provided no estimate of either the estate's unrecovered assets or remaining liabilities that would allow such an analysis to take place.

The deadline is a momentous event in the history of this liquidation, because it will cut off all creditors' IBNR claims, regardless of their class. These creditors once dutifully paid premium to Home, expecting coverage for such claims. In the case of any IBNR claims that are reinsured, such as those of Zurich and other AFIA Cedents, the deadline will also end the collection of reinsurance recoveries. The ultimate distribution of those recoveries benefits both Class II Claimants and Zurich as a Class I recipient of administrative expenses. Despite the significant nature of the Liquidator's requested relief, the Motion was approved without the evidence necessary to truly balance the interests of the affected parties as required by New Hampshire law.

In finding that establishment of a claim amendment deadline was in accord with a "reasonable balance" under New Hampshire law, the Superior Court emphasized: (a) the length of the liquidation to date, and (b) that AFIA Cedents' claims were of a low "Class V" priority. Add. at 60.

As discussed further at pp. 33-34 below, the length of the Home liquidation is not a dispositive fact, in light of both this Court's 2006 order and a comparison to other liquidation proceedings of longer duration. With regard to the argument that AFIA Cedents claims are only of Class V status, the AFIA Agreement accords amounts due AFIA Cedents Class I status and also provides a benefit to Class II priority creditors that the Superior Court erroneously disregarded.

Moreover, the Act's purpose is, among other things, to allow for the "***equitable apportionment of any unavoidable loss***." RSA 402-C:1, IV (emphasis added). Establishment of a deadline that cuts off IBNR means no apportionment will be made to such losses that have been incurred but are yet to be reported by any claimant, ***regardless of class***, and these unliquidated claims will be left completely unprotected. Further, termination of the liquidation, which will follow any claim amendment deadline, should only occur when "***all assets*** justifying the expense of collection and distribution have been collected and distributed." RSA 402-C:48, I. With claims still being reported, and assets in the form of reinsurance recoveries still to be collected and distributed to priority creditors, this is not the time under New Hampshire law to set a claim amendment deadline and end the liquidation. To do so would not just harm Zurich and similarly situated AFIA Cedents, but all Class II claimants who stand to collect a portion of these assets.

A. The Superior Court Erred by Failing to Follow the 4-Part Test Proposed by the Vermont Supreme Court in *Ambassador*

While there is no binding New Hampshire authority directly on point, the Vermont Supreme Court addressed and denied such a motion of a liquidator in another insurer insolvency proceeding under the same statutory framework in *In re Ambassador Insurance Co.*, 2015 VT 4, 114 A.3d 492 (2015).

Ambassador applied Vermont's insurer rehabilitation and insolvency act, which contains the same language as the Act at issue here. Thus, it provides particularly persuasive authority.[5]

Ambassador involved an insolvent property/casualty insurer that was placed into receivership in 1983. *In re Ambassador*, 114 A.3d at 493. The court issued a liquidation order in 1987 and set a deadline of March 1, 1988, for the filing of initial claims and accompanying proofs of loss. *Id.*

In the early 1980s – before the liquidation proceedings began – Ambassador issued two long-tail occurrence-based excess liability policies to AP Green Industries, a manufacturer of products containing asbestos. *Id.* at 495. By the early 2000s, AP Green's liability for asbestos claims covered by those excess policies reached the levels that could have eventually triggered the policies. *Id.*

Meanwhile, in June 2010, years after the insurer was placed into liquidation, the liquidator "filed a motion with the superior court to establish a deadline by which all claimants, including those who previously filed policyholder-protection claims, would need to file final and complete proofs of claim." *Id.* at 496. AP Green's successor-in-interest objected on

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[5] The New Hampshire Supreme Court has acknowledged the good practice of relying on persuasive authority from sister states in rendering decisions under New Hampshire law. *See In re Waterman*, 154 N.H. 437, 442 (2006) (rendering a holding "[i]n light of the above discussion of the persuasive authority from other jurisdictions[.]"); *In re Opinion of the Justices*, 129 N.H. 714, 718 (1987) (stating "[i]n so holding, we come to the same conclusion that other courts have reached when confronted with questions similar to those posed to us," citing to multiple sister state authorities, then recognizing "the weight of such persuasive authority") (citations omitted).

the grounds that it was too soon to set a deadline because it would unreasonably limit claimants' ability to submit proof of long-tail claims under the two excess policies. *In re Ambassador*, 114 A.3d at 496. The lower court rejected that argument and set a final deadline for submitting claims. *Id.*

On appeal, the Vermont Supreme Court analyzed whether the trial court unreasonably imposed a final claim amendment date that was too early. *Id.* at 497. The Court discussed two "legal considerations" that affected whether the final claim date was reasonable. First, "any final claim date must be consistent with the terms and goals of the liquidation order," including distributing assets "in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third-party claims." *Id.* at 498 (internal quotation marks omitted).[6] Second, "any final claim date must be consistent with the critical goal of the liquidation process: the protection of the public in general and policyholders in particular." *Id.* The Vermont Supreme Court found:

> The policyholders in this case paid good money for the insurance they purchased. Members of the public who have sustained injuries for which the policyholders are liable may also suffer if the contracted-for insurance is not available to

[6] As noted above, New Hampshire's statutory language is identical. *See* RSA 402-C:46, I ("Under the direction of the court, the liquidator shall pay dividends in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims.").

> the policyholder[s]. When an insurer is insolvent, frustration of some policyholders' contractual expectations and a lack of coverage for some injured innocent third parties may be inevitable, ***but courts and liquidators should be loath to cut off valid claims in the face of ample funds to pay those claims without good reason.***

In re Ambassador, 114 A.3d at 498 (emphasis added) (citation omitted).

There were two additional facts in the case that justified a longer liquidation proceeding. First, much of the insurance written by Ambassador was for "excess coverage for long-tail claims," and "[i]njury caused by the risks insured by Ambassador—including disease caused by asbestos exposure—often does not declare itself until years, even decades, after the underlying exposure." *Id.* at 499 (citing *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973); M. Veed, *Cutting the Gordian Knot: Long-Tail Claims in Insurance Insolvencies*, 34 Tort & Ins. L.J. 167, 169 (Fall 1998) (included at Apx. Vol. II at 182, 184). Second, the Ambassador liquidator still had substantial undistributed assets on hand ($92 million); thus, there were still ample funds available to pay future claims. *In re Ambassador*, 114 A.3d at 499–500. The Court also found that there were ample funds to sustain the liquidation's administrative costs for several more years. *Id.* at 500-01.

The Vermont Supreme Court then employed a well-considered framework for analyzing whether a proposed final claim amendment deadline in an insurance liquidation proceeding would foster a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims of creditors.

Specifically, the Vermont Supreme Court held that courts facing this issue should analyze and weigh the following four factors: "(1) the company's remaining assets; (2) the nature and amount of its remaining liabilities; (3) the administration costs of the estate; and (4) the extent to which delay in termination of the liquidation proceedings results in a delay of full payment to priority claim holders." *In re Ambassador*, 114 A.3d at 500.

The Court then evaluated and applied these four factors and held that the trial court's final claim amendment deadline date failed to strike a "reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims." *Id.* (internal quotation marks omitted). The Court "recognize[d] that this liquidation has continued for quite some time—nearly three decades—***but the length of the liquidation is not in and of itself sufficient to justify cutting off valid but not fully ripe claims under the Ambassador policies when funds remain to pay those claims and the estate can be administered economically***." *Id.* at 501 (emphasis added). By denying the liquidator's premature motion for a final claim amendment deadline, the Court's decision has allowed the *Ambassador* liquidation proceeding to continue without fixing a final cutoff date for amendments of claims, thereby permitting IBNR to develop into non-contingent paid claims that can be included in the creditors' claims against the Ambassador estate. Six years after the *Ambassador* decision, the liquidation is ongoing, and creditors' claim amendments continue to be accepted with no deadline in place for finalizing claims.[7]

[7] *See* https://ambassadorliquidation.com.

The Superior Court, however, declined to apply *Ambassador*, mistakenly finding that the motion at issue in *Ambassador* was different than the Motion at issue here. That is incorrect. Even the Liquidator acknowledged as much in its Response to Zurich's Motion for Reconsideration. Apx. Vol. I at 143. The Superior Court ignored the parties' agreement on this point in its ruling on the Motion for Reconsideration, continuing to insist that *Ambassador* involved a different kind of requested relief. Add. at 68. Both motions, however, involve a deadline for the final amendment of previously submitted proofs of claim and both motions seek to cut off IBNR claims. Thus, the Superior Court's cited rationale in ignoring *Ambassador* is unavailing. The Superior Court erred in refusing to apply the *Ambassador* framework to the Liquidator's requested relief. Fair application of the *Ambassador* test would result in denial of the Motion on the current record.

B. Application of the *Ambassador* Test Would Result in a Denial of the Motion

Were the *Ambassador* test to be applied here, all four factors weigh in favor of denying the Liquidator's Motion to impose, at this time, a final claim amendment deadline that would deprive Home of substantial additional reinsurance recoveries/assets, and Home's creditors of bargained-for coverage.

First, with regard to the Company's remaining assets, Home's Estate still has over $800 million in undistributed assets and, in addition, has substantial reinsurance recoverables that will be due on non-contingent claims that will further augment the Estate's assets in the foreseeable future.

The Liquidator, however, failed to provide the Superior Court with any estimate of the reinsurance assets that will be foregone by virtue of a premature claim amendment deadline. And Home's reinsurance is not limited to the reinsurance of AFIA-related claims. Home has other reinsurance available to it, including but not limited to, its agreements with BAFCO Reinsurance Company Ltd. of Bermuda ("BAFCO").[8] In 2019, Home recovered $16.7 million in reinsurance, more than enough to offset its operating budget. Apx. Vol. II at 280. In August 2020, the Liquidator reported more than $10 million on one quarterly report for Class V claims for which there was a "partial reinsurance allowance" – most of which was unrelated to AFIA Cedents. *Id.* at 302-03. Without knowing how much future reinsurance would be given up, it is impossible to fully understand Home's remaining assets and apply the first part of the *Ambassador* test.

Second, with regard to the nature and amount of remaining liabilities, the IBNR claims that the Motion seeks to cut off are long-tail claims insured or reinsured by Home arising primarily from products injurious to humans (such as asbestos, silica, and talc), but also perhaps from harmful acts that occurred many years ago (such as child sexual abuse[9] and sports head injuries), which, by their nature, take decades to

[8] BAFCO is the predecessor-in-interest to Century International Reinsurance Company Ltd.

[9] Notably, many states are in the process of reviving statutes of limitation for sex abuse claims, meaning that creditors of Home may face decades-old claims only now being brought for the first time. *See, e.g.*, Cal. Code of Civil Proc. § 340.1(q). The Home's insureds and reinsureds paid for coverage expecting that Home would respond to claims brought against them. Obviously, the liquidation process means those insureds and reinsureds will not receive payment for the entirety of their claims, but they

become reported claims. Thus, just as in the *Ambassador* liquidation, here there are substantial long-tail claims that will not be reported for years, making an early deadline unreasonable because it would deny coverage for these claims.

There is one important difference between the application of this prong of the test in *Ambassador* and any attempt to apply it on the facts presented here. In *Ambassador*, the liquidator supplied the Vermont courts with an estimate of IBNR. *In re Ambassador*, 114 A.3d at 494, ¶ 7 ("In addition, the liquidator estimates that the amount of unknown, unasserted potential future claims is around $13 million."). In support of its Motion here, however, the Liquidator did not even attempt to quantify the claims arising from such IBNR of all creditors (regardless of class) that would be entirely cut off by a premature and unjustifiably early claim amendment deadline. The Superior Court then summarily concluded that "no party to this action is in a position to produce a reliable estimate of the value of IBNR claims … ." Apx. Vol. I at 36.

That conclusion, however, erroneously ignored two key facts: 1) the Liquidator asked ***this Court*** to rely on an estimate of IBNR in 2006 when it sought approval of the AFIA Agreement (p. 12, *supra*); and 2) the *Ambassador* liquidator provided an IBNR estimate to the Vermont courts.

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should at least have the opportunity to seek their proportionate reimbursement for all claims that they are able to file prior to the expiration of statutes of limitations. By seeking to impose a claim amendment deadline that is so premature that even statutes of limitations have not yet expired for claims that state legislatures have determined are deserving of compensation, the Motion effectively seeks to bring this liquidation to a close too quickly.

Calculating IBNR is something insurance companies like Home perform in the regular course of business. It was error not to consider the estate's IBNR before implementing a claim amendment deadline that forever ends the ability of creditors to receive recovery on such claims.

Without an IBNR calculation, there was insufficient evidence for the trial court to determine whether the claims amendment deadline strikes a "reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims." RSA 402-C:46, I; *see also* RSA 402-C:48,I (requiring that the Liquidator may apply to the court to terminate the liquidation once "all assets justifying the expense of collection and distribution have been collected and distributed under this chapter"). In *New Hampshire-Vermont Physician Serv. v. Durkin*, this Court remanded a decision of the Insurance Commissioner finding that the opinion of an actuary of the insurance department who presented only conclusory opinions, not facts, was insufficient evidence to support position that 10-day reserve would be adequate to protect a medical services corporation's subscribers. *See New Hampshire-Vermont Physician Serv. v. Durkin*, 113 N.H. 717, 723-724 (1973); *see also New Hampshire-Vermont Hospitalization Serv. v. Whaland*, 114 N.H. 92, 96 (1974) (similarly holding that evidence in record was insufficient to sustain finding that ten-day reserve "would be adequate to ensure the successful operation of the New Hampshire Blue Cross plan"). This Court should similarly remand this case to require a calculation of IBNR, as the Liquidator has done before, and provide that information to the trial court for consideration.

Despite the Liquidator's inexplicable failure to provide this Court with current information, there is undoubtedly IBNR that will be cut off if the premature claim amendment deadline is adopted, resulting in claims that will be fully borne by Home's insureds and reinsureds and foregone reinsurance recoveries on those liabilities of Home. The proposed settlement between Home and Johnson & Johnson ("J&J") demonstrates this, as it provides a release by J&J of the Liquidator of any future claims J&J may have under its policies with Home. Apx. Vol. I at 155.[10] That is standard language appearing throughout Home's settlements, and it demonstrates that IBNR was part of J&J's approved claim. For creditors such as Zurich that have not entered into such settlements with the Liquidator, their IBNR claims will be forfeited by a premature claim amendment deadline and policyholders or reinsureds like Zurich that faithfully paid premiums to Home will now bear the full costs of those claims. This is particularly notable in the case of Zurich and other AFIA Cedents, because they would then be left holding the bag for 100% of claims that they once believed were ultimately reinsured by Chubb, ***which is not even an insolvent entity***.

While calculation of IBNR is necessarily an estimation, it is underpinned by mathematics and actuarial science. The Liquidator was able to provide this Court with an estimate of IBNR seventeen years ago,

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[10] The proposed settlement itself can be found on the Superior Court's docket at: http://www.hicilclerk.org/DocsDB/2020.nsf/0FDF1FFECF349E1C8525864E00633A23/$file/Motion%20to%20Approve%20Settlement%20with%20Johnson%20&%20Johnson%20(A1604579).DOCX.pdf?OpenElement

when it reported that the AFIA Agreement for which it sought approval would lead to $231 million in reinsurance recoveries, including IBNR. No claim amendment deadline should be granted without an objective and independent review of both IBNR and future reinsurance recoveries.

Third, with regard to the administration costs of the estate, the annual costs to administer Home's estate are modest when compared with the estate's current assets, and these administrative expenses have declined substantially over the course of the liquidation. The annual budget of Home's administrative costs has decreased by 50% over the last 15 years (*see* Apx. Vol. I at 186), and likely will continue to decrease further. One year of administrative costs constitutes only 1.6% of the $808.4 million in Home's currently remaining assets. Thus, there are ample assets to cover Home's operating costs while additional claims are made against Home and additional reinsurance recoveries accumulate to pay those costs and reimburse claimants.

Moreover, if Zurich and other AFIA Cedents are afforded the time and opportunity to commute their IBNR claims with their own cedents or policyholders, then there will be a sudden influx of reinsurance recoveries at one time when that commutation is presented as one claim to the estate (rather than stretching out over the years it takes individual underlying claims to be reported) that will offset Home's annual administrative budget.

The appropriate action in accord with New Hampshire law to minimize the estate's administrative costs while still benefitting Home's creditors is to adopt a procedure to calculate IBNR, facilitate commutations, obtain reinsurance recoveries on those commutations, and only thereafter terminate the liquidation proceeding once "all assets

justifying the expense of collection and distribution have been collected and distributed … ." RSA 402-C:48, I.

Fourth, with regard to any delay in making final payments, the Liquidator has already made numerous interim distributions to priority creditors, and keeping the liquidation open would not delay further interim distributions to these priority creditors.

Given the distributions already made to Class II policyholders, priority creditors have not had to wait to receive partial payments. Further, the Liquidator concedes that additional interim distributions can be made on approved claims while the liquidation remains open. Apx. Vol. I at 181. Thus, priority creditors will not be disadvantaged by keeping Home's estate open; in fact, they will benefit from Home's reinsurance recoveries and will be able to amend their current claims for which Home is liable.

In addition, as the Vermont Supreme Court wrote in *Ambassador,* "the length of the liquidation is not in and of itself sufficient to justify cutting off valid but not fully ripe claims … when funds remain to pay those claims and the estate can be administered economically." *In re Ambassador Insurance Company, Inc.*, 114 A.3d at 501. Thus, the mere fact that a denial of the Motion will result in delaying the conclusion of this liquidation does not, in and of itself, warrant granting the Motion to the detriment of future long-tail claimants and creditors.

It is important to note that it is common for liquidation proceedings of property/casualty insurance companies with long-tail IBNR liabilities to last multiple decades. Indeed, imposing an early final claim amendment deadline only 18 years after Home was placed into liquidation would be contrary to the precedent established by other liquidations. *See In re*

Ambassador Insurance Company, Inc., 114 A.3d 492 (thirty-four years, beginning in 1987 and no claim amendment deadline has been set); *In re Liquidation of Integrity Ins. Co.*, 193 N.J. 86, 935 A.2d 1184 (2007) (nearly thirty years, beginning in 1987 and concluded in 2016, https://www.nj.gov/dobi/finreceivership/integrityfinalorder160106.pdf); *In re Liquidation of Midland Ins. Co.*, 16 N.Y.3d 536, 947 N.E.2d 1174, 1176 (2011) (nearly thirty years; entered into liquidation proceedings in 1986 and final claim amendment deadline of December 31, 2015, http://www.nylb.org/Documents/Midland_POC2015Order.pdf); *Pac. Mut. Life Ins. Co. of Cal. v. McConnell*, 44 Cal. 2d 715, 719, 285 P.2d 636, 637 (1955) (nearly thirty years; entered into liquidation proceedings in 1937, was still proceeding through the judicial system in 1955, and closed in 1967, https://www.caclo.org/perl/companies.pl?closed=1).[11] These other proceedings demonstrate how unusually early it would be to impose a final claim amendment deadline on Home's creditors now, after only eighteen years have elapsed, particularly given the massive size of this liquidation and the long-tail nature of the claims involved.

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[11] *See also* Liquidation of Union Indemnity Insurance Company of New York (twenty-five years; entered into liquidation in 1985 and final claims date entered in 2010, http://www.nylb.org/UnionIndem.htm), Liquidation Proceedings of Pine Top Insurance Company (twenty-three years; entered into liquidation proceedings in 1987 and final claims deadline in 2010, https://www.osdchi.com/closed/pinetop.htm); Liquidation Proceedings of American Mutual Reinsurance Company (twenty-one years; began in 1988 and closed in 2009, https://www.osdchi.com/closed/americanmutual.htm); Liquidation Proceedings of Los Angeles Insurance Company (twenty-one years; began in 1973 and closed in 1994, https://www.caclo.org/perl/index.pl?document_id=d7a1369866b95e9d6df5726826ad88f1).

Therefore, upon application of the four-factor *Ambassador* test, the proposed deadline does not, on the record provided by the Liquidator and accepted by the Superior Court, strike a "reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims" as required by RSA 402-C:46, I.

C. Even if This Court Fashions a Different Test, the Liquidator Must Estimate Assets and Liabilities in Order for a Reasonable Balance to be Determined Under New Hampshire Law

Even if the *Ambassador* test is not specifically applied, some framework must be used to determine whether this is the appropriate time for a claim amendment deadline. In fashioning any test, consideration must first be given to the purpose of the Act, and specifically to providing for the "equitable apportionment of any unavoidable loss." RSA 402-C:1, IV. Furthermore, pursuant to New Hampshire law, there must be a "reasonable balance" between unliquidated claims and the expeditious completion of the liquidation. RSA 402-C:46, I. Finally, the fact that such a deadline is a prerequisite to termination of the liquidation should be considered. Any plan for a deadline must account for the Act's requirement for the collection of all economically justifiable assets prior to termination. RSA 402-C:48, I. Thus, any balancing requires analysis of the amount of future claims that will be forever barred and the amount of reinsurance recoveries that will be forever lost.

The IBNR forfeited by the Liquidator's requested relief consists of "unliquidated and undetermined" claims entitled to protection under New

Hampshire law. RSA 402-C:46, I. These claims represent liabilities for which Home's policyholders paid premium for coverage, and which, by virtue of a premature claim amendment deadline, would have to be borne in their entirety by those policyholders.

IBNR can be estimated. When it was to the Liquidator's advantage to rely on IBNR when it wanted this Court to approve the AFIA Agreement in 2006, the Liquidator estimated IBNR and asked this Court to rely on it. With the benefit of another fifteen years of claim development, an estimate of IBNR today should be even more accurate.

Once IBNR is estimated, then the reinsurance asset yet to be recovered can also be estimated across the breadth of Home's reinsurance program (*i.e.*, not merely reinsurance relating to AFIA Cedents' claims). The Superior Court, however, approved the claim amendment deadline without any consideration of what assets are being given up that could then be used to pay priority creditors in order to provide an "equitable apportionment of any unavoidable loss." RSA 402-C:1, IV. Further, without estimation of this asset, the Superior Court could not know whether its collection is economically justifiable, which is a prerequisite to termination of the liquidation. RSA 402-C:48, I. Enacting a deadline now without knowing the value of that asset sets up a *fait accompli* when, upon the Liquidator's eventual motion for termination, those assets can no longer be collected and thus cannot be factored into a court's analysis of such a motion as required under RSA 402-C:48, I.

Moreover, given this Court's edict that the AFIA Agreement "benefits the Class II claimants" (*In re Liquidation of Home Ins. Co.*, 154 N.H. at 490), any balancing exercise must account for the benefit those

claimants receive from the recovery of these assets. This analysis requires the IBNR and reinsurance recoverable information the Liquidator has not provided. It was an abuse of the Superior Court's discretion to cast the AFIA Agreement aside without regard for the value of IBNR when this very Court expressly considered IBNR at the time it approved the AFIA Agreement.

By not providing the necessary information, the Liquidator left the Superior Court with no ability to assess alternative outcomes, such as an extended deadline or the continuation of interim payments to priority creditors. *See* p. 32, *infra*. Ruling on the Motion now need not be an "all or nothing" proposition. Indeed, interim payments could continue to be made to priority claimants while further assets are recovered in the years ahead and then additional payments to those priority claimants are made.

Rather than consider these factors, however, the Superior Court ruled on an incomplete record. Simply put, the Liquidator has not met its burden of proof as the moving party. Applying any balancing test without this information is impossible, and thus the Court's conclusion that the Liquidator's balancing of interests was "reasonable" is an error of fact and law and outside its discretion under New Hampshire law.

III. The Superior Court Erred in Granting the Motion for Other Reasons Applicable to Zurich's Circumstances

A. Imposing a Deadline at this Time Conflicts with the AFIA Agreement Approved by this Court, as well as Zurich's Settlement with the Liquidator

Additionally, the Superior Court erred in imposing a deadline that is at odds with the agreements the Liquidator invited and entered into with Zurich and other AFIA Cedents in the early 2000s. In its initial order, the Superior Court wrote that the Liquidator has the extraordinary power to "disavow" its contracts, so the Superior Court did not consider the AFIA Agreement or Zurich's settlement agreement. Add. at 60. After both Zurich and the Liquidator informed the Superior Court that the Liquidator had no such power to disavow post-liquidation agreements such as these, the Superior Court reconsidered its order, but found that these agreements had "no bearing" on its decision because the agreements did not specifically address how long the Liquidator must accept amended claims. Add. at 68.

Thus, even upon reconsideration, the Superior Court completely disregarded the AFIA Agreement approved by this Court and Zurich's separate settlement agreement with the Liquidator. Though the Superior Court emphasized that the AFIA Agreement did not "address how long the Liquidator is obligated" to accept such claims (*id.*), ***this Court's 2006 ruling did***. There, this Court wrote that "it is reasonable to assume that collection proceedings would be lengthy, complex, and difficult." *In re Liquidation of Home Ins. Co.*, 154 N.H. at 490. When the collection proceedings turned out to be lengthy as predicted, their length should not have been used by the Superior Court as a rationale – let alone the primary rationale - to end them.

The Liquidator negotiated a deal with Zurich and the other AFIA Cedents that benefitted both parties – and Home's priority Class II creditors. The Liquidator represented to this Court that $231 million of reinsurance assets would be collected if the Court approved the AFIA Agreement. That amount ***included*** IBNR. Zurich's ability to recover a portion of that IBNR was part of the offered consideration for its entering into that agreement that benefitted the Liquidator and prior claimants.

Moreover, Paragraph 6.3 of the Agrippina/Zurich Settlement Agreement with the Liquidator provides that Home will respond to claims asserted by policyholders against Zurich's policies and "***do all things necessary*** to have [Home's] obligations admitted into Home's estate." Apx. Vol. I at 295, ¶ 6.3.2 (emphasis added). The proposed claim amendment deadline ends the process of accepting Home's obligations and cuts off the flow of future reinsurance recoveries the Liquidator once touted to this Court. If IBNR would be cut off now by the Liquidator's proposed claim amendment deadline, then when future claims are reported and brought by policyholders and cedent insurers of the AFIA Cedents, Zurich would lose the bargained-for reinsurance coverage from Home and Home would not be able to collect reinsurance from Chubb to pay Class II priority creditor claims. Plainly, imposition of a deadline also means the Liquidator is not doing "all things necessary" to have Zurich's obligations admitted into Home's estate; in fact, with regard to Zurich's IBNR, the Liquidator is actively trying to prevent the admission of those obligations.

If, however, the Superior Court's order is reversed, Home and Chubb will continue to handle future claims brought against Zurich, and reinsurance recoveries arising from those claims will continue to benefit

both Home and the AFIA Cedents as all parties envisioned when they entered into these agreements. Home will then be living up to its obligations under these agreements and this Court's 2006 plan for the recovery of reinsurance assets to benefit priority creditors until a requisite showing has been made under New Hampshire law that it should end.

B. Imposing a Premature Deadline Conflicts with the Scheme of Arrangement that Binds Home

The Scheme of Arrangement initiated by and binding upon Home is also at odds with the Liquidator's proposed early claim amendment deadline. The January 22, 2004 agreement with all AFIA Cedents implements the Scheme of Arrangement between Home and the AFIA Cedents and imposes a binding contractual obligation on the Liquidator to pay the AFIA Cedents 50% of the Liquidator's reinsurance recoveries (less specified deductions, such as offsets asserted by the reinsurers) for their claims, with the other 50% remaining for use to pay Class II claimants. Apx. Vol. II at 332.

The Scheme also expressly authorizes the Liquidator to enter into commutations with Home's reinsurers. Apx. Vol. II at 113, ¶ 2.12. Unbeknownst to Zurich until recently, however, the Liquidator ended these efforts to collect IBNR amounts that would benefit Home's priority creditors. Apx. Vol. I at 266, ¶¶ 12-13. This failure by the Liquidator to commute with Home's reinsurers coupled with the request for a premature claim amendment deadline has frustrated the very purpose of the Scheme, which was to allow the Liquidator to collect claims – including IBNR – from Home's reinsurers. The result is a proposed premature claim amendment deadline that unfairly and unreasonably bestows a windfall on

Home's reinsurers, to the detriment of both Class II creditors and the AFIA Cedents, including Zurich. The Liquidator should live up to its contractual obligations, maximize reinsurance recoveries, and later propose a claim amendment deadline once that process is complete.

C. Imposing a Claim Amendment Deadline at this Time is Unfair to Zurich Because the Information Necessary to Determine Its Final Claims Is in the Possession and Control of the Liquidator and/or Chubb

Granting the Liquidator's Motion and imposing a 150-day deadline would also impose severe and unfair hardship on Zurich because it does not presently possess the information necessary to calculate its IBNR claims and quantify the fair value of its case reserves.

Under the terms of the Settlement Agreement between the Liquidator and Zurich, the claims against Rutty Pool members are handled, adjusted, and settled by Home, either through itself or through Chubb. *See* Apx. Vol. I at 264, ¶ 7. Zurich has no role in this process, as it long ago obtained 100% reinsurance from Home and then all liabilities were to rest with Chubb. Zurich's Settlement Agreement expressly provides that "Home shall, either itself or through AISUK,[12] have the sole right to and will investigate, adjust and admit or refute liability for such claims in the name and with the authority (which is hereby granted and/or confirmed)" of Zurich. *See* Apx. Vol. I at 295, ¶ 6.3. That Settlement Agreement further provides that Home will either itself, or through Chubb, advise Zurich of

[12] AISUK has been succeeded in this role by CISUK, a Chubb entity.

adjusted claims and provide information needed by Zurich "for the determination of claims in Home's estate." *See* Apx. Vol. I at 295, ¶ 6.3.1.

Currently, claims against the insurance policies and reinsurance contracts of the Rutty Pool members are submitted directly to Chubb by the policyholders and ceding insurers of Rutty Pool members, as Chubb was intended to be the party ultimately liable for such claims. While quarterly reports of gross reserves are shared with Zurich, Zurich does not have sufficient information to be able to estimate its IBNR with confidence and then attempt to commute those IBNR claims. Apx. Vol. I at 266-67, ¶ 14. That detailed information is in the possession of the Liquidator and/or Chubb. *Id.* at 265, ¶ 9.

This imbalance in information highlights the unfairness of the Liquidator's Motion. Zurich and other AFIA Cedents agreed to help the Liquidator collect substantial amounts of claims from Chubb, including IBNR, when they entered into the AFIA Agreement and established the Scheme together with the Liquidator. Now, the Liquidator has requested a claim amendment deadline earlier than in other analogous insurance liquidations and has sought to cut off IBNR claims that form an important component of the consideration offered to the AFIA Cedents in 2004 in return for their agreement to settle. Meanwhile, Zurich has not engaged in its own settlement discussions regarding its future claims because it lacks the information needed to calculate them with confidence.

It is worth noting that, in his Motion, the Liquidator suggested that creditors with remaining unresolved proofs of claim are merely "resistant" or unwilling to quantify or settle their claims. Apx. Vol. I at 197. The Liquidator offered no evidence or proof to support this contention. In any

case, Zurich is certainly not a recalcitrant claimant who has dallied and failed to present settled claims to the Liquidator. Zurich has been waiting for IBNR to crystallize into reported claims and for the outcome of the Liquidator's commutation negotiations with Chubb. Indeed, there is nothing that Zurich could do to expedite the reporting of long-tail IBNR claims other than wait for the injuries from the underlying exposures to be reported as claims.

Therefore, the Superior Court erred by completely disregarding this Court's 2006 ruling and the Liquidator's various agreements with and obligations to AFIA Cedents. For these additional reasons, the Superior Court's order should be reversed.

CONCLUSION

Consistent with New Hampshire law, the Superior Court should have applied a balancing test similar to or identical to that found in *Ambassador* that weighs the expeditious completion of the liquidation against the protection of unliquidated and undetermined claims, including implementation of the Act's purpose to provide for the "equitable apportionment of any unavoidable loss." The Superior Court should also have considered that the Act only allows termination of liquidation proceedings upon the collection and distribution of all economically justifiable assets, but the deadline ends the collection of certain assets. The Superior Court could only have applied such a balancing with an estimation of the claims that would never be paid and the assets (in the form of reinsurance recoverables) that would be discarded. By failing to provide this information, the Liquidator did not meet its burden of proof. By

granting the Liquidator's requested relief, the Superior Court exceeded its discretion.

Furthermore, under the circumstances presented here by the AFIA Agreement approved by this Court and the Zurich settlement agreement with the Liquidator, the Court erred in failing to consider the Liquidator's binding contractual obligations when approving a premature claim amendment deadline in contradiction of those obligations.

Wherefore, Zurich requests that this Honorable Court find the Superior Court's Order Approving the Claim Amendment Deadline to be issued in error and remand the case for further proceedings consistent with this Court's order.

REQUEST FOR ORAL ARGUMENT

Zurich requests fifteen (15) minutes of oral argument. Attorney Steffen will argue for Zurich. Copies of the written decisions appealed from are included in an addendum to this brief.

Respectfully submitted,

ZURICH INSURANCE PLC, GERMAN BRANCH

By its attorney,

Dated: September 13, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitation set out in Supreme Court Rule 16(11), and contains 9,393 words.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Amended Brief shall be served on all counsel of record through the New Hampshire Supreme Court's electronic filing system.

/s/ Mark C. Rouvalis
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ADDENDUM

Table of Contents **Page**

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

IN THE MATTER OF THE LIQUIDATION OF
THE HOME INSURANCE, CO.

Docket No.: 217-2003-EQ-00106

ORDER

The Insurance Commissioner of the State of New Hampshire, as Liquidator of the Home Insurance Company (the "Home"), moves for the Court to establish a final deadline for the amendment or submission of claims to the Home's estate (the "Claim Amendment Deadline"). Along with his motion, the Liquidator has filed a Proposed Order specifying a date and procedural requirements for amending claimants to follow. A number of policyholder priority creditors object. These are the Catholic Foreign Mission Soc. of America, Inc. a/k/a the Maryknoll Fathers and Brothers (the "Maryknoll Society") and three worker's compensation claimants—Patricia Erway, Edward Crosby, and Howard Campbell (the "Worker's Compensation Claimants").[1] In addition, a number of non-policyholders object. These are former Home employee Linda Faye Peeples, David Axinn, in his capacity as Special Deputy Superintendent of the New York Liquidation Bureau (the "NYLB"), and several insurance entities reinsured by the Home (the "AFIA cedents"). The objecting AFIA cedents are: Catalina London, Ltd. and Catalina Worthing Ins. Ltd. (the "Catalina Group"); the German branch of Zurich Ins.,

[1] U.S. Steel Corp. and MW Custom Papers each also initially filed objections to the Liquidator's Motion for Approval of a Claim Amendment Deadline but have since withdrawn their objections. (See List of Filings that May Be Cited During Hearing at 2 n.3.) During the December 11, 2020 hearing on the Liquidator's motion, the Court learned that Johnson & Johnson also withdrew its objection.

P.L.C., and Württembergische Versicherung, A.G. ("Zurich and Württembergische"); Indemnity Marine Assurance Co., Nederlande Reassurantie Groep N.V., NRG Victory Reinsurance Ltd., NRG Fenchurch Ins. Co., Ltd., New Zealand Reinsurance Co., Tenecom Ltd., Underwriters at Lloyd's of London, Winterthur Swiss Ins. Co., and World Auxiliary Corp., Ltd. ("Resolute"); and Nationwide Mutual Ins. Co. ("Nationwide"). The Court held a hearing on this matter on December 11, 2020 and heard oral argument from Ms. Peeples, the Maryknoll Society, and various objecting AFIA cedents. For the following reasons, the Liquidator's Motion for Approval of a Claim Amendment Deadline is GRANTED and the Court approves the Proposed Order.

I. Background

The Home is a New Hampshire-domiciled insurance company incorporated in 1973. (Liquidator's Mot. Approval Cl. Am. Deadline ("Liq.'s Mot.") at 3.) At its height, the Home and its subsidiaries wrote insurance and reinsurance in almost all fifty states, as well as Canada, Bermuda, Hong Kong, and the United Kingdom. (Id.) In the early 1990s, however, following financial difficulties, the Home stopped writing new personal lines of business. (Id.) By 1995, the Home had stopped writing all business, including commercial lines, with the exception of certain personal lines subject to mandatory renewal in a few states. (Id.) The Court found the Home insolvent on June 13, 2003 and appointed the Liquidator to distribute the assets of the Home pursuant to RSA 402-C, the Insurers Rehabilitation and Liquidation Act (the "Act"). (Id. at 1; Order of Liquidation.) The Order of Liquidation established June 13, 2004 as the deadline for filing claims to the Liquidator (the "Claim Filing Deadline"). (Order of Liquidation ¶ (bb).) On June 11, 2003, approximately one year in advance of the Claim Filing Deadline, the

Court issued an order approving notice of the liquidation and of the deadline to file. (Order Approving Notice.) Since 2004, at least 20,785 proofs of claim have been filed with the Liquidator, 19,695 of which had been resolved as of May 31, 2019. (Liq.'s Mot. at 3–4.) These resolved claims represent a total allowed amount of $3.08 billion. (Id. at 4.)

Before entering liquidation, the Home had an unincorporated branch that operated in the United Kingdom as part of an association of American insurance companies known as the American Foreign Insurance Association ("AFIA"). (Id. at 3; Zurich and Würtembergische's Obj. to Liq.'s Mot. at 7.) In 1984, Cigna bought AFIA and, as part of the transaction, a subsidiary of Cigna, the Insurance Company of North America (the "INA"), assumed the reinsurance obligations of the Home with respect to AFIA by way of an assumption agreement. (Liquidator's Resp. to AFIA cedents' Objs. to Liq.'s Mot. ("Liq.'s Resp. AFIA") at 3.) The assumption agreement contained an insolvency clause requiring the INA to pay obligations directly to the Home or the Liquidator in the event of the Home's insolvency. (Id.) In 1999, Century Indemnity Company ("CIC") succeeded to the INA's obligations. (Id.)

When the Home became insolvent in 2003, the AFIA cedents filed proofs of claim in the liquidation, which were all held to be Class V claims. See In re Liquidation of Home Ins. Co., 154 N.H. 472, 477 (2006) ("The claims of the AFIA Cedents . . . fall into the 'all other claims' category of Class V."); see also RSA § 402-C:44, V (defining a Class V claim). The Liquidator resolved to access the excess reinsurance funds available from CIC to increase the assets of the estate and, therefore, had an incentive to quantify the extent of the AFIA cedents' claims. (Liq.'s Resp. AFIA at 4.) However,

as the Liquidator determined that no creditors with claims below Class II would receive any proceeds from the Home's estate, the AFIA cedents had no incentive to file and prove their claims. (Id. at 3–4.)

To address the situation, the Liquidator proposed an arrangement, pursued through various agreements and settlements between the Home estate and the AFIA Cedents ("the AFIA Scheme"), whereby AFIA members agreed to cede their claims under the reinsurance contracts they had with the Home while continuing to file and quantify their claims with the Liquidator. (Id. at 4; Resolute's Obj. to Liq.'s Mot. at 5.) In exchange, the AFIA cedents received a share of the reinsurance collected by the Liquidator from CIC. (Liq.'s Resp. AFIA at 4.) On August 6, 2004, the AFIA cedents entered into a Claims Protocol with CIC for the handling of AFIA claims in the liquidation. (Id.) CIC challenged the AFIA Scheme in this jurisdiction, but the scheme was upheld by the New Hampshire Supreme Court, which affirmed that (1) payments of the Liquidator to the AFIA cedents pursuant to the AFIA Scheme constitute Class I payments to distribute assets, (2) the payments are necessary to collect assets, and (3) the scheme is fair and reasonable as it benefits Class II claimants. In re Home, 154 N.H. at 481–490.

Under the Claims Protocol, the CIC, through its agent, ACE-INA UK Services Ltd. ("ACE-INA"), would review claims and make recommendations to the Liquidator. (Liq.'s Resp. AFIA at 4.) ACE-INA's successor, Chubb International Services UK Ltd. ("Chubb"), exercises this role today. (Id. 4–5.) If the Liquidator agrees with a recommendation, a notice of determination is issued to the claimant pursuant to the Court's Claims Procedure Order. (Id. at 5.) If the claimant agrees with the

determination, the determination is presented to the Court in a Liquidator's report of claims and recommendations. (Id. at 5.) Once the determination is approved, CIC applies any offsets it may have and makes payment to the Liquidator. (Id. at 5.) Historically, claims by the AFIA cedents have significantly contributed to the estate and, therefore, to the funds available for distribution to Class II claimants. (See id. at 13.) The extent of recovery available from any future claims, however, is disputed by the parties. (Id. at 12.) The Liquidator's motion for a Claim Amendment Deadline would foreclose future claims made pursuant to the AFIA Scheme. (See id. at 14.)

II. Analysis

The Liquidator seeks to impose a Claim Amendment Deadline to ensure Class II creditors receive the full extent of available distributions in a timely fashion. The New Hampshire Legislature directs the Court to "liberally construe[]" the Act so as to protect the "interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors." RSA 402-C:1, III–IV. The Act enumerates a series of avenues to ensure the fulfillment of this statutory purpose, including enhancing the "efficiency and economy of liquidation" and ensuring the "[e]quitable apportionment of any unavoidable loss." Gonya v. Comm'r, N.H. Ins. Dep't, 153 N.H. 521, 524 (2006) (citing RSA 402-C:1, IV(c)–(d)). When appointing a liquidator to administer the business of a domestic insurer, the Court transfers to such liquidator "the title to all of the property, contracts and rights of action and all of the books and records of the insurer" subject to liquidation. 402-C:21, I. Subject to the Court's control, the liquidator is empowered to take extraordinary steps to achieve the Act's statutory purposes, including to "[e]nter into such contracts as are necessary to carry out the

order to liquidate," to "affirm or disavow any contracts to which the insurer is a party," and to "[e]xercise and enforce all the rights, remedies and powers of any creditor, shareholder, policyholder or member." 402-C:25, XVIII, XI. Thus, the Act "grants the liquidator broad authority to administer liquidation proceedings." In re Home, 154 N.H. at 482.

The Act provides an enumerated order of distribution for the apportionment of estate assets, which divides claimants into separate priority "classes," numbered I–X in order of decreasing priority. See RSA 402-C:44. In general terms, Class I consists of the "administrative costs" of liquidating the estate, Class II of claims made by policyholders of the insurer, Class III of claims by the federal government, Class IV of employee wages, Class V of "residual claims," including those of state or local governments, Class VI of judicial judgments, Class VII of interest on claims already paid, Class VIII of miscellaneous subordinated claims, Class IX of preferred ownership claims, and Class X of shareholder and other "proprietary claims." Id. "Every claim in each class shall be paid in full or adequate funds retained for the payment before the members of the next class receive any payment," and "[n]o subclasses" shall be established. In re Home, 154 N.H. at 475 (citing RSA 402-C:44).

A. Objections of Class II Policyholders

The Court first turns to objections filed by Class II policyholders. Only four Class II policyholders have current objections to the Liquidator's proposed Claim Amendment Deadline and, of those four, only one—the Maryknoll Society—presented oral argument during the December 11, 2020 hearing. The Liquidator contends that the imposition of a Claim Amendment Deadline would directly benefit Class II policyholders and argues

that the interests of individual objectors in maintaining the estate open do not outweigh the interest of Class II claimants as a whole. During oral argument, he argued that the absence of additional Class II claimant objections, especially in view of the sophistication of the Home's Class II creditors, suggests Class II policyholders recognize a Claim Amendment Deadline is in their interest.

i. The Maryknoll Society's Objection

The Maryknoll Society has a valid policy with the Home that provides coverage for the period of 1970–1973. (The Maryknoll Society's Obj. to Mot. Approval Cl. Am. Deadline re The Home at 2.) Over the years, the Maryknoll Society has submitted several claims to the Home to cover civil litigation expenses regarding alleged instances of sexual abuse by Maryknoll Society personnel in Hawaii. (Id.) The Maryknoll Society contends that, as the Hawaii Legislature has consistently extended the statute of limitations for the filing of such claims, it risks losing coverage for litigation expenses incurred in the event that the statute of limitations is further extended. (Id.) The Maryknoll Society also argues that it has upheld its end of the bargain by paying all premiums for the policy issued by the Home, and it is therefore entitled to seek coverage in the event that an extension of the Hawaii statute of limitations for sexual abuse results in further litigation expenses. (Id.)

The Court concludes that the effect of a potential extension of the applicable Hawaii statute of limitations on the Maryknoll Society is far too speculative a concern to outweigh the interests of other Class II creditors in securing final distributions. Pursuant to the Act, the Liquidator has broad authority to "[e]xercise and enforce all the rights, remedies and powers of any creditor, shareholder, policyholder or member." 402-C:25,

XVIII. The Liquidator's motion to impose a Claim Amendment Deadline is an effort to exercise such authority to protect the rights of Class II priority creditors to a timely disbursement of as large a portion of their insurance claim as possible. Without a Claim Amendment Deadline, the Liquidator will be unable to distribute substantial estate assets to Class II creditors for the foreseeable future, as he will not know the full amount of the Home's liabilities and a reserve will be necessary for the continued administration of the estate. (Mot. Approval Cl. Am. Deadline at 9.) The Liquidator's interests in protecting the rights of Class II creditors should not yield to the Maryknoll Society's individual interest in covering litigation expenses in the event of a change in the law. The current Hawaii statute of limitations for sexual offenses during the relevant coverage period expired on April 24, 2020. See Hawaii Rev. Stat. Ann. § 657-1.8(b) ("For a period of eight years after April 24, 2012, a victim of child sexual abuse" previously barred from initiating an action by expiration of the then-current statute of limitations "may file a claim in a circuit court of this State against the person who committed the act of sexual abuse.") The Court has no way to know whether the Hawaii Legislature will choose to extend the statute of limitations at some point after a Claim Amendment Deadline is imposed. The Court does know, however, that Class II creditors will not receive a final disbursement until the Liquidator can set a Claim Amendment Deadline. Though the Maryknoll Society upheld its end of the bargain by paying all premiums for the policy issued by the Home, so did all other Class II creditors entitled to recovery in this liquidation. Accordingly, the Court is not persuaded by the Maryknoll Society's objection to the imposition of a Claim Amendment Deadline.

ii. The Workers Compensation Claimants' Objection

Each of the Workers Compensation Claimants filed a proof of claim with the Liquidator more than a decade ago regarding particular injuries each suffered while employed by the Home. (Liquidator's Resp. First Group Objs. Mot. Approval Cl. Am. Deadline ("Resp. First Group").) Ms. Erway's claim was transferred to a guaranty association in Michigan pursuant to Michigan's Property and Casualty Guaranty Association Act, Mich. Comp. Laws Ann. § 500.7901 et seq. (Id., Ex. A.) Mr. Crosby's claim was transferred to a guaranty association in Texas pursuant to chapter 462 of the Texas Property and Casualty Insurance Guaranty Act, Tex. Code Ann. § 462.001. (Id., Ex. B.) Mr. Campbell's claim was transferred to the NYLB in New York pursuant to N.Y. Ins. Law § 7405. (Id., Ex. C.) Each of these guaranty associations has a duty to pay certain obligations of an insolvent insurer that come within their respective acts' definition of covered claims. The Liquidator denied Ms. Erway's claim in 2007, Mr. Campbell's in 2008, and Mr. Crosby's in 2009, each time citing the claimant's ability to pursue a remedy from the respective guaranty association instead of the Home's estate. (Id., Exs. A–C.)

Each of the objections of the Worker's Compensation Claimants is properly addressed by the out-of-state guaranty associations handling their claims. Pursuant to RSA 404-B:11, the Liquidator "shall be bound by settlements of covered claims by [an] association or a similar organization in another state." RSA 404-B:11, II (emphasis added). Because all three Guaranty Association Claimants have open claims before guaranty associations in other jurisdictions, the Liquidator may not review any unfavorable settlements of covered claims or provide an alternative venue to secure

relief for the injuries each suffered in the Home's employ. Id. To the extent any of the Worker's Compensation Claimants fears that a guaranty association will decline to adjudicate his or her claim, a Claim Amendment Deadline will not affect the availability of alternative relief from the Home liquidation. The Liquidator expressly states that the sought Claim Amendment Deadline does not bar known claims, such that the Worker's Compensation Claimants remain free to file proof of claims before any deadline to preserve whatever rights they may have against the Home. (Resp. First Group ¶¶ 4–5.) The Court is not persuaded, therefore, that the imposition of a Claim Amendment Deadline would prejudice the rights of the Worker's Compensation Claimants, especially to such an extent as would require a denial of the instant motion.

B. Objections of Non-Class II Policyholders

The Court now turns to the objections of non-Class II claimants. A number of these objections were filed by Class V Claimants who provided oral argument during the December 11, 2020 hearing. These include the objections of Ms. Peeples and of various AFIA cedents. The NYLB, a non-claimant, has also filed an objection to the Liquidator's motion. The Liquidator has submitted written pleadings in response to each of these objections and highlighted them to the Court in advance of the hearing. (See List of Filings that May Be Cited During Hearing at 1–5.)

i. Ms. Peeples' Objection

Ms. Peeples was continuously employed by the Home from September 1986 to November 1990. (Ms. Peeple's Obj. dated Apr. 1, 2010; Referee Case File of Linda Faye Peeples ("Peeples Case File"), Ex. A.) Beginning in 1986, she invested six percent of her earnings in a health insurance plan with the Home that, after several

modifications, became a Section 401(k) plan. (Id.; Resp. First Group, Ex. E. at 1, n.1.)

On May 5, 2010, nearly six years after the 2004 filing deadline, Ms. Peeples filed a proof of claim with the Liquidator, contending that the Home invested her 401(k) funds in junk bonds and never paid her for her contributions. (Peeples Case File, Ex. A.) Ms. Peeples' late filing was excused on account of her not being on notice of the Claim Filing Deadline. (See id., Exs. C–D.) After considering her claim, the Liquidator issued Ms. Peeples a notice that her claim was given Class V priority status and that a determination of the amount of her claim would be made "only if it [was] later concluded that there will be sufficient assets to permit a distribution to Class V claimants." (Id., Ex. D at 1.) Ms. Peeples disputed the determination, and later a redetermination, that her claim was a Class V priority claim, insisting she was entitled to Class II priority. (Id., Exs. E–G.) Ultimately, on March 15, 2013, Ms. Peeples was granted a telephonic hearing before Court-appointed Referee Melinda Gehris, who affirmed the Liquidator's determination that her claim for 401(k) distributions is not a policy related claim and is only entitled to Class V priority. (Resp. First Group, Ex. E at 3.) Ms. Peeples did not initially seek review of the Referee's determination in this Court.

Ms. Peeple's first objection in this Court was filed on November 15, 2019, in response to the Liquidator's Motion for Approval of a Claim Amendment Deadline. (Ms. Peeple's Obj. dated Nov 15, 2019.) She asks the Court to "re-examine [her] claim" on the ground that, as a former employee of the Home who placed her trust in the company by investing in the Home's 401(k) plan, she is entitled to Class II priority. (Id.) She seeks $1,500,000 in contractual damages, alleging she made contributions to the 401(k) plan in consideration for the Home's promises that she would be rewarded in

retirement. (Id.) Following a status conference on February 28, 2020, Ms. Peeples filed a further objection, reiterating her position and contending that the Liquidator's reports "support that there [are] sufficient . . . funds to settle" her claim. (Ms. Peeple's Obj. dated Apr. 1, 2010.)

The Court concludes the substance of Ms. Peeples' objection was properly addressed by Referee Gheris in 2013 and her opposition to the instant motion is unavailing, as the approval or denial of a Claim Amendment Deadline has no bearing on the availability of distributions to Class V priority claimants. Following notice of Referee Gheris' determination in 2013, Ms. Peeples had "60 days" to seek review of the Referee's determination in this Court. RSA 402-C:41, I; (Claims Procedure Order § 8.) While the Court sympathizes with Ms. Peeples' plight, Ms. Peeples' objection is untimely, as it has been in excess of seven years since the deadline to seek review of the Referee's determination. Moreover, even if Ms. Peeples' objection was timely, the instant motion does not concern whether final, properly determined claims may be reviewed by the Court, nor whether the Liquidator properly determined that there are no available funds for claimants below Class II. The Liquidator merely seeks to impose a deadline for the amendment of open claims. This is neither the time nor the occasion to have Ms. Peeple's objections to the class assigned to her claim reexamined. Therefore, to the extent Ms. Peeples objects not to her status as a Class V Claimant but to the imposition of the Liquidator's proposed Claim Amendment Deadline, the Court is not persuaded that Ms. Peeples' concerns justify denying the Liquidator's motion to the detriment of higher priority creditors.

ii. The AFIA Cedents' Objections

The AFIA cedents contend that the proposed Claim Amendment Deadline is contrary to prior agreements reached with the Liquidator as part of the AFIA Scheme, premature, and not in the best interests of Class II creditors, whose recoveries may ultimately be lower if the Liquidator's motion is granted. (Zurich and Würtembergische's Obj. to Liq.'s Mot. at 1; Resolute's Obj. to Liq.'s Mot. at 5.) In particular, they argue that the proposed Claim Amendment Deadline does not strike a "reasonable balance" between the expeditious completion of the liquidation and the protection of incurred but not reported ("IBNR") claims. (Nationwide's Obj. to Liq.'s Mot. at 4–7; Zurich and Würtembergische's Obj. to Liq.'s Mot. at 1.) They point to the potential benefit to priority claimants of IBNR recoveries pursuant to the AFIA Scheme, as well as to the potential for Class II claimants to pursue their own IBNR claims in the future. (Nationwide's Obj. to Liq.'s Mot. at 2–3; Zurich and Würtembergische's Obj. to Liq.'s Mot. at 2.) In addition, the AFIA cedents argue that approval of a Claim Amendment Deadline at this time would prejudice their ability to value claims pursuant to the AFIA Scheme and place them in a weak negotiating position with Chubb and the Liquidator. (Nationwide's Obj. to Liq.'s Mot. at 5–6; Zurich and Würtembergische's Obj. to Liq.'s Mot. at 26–28.) Finally, a number of the AFIA cedents urge the Court to adopt the framework employed by the Vermont Supreme Court in In re Ambassador Insurance Co., 114 A.3d 492, 498–502 (2015), which they cite as support for the denial of the Liquidator's motion or, in the alternative, for an exception to be provided for future IBNR recoveries. (Zurich and Würtembergische's Obj. to Liq.'s Mot. at 2; Resolute's Obj. to Liq.'s Mot. at 5–7.)

As a preliminary matter, the Liquidator has the power to terminate any of his

duties under the AFIA Scheme to impose a Claim Amendment Deadline. The Act delegates broad powers to the Liquidator, including the power to "disavow any contracts to which the insurer is a party." RSA 402-C:25, XI. Damages asserted for the alleged breach of any settlements or contracts entered into as part of the AFIA Scheme are claims below Class II priority status and therefore unrecoverable, as they can only be pursued as Class VI judicial judgments. RSA 402-C:44, VI. The Court need not, therefore, further address any of the AFIA cedents' claims for breach of contract or any settlement agreements. (See e.g., Zurich and Würtembergische's Obj. to Liq.'s Mot. at 25–28.)

Rather, the Court concludes that the proposed Claim Amendment Deadline strikes a "reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims." RSA 402-C:46, I; see RSA 402-C:40, II (Delay in the filing of an insured's claim "shall not be a reason for unreasonable delay.") The Home has been in liquidation since June 2003, more than seventeen years ago. (Order of Liquidation.) The only recoverable non-administrative claims that remain are those of Class II policyholders, whose claims have had at least twenty-three years to develop since the Home stopped providing material coverage in 1997. (Aff. Bengelsdorf in Supp. Liq's Mot. ¶ 18.) The Liquidator does not owe a duty under the Act to protect the undetermined claims of creditors below Class II, including those of the AFIA cedents, as the Home estate lacks assets sufficient to make distributions to Class II claimants. RSA C:44 ("Every claim in each class shall be paid in full or adequate funds retained for the payment before the members of the next class receive any payment.") Consequently, the AFIA cedents' IBNR claims are not relevant

to the "reasonable balance" analysis imposed by the Act. RSA 402-C:46, I.[2] The Court recognizes that observance of the AFIA Scheme may result in additional recoveries to Class II claimants. However, given the length of time since the Home entered liquidation and the uncertain nature of future recoveries versus administration costs, it was reasonable for the Liquidator to conclude that such additional recoveries do not justify delaying final distributions to priority creditors. RSA 402-C:48, I.

The Court declines to apply the multi-factor test employed by the Vermont Supreme Court in In re Ambassador to the facts of this case. 114 A.3d 492. In In re Ambassador, the Vermont Supreme Court reversed a trial court order approving imposition of a deadline to "file final proofs of claim" where the estate in liquidation had already paid all allowed policyholder claims "in full, with interest," and had an additional $92 million remaining to address future and lower priority claims. Id. 493–494. The Vermont Supreme Court concluded that given the "unique circumstances" before it, the proposed deadline to file did not strike a "reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims." Id. at 500. In doing so, the Court examined the following nonexclusive factors: (1) the company's remaining assets; (2) the nature and amount of its remaining liabilities; (3) the administration costs of the estate; and (4) the extent to which delay in termination of the liquidation proceedings results in a delay of full payment to priority claim holders. Id.

[2] It is entirely unclear whether any "unliquidated and undetermined" claims are likely to be filed by Class II priority claimants. The only Class II claimant that presently expresses concern regarding its ability to file IBNR claims is the Maryknoll Society. Because the Court is not persuaded by the Maryknoll Society's objections on other grounds, see supra, § (II)(A)(i), the Court need not address whether IBNR claims constitute "unliquidated and undetermined" claims under the Act.

The facts before the Court are not comparable to In re Ambassador in key respects. Unlike the liquidator in In re Ambassador, the Liquidator before this Court seeks the imposition of a claim amendment deadline—a claim filing deadline went into effect in June 2004, more than sixteen years ago. In addition, the Home is unable to pay all policyholder claimants in full, and it will be unable to issue final disbursements to policyholder claimants until a claim amendment deadline is approved.

Even if the Court were to limit its analysis of RSA 402-C:46, I in this case to the four factors considered in In re Ambassador, three of the four factors weigh in favor of granting the Liquidator's motion. First, the Home's remaining assets to pay Class II creditors are limited and Class II claimants will not receive a full disbursement, such that a reasonable balance struck between an expeditious completion of the liquidation and foreclosure of undetermined claims may reasonably weigh in favor of disbursing what funds remain for priority creditors, seventeen years since the Home entered liquidation, in a timely fashion. Id. Second, the claims of Class II priority creditors constitute in themselves "the nature and amount" of the Home's remaining recoverable liabilities, such that any reasonable determination must place their interests above the interests of lower priority creditors, including the AFIA cedents. Id. Third, the continued administration of the estate, while likely offset in cost by recoveries pursuant to the AFIA Scheme, prevents a calculation of final liabilities and, consequently, the timely, expeditious disbursement of final payments to Class II claimants. Id.

iii. The NYLB's Objection

The NYLB fulfills the role of a guaranty association in the State of New York. (NYLB Obj. ¶ 3.) It administers the Property/Casualty Insurance Security Fund under

New York Insurance Law, Article 76. (Id.) The NYLB is concerned that previously time-barred sexual abuse claims may be asserted against Class II policy holders in New York, citing the enactment of New York's Child Victims Act, N.Y. C.P.L.R. § 214-g ("the CVA"), which took effect in February 2019. (Id.) The statute provides that previously time-barred claims for sexual abuse against a child of less than 18 years of age are "revived, and action thereon may be commenced not earlier than six months after, and not later than one year and six months after the effective date" of the statute. N.Y. C.P.L.R. § 214-g. The revival period of the CVA, therefore, last expired in August 2020. Id.

The Court is not persuaded that the rights of existing Class II creditors to final distributions should yield to the interests of potential future claimants merely in case of a potential change in New York law. As with the Hawaii Legislature, the Court has no way to ascertain whether the New York Legislature will choose to extend the statute of limitations for sexual abuse, nor even whether a potential extension would result in the filing of additional Class II proofs of claim. To prevent the distribution of disbursements to known Class II claimants across the country on account of speculation regarding amendments to a New York statute, more than sixteen years since the expiration of the Claim Filing Deadline, would frustrate the Liquidator's authority to "[e]xercise and enforce all the rights, remedies and powers" of existing Class II creditors. 402-C:25, XVIII, XI; In re Home, 154 N.H. at 482 (the Liquidator has "broad authority to administer liquidation proceedings.") The Court, therefore, is not persuaded that the NYLB's objections warrant a denial of the Liquidator's motion for approval of a Claim Amendment Deadline.

III. Conclusion

For the foregoing reasons, the Liquidator's Motion for Approval of a Claim Amendment Deadline is GRANTED, with no exceptions made as to any objector. The Court also issues a separate order specifying the procedures to follow for claimants to seek amendments to existing claims.

SO ORDERED.

1/28/21
Date

John C. Kissinger, Jr.
Presiding Justice

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

IN THE MATTER OF THE LIQUIDATION OF
THE HOME INSURANCE, CO.

Docket No.: 217-2003-EQ-00106

ORDER

John R. Elias, Insurance Commissioner of the State of New Hampshire, as Liquidator of the Home Insurance Company (the "Home"), has moved for the Court to establish a final deadline for the amendment or submission of claims in the Home's liquidation proceedings (the "Claim Amendment Deadline"). The Court granted the Liquidator's motion on January 28, 2021, over the objection of various parties, including several insurance agencies reinsured by the Home (the "AFIA Cedents"). A number of AFIA Cedents (the "Objecting Creditors") now move for the Court to stay and to reconsider portions of its January 28, 2021 Orders granting the Liquidator's motion. These are: the German branch of Zurich Ins., P.L.C., Württembergische Versicherung, A.G. (collectively, "Zurich and Württembergische"), Nationwide Mutual Ins. Co., Indemnity Marine Assurance Co., Nederlande Reassurantie Groep N.V., NRG Victory Reinsurance Ltd., NRG Fenchurch Ins. Co., Ltd., New Zealand Reinsurance Co., Tenecom Ltd., Underwriters at Lloyd's of London, Winterthur Swiss Ins. Co., and World Auxiliary Corp., Ltd. The Liquidator[1] partially objects. For the following reasons, the Objecting Creditors' motion for partial reconsideration of the Court's January 28, 2021

[1] The current Liquidator, and the party bringing the objection, is Christopher R. Nicolopoulos. Mr. Elias has not served as Insurance Commissioner since December 2019.

Orders is DENIED in part, while their motion to stay is GRANTED in part.

A. Motion for Reconsideration

A motion for reconsideration "shall state, with particular clarity, points of law or fact that the [C]ourt has overlooked or misapprehended." Super. Ct. Civ. R. 12(e). The Objecting Creditors contend the Court overlooked or misapprehended each of the following: (1) the Liquidator does not have the power to disavow post liquidation contracts, (2) the facts before the Vermont Supreme Court in In re Ambassador Insurance Co., 114 A.3d 492 (2015), are the "[s]ame as [p]resented [h]ere" and this Court's application of the balancing test employed by the In re Ambassador court must account for the Liquidator's "[f]ailure to [e]stimate" the value of incurred but not reported ("IBNR") claims, (3) the statute of limitations for claims brought pursuant to New York's Child Victims Act has been extended to August 2021, and (4) the status of Johnson & Johnson's settlement is unclear and may bear upon the Court's consideration of the instant motion. (Zurich and Württembergische's Mot. Recon. at 1–9.) The Court addresses each argument in turn.

First, the Objecting Creditors successfully argue the Court misapprehended the Liquidator's power to disavow contracts post-liquidation pursuant to RSA 402-C:25, XI. RSA 402-C:25, XI provides, in relevant part, that "[s]ubject to the [C]ourt's control, [the Liquidator] may . . . affirm or disavow any contracts to which the insurer is a party." In its January 28, 2021 Order addressing the AFIA Cedents' objections to the Claim Amendment Deadline (the "Primary Order"), the Court interpreted this provision to grant the Liquidator broad authority to disavow any prior agreements the Liquidator may have reached with the AFIA Cedents once appointed to the liquidation. Upon

reconsideration, such a reading does not comport with the policy goals sought to be advanced by the statute, nor with the New Hampshire Supreme Court's endorsement of binding agreements between the AFIA Cedents and the Liquidator. See In re Liquidation of Home Ins. Co., 154 N.H. 472, 490 (2006) (upholding the AFIA agreements as "fair and reasonable"); 402-C:1, IV ("The purpose of this chapter is," in part, to promote "[i]mproved methods for rehabilitating insurers" and to "[e]nhance[] [the] efficiency and economy of liquidation."). Despite the ostensibly broad language of RSA 402-C:25, XI, courts in other jurisdictions have interpreted similar statutory provisions to apply only in the pre-liquidation context. See, e.g., State ex rel. Wagner v. Kay, 722 N.W.2d 348, 355 (2006) (The "liquidator is not automatically bound by the preappointment contractual obligations of the insurer.") (emphasis added); Benjamin v. Pipoly, 800 N.E.2d 50, 59 (2003) (Ohio Ct. App. 2003) ("Thus, we hold that when a liquidator is appointed by court order, as in the instant case, she is not automatically bound by the pre-appointment contractual obligations of the insurer.") (emphasis added); First Am. Ins. Co. v. Commonwealth Gen. Ins. Co., 954 S.W.2d 460, 469 (Mo. Ct. App. 1997) (The applicable state statute "grants [the liquidator] broad authority to disaffirm pre-liquidation agreements to which the insurer is a party . . .") (emphasis added).

Nevertheless, for the reasons cited in the Primary Order, the Court properly concludes the Claim Amendment Deadline strikes "a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims." See RSA 402-C:46, I. The agreements reached between the Liquidator and the Objecting Creditors, including those common to all AFIA Cedents

and those reached with individual parties, have no bearing on the result reached by the Court. Nothing in the texts of the agreements cited by the Objecting Creditors, nor by any of the AFIA Cedents in this litigation, addresses how long the Liquidator is obligated to accept the filing of proofs of claim, nor purports to set aside generally applicable limitations the Liquidator may ordinarily impose on the filing of such claims. In the absence of any contractual language addressing these matters, or of any other indications that the Liquidator ever manifested an intent to limit his authority to impose a Claim Filing Deadline, the Court cannot read into the parties' various agreements what the parties did not see fit to include. Poland v. Twomey, 156 N.H. 412, 414 (2007) ("A valid, enforceable contract requires . . . a meeting of the minds," which consists of a shared understanding of the "essential terms" of the agreement and a "manifest . . . intention" to be bound by such terms) (emphasis added).

Second, the Court neither overlooked nor misapprehended any issue of fact or law in its treatment of In re Ambassador, 114 A.3d 492. Super. Ct. Civ. R. 12(e). As the Court noted in its Primary Order, the facts before the Vermont Supreme Court in In re Ambassador are not the same as those presently before the Court. In re Ambassador dealt with a claim filing deadline, not a claim amendment deadline. Here, a claim filing deadline was imposed more than sixteen years ago, in June 2004. In addition, unlike the liquidator before the Vermont Supreme Court in In re Ambassador, the Liquidator here does not have sufficient means to pay all policyholder claimants in full. Crucially, the Liquidator is unable to issue final disbursements to policyholder claimants unless and until a claim amendment deadline is imposed. The Court can hardly agree with the Objecting Creditors that the facts before the Vermont Supreme

Court in In re Ambassador are, in practice, the "[s]ame as [those] [p]resented [h]ere." (Zurich and Württembergische's Mot. Recon. at 6.) Moreover, the Court committed no error by failing to require the Liquidator to quantify the value of IBNR claims prior to weighing the factors adopted by the In re Ambassador court. No party to this action is in a position to produce a reliable estimate of the value of IBNR claims and, for the reasons laid out in the Court's Primary Order, there are sufficient facts before the Court for it to conclude the In re Ambassador factors, if applicable, do not compel the Court to require the Liquidator to keep the liquidation open at the expense of ensuring final distributions are disbursed to priority creditors.

Third, the Objecting Creditors successfully argue the Court misapprehended the latest extension of the statute of limitations applicable to New York's Child Victims Act. See N.Y. C.P.L.R. § 214-g (2020). The statute of limitations pertaining to New York's Child Victims Act was most recently extended to August 14, 2021, not 2020. Id. (An "action [hereunder] may be commenced not earlier than six months after, and not later than two years and six months after" February 14, 2019, "the effective date of this section.") (emphasis added). The Court erroneously relied on a prior version of the statute, which instead read "not earlier than six months after, and not later than one year and six months after" the effective date of the statute. Id. (2019) (emphasis added).

Nevertheless, the Court is not persuaded that the interests of those Class II policy holders who may be affected by the statute of limitations' extension outweigh the interests of other Class II policy holders in securing timely, final distributions on their pending claims. It has now been more than sixteen years since the expiration of the

Claim Filing Deadline, and the Liquidator has a statutory mandate to "[e]xercise and enforce all the rights, remedies and powers" of priority creditors, not individually but as a class. 402-C:25, XVIII, X. The Court committed no error by granting a Claim Amendment Deadline that prioritizes the interests of all Class II creditors over the interests of individual creditors who are or may be affected by limitations extensions to statutes that implicate potential claims. In the absence of the Claim Amendment Deadline, the Liquidator is unable to distribute substantial estate assets to Class II creditors for the foreseeable future, frustrating his statutory obligation to secure an "expeditious completion" of the liquidation that timely distributes to priority creditors as large a portion of their claims as possible. Id.; RSA 402-C:46, I.

Finally, the Court's January 28, 2021 Orders contain no errors of fact or law with respect to any aspect of Johnson & Johnson's settlement agreement with the Liquidator. As the Objecting Creditors note, Johnson & Johnson withdrew its objection to the Claim Amendment Deadline prior to the December 11, 2020 hearing on the merits. The status of the settlement agreement has no bearing on the Court's January 28, 2021 Orders and the Court was under no obligation to consider any of Johnson & Johnson's former objections once those objections were withdrawn. Accordingly, the Objecting Creditors have failed to identify, with "particular clarity," any "points of law or fact that the [C]ourt has overlooked or misapprehended" sufficient to warrant a reversal of any of the Court's January 28, 2021 rulings. Super. Ct. Civ. R. 12(e).

B. Motion to Stay

Contemporaneously with their motion for reconsideration, the Objecting Creditors have filed a motion to stay the Court's January 28, 2021 Orders "during the pendency of

reconsideration and for a further period of time as necessary to allow for appeal," whether direct "or interlocutory," to "the New Hampshire Supreme Court." (Zurich and Württembergische's Mot. Stay ¶ 3.) They argue that the 150 day period afforded by the Court to submit amendments to existing claims with the Liquidator is only a "short period," and allowing the "claim amendment time period to run while the Court considers issues on reconsideration" is unfairly prejudicial to the Objecting Creditors, as the issues raised by the motion to reconsider "bear directly on the Court's approval of the claim amendment deadline itself." (Id. ¶ 5.) In addition, they argue the Claim Amendment Deadline renders the Objecting Creditors' appeal "vulnerable to a mootness argument" absent a stay. (Id. ¶ 6.)

The Liquidator does not object to a stay of the Claim Amendment Deadline "limited to the time until Zurich and Württembergische's motion for reconsideration is resolved." (Liq.'s Resp. Mot. Stay ¶ 1.) However, the Liquidator opposes the grant of a stay pending appeal, citing prejudice to Class II creditors, whose claims have preference over the Objecting Creditors' Class V claims and who would otherwise be prevented from receiving "the full extent of available distributions in a timely fashion." (Id. ¶¶ 1–5 (citing RSA 402-C:44, II).)

The Court retroactively grants a stay of its January 28, 2021 Orders ending 30 days from the issuance of this Order, so as to afford the Objecting Creditors an opportunity to pursue an interlocutory appeal with the New Hampshire Supreme Court. While the Court is mindful that allowing the clock to run on the Claim Amendment Deadline may prejudice the Objecting Creditors' arguments on appeal, the Court is also mindful of the interests of Class II priority creditors in securing final distributions from the

Home liquidation. As the Objecting Creditors have only Class V priority status, their interests must yield to those of higher priority creditors that stand to benefit from an imposition of the Claim Amendment Deadline. See RSA 402-C:44.

The Objecting Creditors are, accordingly, granted an opportunity to confer with the Liquidator and submit to the Court an agreed-upon "interlocutory appeal statement" pursuant to Sup. Ct. Civ. R. 46(a). ("Whenever any question of law is to be transferred by interlocutory appeal from a ruling . . . counsel shall seasonably prepare and file with the trial court the interlocutory appeal statement or interlocutory transfer statement pursuant to Supreme Court Rule 8 or Supreme Court Rule 9 . . .") The Court is mindful "that interlocutory appeals should be limited to exceptional cases" and will only sign an interlocutory appeal statement compliant with Supreme Court Rules. Guyette v. C & K Dev. Co., 122 N.H. 913, 918 (1982). If the parties do not come to an agreement on the scope or any other material aspect of the interlocutory appeal statement within 14 days of the clerk's notice of decision on this order, counsel for the Objecting Creditors and for the Liquidator shall each submit competing statements for the Court's consideration within 7 days of that deadline. If an interlocutory appeal is sought, the January 28, 2021 Orders will be stayed. In the event a final interlocutory appeal is accepted by the New Hampshire Supreme Court, the Objecting Creditors' motion to stay is GRANTED, pending a resolution of the question raised on appeal. Otherwise, the Court's January 28, 2021 Orders shall take full effect as of 30 days from the issuance of this Order or 30 days from the date of any decision by the New Hampshire Supreme Court denying an interlocutory appeal, whichever is later.

For the foregoing reasons, the Objecting Creditors' motion for partial

reconsideration is DENIED, in part, and their motion to stay is GRANTED, in part.

SO ORDERED.

4/20/21
Date

John C. Kissinger, Jr.
Presiding Justice