THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS **SUPERIOR COURT**

Docket No. 03-E-0106

In the Matter of the Liquidation of The Home Insurance Company

LIQUIDATOR'S OBJECTION AND MEMORANDUM IN OPPOSITION TO CIC'S MOTION TO LIFT STAY AND TO COMPEL ARBITRATION

Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby objects to the Motion to Lift Stay and to Compel Arbitration filed by Century Indemnity Company ("CIC"). As reasons therefor, the Liquidator respectfully submits this memorandum in opposition.

Introduction

In its motion, CIC asks the Court to lift the injunction against proceedings contained in the Court's June 13, 2003 Order of Liquidation and to compel the Liquidator to arbitrate with CIC over the January 22, 2004 agreement with the AFIA Cedents ("AFIA Agreement"). CIC desires to contend in arbitration that the AFIA Agreement improperly expands its obligations under and interferes with its administration of claims pursuant to the Insurance and Reinsurance Assumption Agreement dated January 31, 1984 ("Assumption Agreement"). The Court should deny CIC's attempt to seek another forum to try to nullify the Court's approval of the AFIA Agreement and make waste of years of previous litigation.

The AFIA Agreement was approved – over CIC's objection and after lengthy litigation – by this Court on September 22, 2005 (the "Approval Order") and then affirmed by the Supreme Court on December 5, 2006. In the Matter of the Liquidation of The Home Ins. Co., 154 N.H. 472 (2006). The procedures by which CIC handles claims pursuant to the Assumption

Agreement in the context of the Home liquidation were agreed by CIC and the Liquidator in the August 6, 2004 letter agreement ("Claims Protocol"), which was approved by the Court on November 12, 2004.

Having lost on its challenge to the AFIA Agreement in the New Hampshire and English courts, CIC now seeks to avoid its reinsurance obligations by seeking to assert before an arbitration panel arguments that it raised or could have raised in the approval proceedings. CIC's proposed arbitration directly attacks the Court's Approval Order by challenging the Liquidator's actions in negotiating the AFIA Agreement, which were approved by the Court, and by contending that the assertion of claims by AFIA Cedents pursuant to the AFIA Agreement (under the agreed Claims Protocol procedures and subject to approval by the Court) harms CIC, when the Court has ruled to the contrary. The Court found that the AFIA Agreement is lawful, necessary to collect reinsurance, and fair and reasonable both generally and to CIC, as it places CIC in no worse position than if Home had remained solvent. The Court also held that without the AFIA Agreement CIC would obtain a windfall to the detriment of creditors. In addition, the Supreme Court specifically ruled that the AFIA Agreement was supported by the public policy of obtaining full payment from reinsurers despite an insurer's insolvency to protect the insurer's policyholders and other creditors.

In order to protect and effectuate its final order approving the AFIA Agreement, the Court should deny CIC's request to lift the injunction. Courts commonly issue injunctions to protect their judgments and avoid vexatious relitigation such as that sought by CIC here. CIC's proposed relitigation by arbitration is barred by both the res judicata and collateral estoppel effects of the Approval Order. It arises from the same factual transactions that formed the basis for CIC's previous objections, and it makes essentially the same arguments, this time in the guise

of contractual assertions. The proposed arbitration is also barred because CIC seeks to impose a contractual term that would render the Approval Order a nullity and violate the public policy of obtaining full collection of reinsurance despite an insurer's insolvency established by the Legislature in RSA 402-C:36 and RSA 405:49, I. Even if there were a contract right to the "windfall" identified by this Court and the Supreme Court (which there is not), it cannot be enforced. Finally, CIC's proposed arbitration is barred by laches since CIC unreasonably delayed in bringing the arbitration for four years, and the Liquidator has been prejudiced by the expense of litigating throughout that period.

The balance of harms and the public interest weigh in favor of the injunction. CIC will not be harmed because its obligations do not exceed the obligations that it would have had if Home had remained solvent. The Liquidator and Home's estate would be harmed by the expense of unnecessary proceedings that would substantially duplicate the costly litigation with CIC over the AFIA Agreement in this Court and the Supreme Court from 2004 through 2006. CIC's position is contrary to the public interest in efficient and economical proceedings for insurer liquidations and, more specifically, in full collection of reinsurance.

Even if proceedings over CIC's argument that it does not reinsure claims pursuant to the AFIA Agreement were appropriate, the Court should not compel arbitration. CIC waived its right to arbitrate by choosing to spend years litigating matters regarding the AFIA Agreement before demanding arbitration. Moreover, the arbitration sought by CIC is contrary to the policy of the Act of centralizing control of matters concerning the liquidation in this Court. It would effectively subject the decisions of the Court and the Supreme Court to review by a private panel that is not charged with the public responsibilities of the Court. Where the Legislature placed

control over the liquidation in the Court, the McCarran-Ferguson Act prevents application of the Federal Arbitration Act and there is no requirement of arbitration.

The Court should not countenance CIC's brazen attempt to split its objections to the AFIA Agreement. Four years ago, CIC embarked on a self-professed strategy of protracted and expensive litigation. It sought to benefit from Home's insolvency by reducing the amount of AFIA Cedents' claims and thus the amount of reinsurance CIC would pay under the Assumption Agreement. CIC chose to split its objections and try to refrain from making arguments based expressly upon the Assumption Agreement while challenging the legality, necessity, and fairness and reasonableness of the AFIA Agreement. It lost after 21 months of litigation (from March 2004 through December 2006) including extensive discovery, a five-day evidentiary hearing and two trips to the Supreme Court, as well as proceedings in the English High Court of Justice ("English Court"). CIC negotiated a Claims Protocol providing for it to adjust the AFIA Cedents' claims and to pay on a monthly basis net amounts due Home after application of setoffs. Since 2006, CIC has litigated with the Liquidator over asserted setoffs in disputed claim proceedings before the Referee, the Court, and the Supreme Court. Now that CIC has finally had to start making payments to the Liquidator because the amount CIC owes to Home exceeds its asserted setoff claims, CIC seeks to initiate proceedings designed to claw back the payments and deter the AFIA Cedents from pursuing their claims by asserting that the AFIA Agreement and the process for administration of claims under the Claims Protocol violate the Assumption Agreement. This course of conduct should not be rewarded. The Court should deny CIC's attempt to circumvent the Court's approvals of the AFIA Agreement and Claims Protocol and shift the matter to another, inappropriate forum for relitigation.

Background

The requested arbitration. On April 1, 2008, the same day that it filed its motion, CIC demanded arbitration against Home under the Assumption Agreement. See CIC Ex. E (demand for arbitration). The demand states that in the arbitration "CIC will be seeking a declaration that any claim submitted pursuant to the AFIA Agreement or any scheme of arrangement implemented in accordance with the AFIA Agreement is not reinsured by CIC." CIC Ex. E at 1-2 (emphasis added). The declaration CIC proposes to seek thus would avoid CIC's existing obligation under the Assumption Agreement to reinsure claims submitted by AFIA Cedents on the ground that the claims are submitted pursuant to the AFIA Agreement. CIC asserts that the AFIA Agreement violates provisions of the Assumption Agreement. Id.

The reservation of rights letter from CIC that accompanied the demand makes clear that CIC wishes to contend that the AFIA Agreement itself and the Liquidator's negotiation of the agreement violate the Assumption Agreement. It specifies that "CIC objects to the AFIA liabilities to the extent that the AFIA cedents submitted and prosecuted claims because Home solicited and agreed to pay for those claims pursuant to the AFIA Agreement." Liq. Ex. 4 at 3 (emphasis added). Further, "Home, by soliciting and entering into the AFIA Agreement, breached its obligations to CIC under the [Assumption] Agreement." Id. (emphasis added).

The Assumption Agreement. The Assumption Agreement (CIC Ex. A) was entered between Home, the Insurance Company of North America ("INA") and others in 1984. Under the Assumption Agreement, INA agreed to assume as its direct obligation the insurance and reinsurance obligations of the Home UK branch business, pay those liabilities on behalf of Home, to administer that business, and bear related costs and expenses. INA's obligations included responsibility to adjust claims and indemnify Home through payment of Home's losses

under the AFIA Treaties. Approval Order (Liq. Ex. 1) at 34, granting Finding 11 of Liquidator's Proposed Findings of Fact and Conclusions of Law after Evidentiary Hearing (Liq. Ex. 2, cited as "Finding __"). CIC is the successor to INA. Finding 14.

The rights of Home under the Assumption Agreement are the largest single asset of Home's estate. Approval Order at 8, 16. The value of that asset was estimated at $231 million as of December 31, 2002. Finding 17.

The Assumption Agreement contains an "insolvency clause" in paragraph 6 that requires INA (now CIC) to pay obligations under the Assumption Agreement directly to Home or to Home's liquidator in the event of Home's insolvency. The claims are to be paid on the basis of Home's liability on the claims, "without diminution because of Home's insolvency." The insolvency clause also permits INA to interpose a defense in the determination of claims in the applicable proceeding. Finding 13. See CIC Ex. A ¶ 6.

The AFIA Agreement. The AFIA Agreement (CIC Ex. C) is a letter agreement dated January 22, 2004 with certain AFIA Cedents authorized by the Liquidator and executed by the Joint Provisional Liquidator. It provides for a "scheme of arrangement" (the "Scheme") between Home and all AFIA Cedents under Section 425 of the English Companies Act 1985. Under the Scheme, a portion of the net proceeds received from CIC with respect to the AFIA Cedents' claims will be allocated to the Scheme for distribution to the AFIA Cedents, with the remainder to vest in the Liquidator. AFIA Agreement § 1.9. The amount to be allocated to the Scheme for the AFIA Cedents is determined by taking the amounts actually received from CIC with respect to the AFIA Treaties (i.e., the amount due from CIC less the amounts that CIC successfully withholds as offsets on account of CIC's claims against Home) and deducting costs of obtaining approvals from the New Hampshire and English courts, collection costs, costs of the UK

provisional liquidation, amounts received on account of liabilities that will be settled with the AFIA Cedents by offset, and costs orders. Id. § 1.3 (definition of "Proceeds"). Fifty percent of these net proceeds will be paid to AFIA Cedents, and the remaining 50% will be retained by Home. Id. § 1.2. Finding 105. The AFIA Agreement was conditioned on approval by the Court. AFIA Agreement § 1.1.2.[1]

The Claims Protocol. Recognizing that "[t]he insolvency of Home creates a number of administrative issues that need to be addressed" concerning CIC's claim handling obligations under the Assumption Agreement, CIC and the Liquidator negotiated and agreed on the August 6, 2004 Claims Protocol to provide for the handling of AFIA claims. CIC Ex. D at 1. The Claims Protocol was approved by the Court on November 12, 2004 (Liq. Ex. 14).

Consistent with the insolvency clause, the Claims Protocol provides a process for CIC's involvement in claims handling. CIC, through its affiliate ACE INA Services U.K. Ltd., adjusts the claims and makes recommendations to the Liquidator. Claims Protocol ¶ 2.3. If the Liquidator agrees, he will issue a notice of determination to the claimant. Id. ¶ 2.4.[2] If the claimant objects to a notice of determination or redetermination, CIC may participate in the disputed claim proceeding on motion (to which the Liquidator will assent) and it may interpose any defenses it may deem available to Home. Id. ¶¶ 2.13, 2.16.[3] Where the contract is governed by English law, CIC may obtain costs from the claimant if CIC prevails. Id. ¶ 2.17. The Claims Protocol recognizes that certain services provided under the Claims Protocol may be "beyond

[1] It was also conditioned on approval ("sanction") of the Scheme by the English Court, entry by the English Court of a "global liquidation order" providing for remission of assets to the Liquidator, and approval or "non-objection" by the Financial Services Authority ("FSA"), the UK regulatory body. AFIA Agreement § 1.1.2.

[2] The Claims Protocol provides that if the Liquidator disagrees with CIC's recommendation, then CIC and the Liquidator will confer to attempt mutual resolution within 10 days; if no agreement is reached then the matter may be referred to confidential arbitration. Claims Protocol ¶¶ 2.5-2.8.

[3] Pursuant to the Claims Protocol and its rights to interpose defenses in claim proceedings under the Assumption Agreement, CIC has defended disputed claim proceedings brought by AFIA Cedents regarding their claims. See 2006-HICIL-18, 21, 27, 32.

those required" under the Assumption Agreement, and in that case "CIC should receive reasonable compensation for such additional services." Claim Protocol at 1; see id. ¶¶ 2.1, ¶ 3.2.

The Claims Protocol further provides that CIC will not be liable to make payment on an AFIA Liability unless the claim has been allowed in the Home liquidation. Claims Protocol ¶ 3.5. It recognizes that CIC may assert setoffs, see id. ¶ 3.4, and it specifies that CIC will provide the Liquidator with a monthly setoff statement showing "amounts payable" by CIC and "amounts claimed in offset" against amounts due to Home. Id. ¶ 3.3. CIC is to effect a wire transfer for the balance to the Liquidator. Id.

Prior litigation over the AFIA Agreement. The AFIA Agreement has already been the subject of extensive litigation between the Liquidator and CIC. The Liquidator provided ACE (a group of affiliated companies that includes CIC) with the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents on or about February 11, 2004. Finding 104.

The ACE Companies – including CIC – served the Objections and Response of the ACE Companies to the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents ("ACE Objection") on March 19, 2004. In the ACE Objection, CIC asserted its interests as "a reinsurer of Home" pursuant to the Assumption Agreement, and it challenged the "unlawful 'incentive'" to AFIA Cedents. ACE Objection ¶¶ 2, 11 (Liq. Ex. 5). CIC requested discovery and an evidentiary hearing. Id. ¶ 17.

The ACE Companies also submitted a Memorandum in Support of Their Objections ("ACE Mem."; Liq. Ex. 6) that specifically noted various "terms [of the Assumption Agreement] that are relevant to the matters raised in the Motion." ACE Mem. at 5-6. In the Memorandum, CIC also stated that "Century believes that the Liquidator's conduct in negotiating [certain] provisions [of the AFIA Agreement] directly breaches Home's duty of utmost good faith to

Century under the Assumption Agreement." Id. at 7. CIC asserted that "[w]hether the Liquidator's conduct and its Motion have violated Home's duties to Century under the Assumption Agreement is not before the Court," and it purported to reserve the right to address such issues separately in arbitration. Id. at 7 n.6. At page 15 of the Memorandum, the ACE Companies also promised lengthy litigation:

> [R]egardless of the result before this Court, it is the ACE Companies' present intent . . . to pursue all available remedies on appeal and in England to redress the inequities and flaws of the proposed scheme of arrangement. Thus, 'complex, protracted and costly litigation' is assured so long as the Liquidator continues to pursue implementation of the proposed Agreement.

The ACE Companies filed their Assented-To Petition to Intervene in the Home liquidation on March 26, 2004 (Liq. Ex. 8). It was granted on April 5, 2004 (Liq. Ex. 9).

After hearing and briefing, the Court approved the AFIA Agreement on April 29, 2004. The ACE Companies appealed to the New Hampshire Supreme Court. At the argument on July 15, 2004, they asserted they were aggrieved by an alleged breach of the duty of utmost good faith and by having to handle claims presented pursuant to the AFIA Agreement:

> The Agreement involves, the Ace Companies submit, collusive claims that would not have occurred in the ordinary course. No insurer would go out and collude with a policyholder to have a claim made against it. But that is what's happening here, and that's in violation of Home's duty of utmost good faith to the Ace Companies to minimize the claims against its reinsurer. On that basis it's also aggrieved.
>
> And finally, we've seen the claims now. Some of them have been filed. We've looked at the proofs, and they involve claims that have previously been denied or are time-barred and there are other aspects of them so they're claims that the Ace Companies would have to handle and analyze and deal with that they would not otherwise have to, and that also makes them a person aggrieved in this situation.

Liq. Ex. 12 at 5-6 (emphasis added). After briefing and argument, the Supreme Court issued an order vacating the order and remanding the matter on September 13, 2004.

This Court then held further hearings and issued an Order on Remand on October 8, 2004. In the Order on Remand (Liq. Ex. 10), the Court found that "the direct interests of ACE Companies . . . are interests that would be prejudiced absent an opportunity to respond and demonstrate the potential harm that might be posed by the Liquidator's endorsement of the agreement at issue" and held that ACE Companies "have standing to challenge the agreement." Order on Remand at 5. The Order on Remand addressed other issues, directed the Liquidator to seek an interlocutory appeal on one question, and allowed the ACE Companies to conduct discovery concerning the necessity, reasonableness, and fairness of the AFIA Agreement. Id. at 13-14. The Supreme Court denied interlocutory review on December 27, 2004 (No. 2004-0729).

During the first half of 2005, the ACE Companies conducted extensive discovery (including document requests, interrogatories and depositions) of the Liquidator, the Joint Provisional Liquidators appointed for Home in the United Kingdom, and certain of the AFIA Cedents (Equitas, Unionamerica, Zurich (Germany)). The discovery involved CIC motions to compel directed to those AFIA Cedents, the Liquidator and the Joint Provisional Liquidators.

In July 2005, the Court held a five-day evidentiary hearing at which it heard testimony from eleven witnesses, including two experts, and received over ninety exhibits. The ACE Companies presented five witnesses and cross-examined all the Liquidator's witnesses.

The Court issued the Approval Order approving the AFIA Agreement on September 22, 2005 (Liq. Ex. 1). The Approval Order included rulings on the extensive proposed findings of fact and rulings of law submitted by the ACE Companies and the Liquidator (Liq. Exs. 2 and 3). The ACE Companies appealed to the Supreme Court.

In light of the Approval Order, the Joint Provisional Liquidators applied to the English Court for approval of the Scheme to implement the AFIA Agreement. The ACE Companies

opposed the application. On November 10, 2005, the English Court approved the Scheme. Liq. Ex. 11 (Approved Judgment of Mr. Justice Mann).

After briefing and argument, the Supreme Court issued its decision affirming the Court's Approval Order on December 5, 2006. Liquidation of Home, 154 N.H. 472.

The Court's findings. In the Approval Order, the Court determined that the AFIA Agreement "is lawful." Approval Order at 2. The Court also made detailed factual findings based upon the record at the evidentiary hearing held "to determine the necessity, fairness and reasonableness" of the AFIA Agreement. Id. at 4. See id. at 15-33, 34-35.

The Court first held, over ACE's objection, that it was "obligated . . . to determine whether or not the agreement is necessary to collect assets." Approval Order at 12. It ultimately found that "the Liquidator has met his burden of proving that a reasonable liquidator under the circumstances would have concluded that the agreement was necessary to preserve access to and marshal the AFIA reinsurances." Id. at 30. See Finding 110 ("[T]he Agreement is necessary. If the Liquidator had not addressed the issue by agreement, then the estate would not be able to collect an asset of significant value: the obligations of Century under the Assumption Agreement . . . for AFIA Cedents' claims in excess of amounts they could offset, thereby depriving Home's creditors of the benefit of the asset."); Conclusion of Law 5.

The Court also concluded that the agreement was fair and reasonable in that "[u]nder the agreement the Liquidator stands to collect a portion of reinsurances otherwise at risk, for purposes of providing a direct and substantial benefit to Class II claimants." Approval Order 32. See Finding 111 ("[T]he Agreement is fair and reasonable. It is the result of extensive arms length negotiations and provides for contingent payments to provide the AFIA Cedents with reason to file and prosecute claims that they believe are valid but that they otherwise would not

pursue. The Agreement's formula provides the AFIA Cedents with reason to prosecute claims, but only if the cedent involved believes the claim to be valid (otherwise the time and expense incurred by the AFIA Cedent in pursuing a claim will be lost)."); Conclusion of Law 8.

In the course of addressing fairness and reasonableness, the Court rejected ACE's contention that the Liquidator "had not acted in 'good faith' when deciding to negotiate with the AFIA Cedents shortly after initial discussions over a commercial resolution with ACE." Approval Order at 14-15. The Court found that "ACE's argument is factually flawed. The Court has already found that commutation negotiations had not begun with ACE on October 16 because of Home's lack of adequate claims information and access to those with direct negotiating authority at ACE." Approval Order at 31. See also Conclusion of Law 9 ("The Court concludes that the Liquidator acted as a reasonable liquidator would act under the circumstances in (i) assessing the information available, (ii) pursuing and negotiating the Agreement with AFIA Cedents, and (iii) endorsing the Agreement with AFIA Cedents.")

The Court also found that "the financial fortunes of ACE are best served if the Liquidator's agreement is not upheld. In that case, ACE stands to reap a sizable windfall. If the agreement is upheld, however, ACE cannot argue that its liabilities as a substantial net debtor to the estate, are any greater than those reflected under the terms of the contracts governing the 1999 transaction with Cigna." Approval Order at 31. More specifically, the Court found that: "[T]he Agreement is fair and reasonable to ACE. . . . The obligations of ACE are not increased over what they would have been had Home remained solvent and not been placed in liquidation. ACE offered no evidence to show that the Agreement harmed it. ACE would receive a windfall, compared to its obligations pre-liquidation, if AFIA Cedents did not file and prosecute their claims beyond offset." Finding 115.

The Supreme Court's decision. The ACE Companies, including CIC, appealed from the Superior Court's Approval Order to the Supreme Court. The ACE Companies specifically challenged the Superior Court's finding that the payments pursuant to the AFIA Agreement were necessary costs of preserving and recovering an asset. Liquidation of Home, 154 N.H. at 485. "After reviewing the record, [the Supreme Court] conclude[d] that there was sufficient evidence to support the superior court's finding that the AFIA Cedents would not file and prosecute claims without a financial incentive." Id. at 487. It upheld the "finding that the proposed agreement was necessary." Id. at 488. The Supreme Court also held that "there is no doubt that the ACE Companies 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." Id., citing RSA 402-C:36; RSA 405:49, I.

The ACE Companies also attacked the Superior Court's finding that the AFIA Agreement was fair and reasonable. 154 N.H. at 489. The Supreme Court, however, "concur[red] with the court's decision that the agreement was fair and reasonable." Id. at 490. Among other things, the Supreme Court noted that the evidence demonstrated that "the AFIA Cedents would not have filed claims against the Home estate without a financial incentive" and that "the agreement benefits the Class II claimants to Home's estate since it increases the likelihood that their claims will be paid." Id.

Subsequent litigation. CIC has asserted claims against Home by filing proofs of claim. The Liquidator disallowed several of those claims, and there have been disputed claim proceedings before the Referee with respect to those matters. See Disputed Claim Proceedings 2005-HICIL 2, 11, 12, 13, 14.

In addition to disputes over the validity of its claims, CIC has also litigated legal issues regarding the propriety of CIC's asserted setoffs in disputed claim proceedings. See 2005-HICIL-14 (August 31, 2007 Referee's Ruling on Setoff Issue; March 11, 2008 Ruling [re PECO setoff]). These matters have also come before the Court. See July 12, 2007 Order on Claimant's Motion to Recommit (MSA); October 18, 2007 Order on Claimant's Motion to Recommit (reinsurer assignee), appeal pending, No. 2007-0794; Liquidator's Motion to Recommit Referee's Ruling on Setoff of CIC's PECO Claim (March 25, 2008).

The New Hampshire Act

The Legislature created a comprehensive scheme to address troubled insurers in the Insurers Rehabilitation and Liquidation Act ("Act"), and several aspects of the Act are pertinent here. First, the Act centralizes ultimate control of matters concerning the liquidation in this Court. It places exclusive jurisdiction over liquidation proceedings for New Hampshire insurers in the Superior Court for Merrimack County or the superior court in the county in which the principal office of the insurer is located. See RSA 402-C:20; RSA 402-C:4, III. That court "shall direct the liquidator forthwith to take possession of the assets of the insurer and to administer them under the orders of the court." RSA 402-C:21, I (emphasis added). "The liquidator shall be vested by operation of law with the title to all of the property, contracts and rights of action . . . of the insurer ordered liquidated. Id.

Second, the Act seeks to avoid unnecessary and wasteful litigation by abating actions except as authorized by the Court. The Act provides that upon issuance of an order appointing the Commissioner as liquidator, "all actions and all proceedings against the insurer whether in this state or elsewhere shall be abated and the liquidator shall not intervene in them, except as provided in this subsection." RSA 402-C:28, I. The exceptions are where "in the liquidator's

judgment an action in this state has proceeded to a point where fairness or convenience would be served by its continuation to judgment," in which case the Liquidator "may apply to the court," and where "in the liquidator's judgment, protection of the estate of the insurer necessitates intervention in an action against the insurer that is pending outside this state," in which case he may intervene "with the approval of the court." Id. (emphasis added).

Third, the Act places control over asset collection matters with the Court. "Subject to the court's control, [the Liquidator] may . . . VI. Collect all debts and monies due and claims belonging to the insurer, wherever located . . . . XII. Continue to prosecute and institute in the name of the insurer or in his name any suits and other legal proceedings, in this state or elsewhere . . . ." RSA 402-C:25. The Act provides for "extension of the scope of personal jurisdiction over debtors of the insurer outside this state." RSA 402-C:1, IV(e). It expressly extends jurisdiction over reinsurers by providing that a court of this state "has jurisdiction over a person served in an action brought by the receiver of a domestic insurer . . . (b) [i]f the person served is a reinsurer who has at any time entered into a contract of reinsurance with an insurer against which a delinquency proceeding has been instituted . . . in any action on or incident to the reinsurance contract." RSA 402-C:4, V. Venue is to be in the Court. RSA 402-C:4, IV.[4] A debtor may move litigation to another state only if allowed by the Court. See RSA 402-C:4, VI ("If the court on motion of any party finds that any action commenced under paragraph V should as a matter of substantial justice be tried in a forum outside this state, the court may enter an order to stay further proceedings on the action in this state.").

[4] RSA 402-C:4, IV provides in pertinent part: "All other actions and proceedings [other than delinquency proceedings themselves] initiated by the receiver may be commenced and tried where the delinquency proceedings are then pending or Merrimack county superior court. All other actions and proceedings against the receiver shall be commenced and tried in the county where the delinquency proceedings are pending. At any time upon motion of any party, venue may be changed by order of the court or the presiding judge thereof to any other superior court in this state, as the convenience of the parties and witnesses and the ends of justice may require."

The Act does not contemplate arbitration. It refers to arbitration only once: as one of several ways of determining the value of security held by a secured creditor but subject to control of the Court. RSA 402-C:43, I(b) ("The value of any security held by a secured creditor shall be determined in one of the following ways, as the court directs: . . . (b) By agreement, arbitration, compromise or litigation between the creditor and the liquidator.") (emphasis added). See RSA 402-C:43, II ("The determination shall be under the supervision and control of the court.").

The Act expressly does not permit a reinsurer's obligations to be reduced because of liquidation. "The amount recoverable by the liquidator from a reinsurer shall not be reduced as a result of delinquency proceedings regardless of whether the reinsurance contract" contains an insolvency clause. RSA 402-C:36 (emphasis added).

Finally, the Act provides for injunctions to protect the proceedings. The Court is authorized to grant "such restraining orders, temporary and permanent injunctions, and other orders as are deemed necessary and proper to prevent: . . . (c) Interference with the receiver or with the proceedings; (d) Waste of the insurer's assets; . . . (f) The institution or further prosecution of any actions or proceedings; . . . (k) Any other threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors or shareholders, or the administration of the proceeding." RSA 402-C:5, I.

ARGUMENT

I. CIC IS PROPERLY ENJOINED FROM CIRCUMVENTING THE APPROVAL ORDER BY ARBITRATION, AND THE MOTION TO LIFT THE STAY SHOULD BE DENIED.

The Order of Liquidation enjoins all persons from commencing or continuing any proceeding against Home or the Liquidator, Order of Liquidation ¶ (n)(1) (Liq. Ex. 15), and CIC properly recognizes that it may not commence its proposed arbitration without having the

injunction lifted upon a showing of "good cause." The Court should keep the injunction in effect as to CIC's proposed arbitration because the arbitration would waste the assets of the estate, prejudice the interests of the insolvent insurer's estate and its creditors, and interfere with the liquidation proceeding. See RSA 402-C:5, I. Cf. Webster v. Superior Court, 46 Cal. 3d 338, 350-54 (1988) (considering such factors concerning creditor's proposed action). The injunction prevents the expense of the defense of an unnecessary proceeding and enforces the policy of having the Court control matters regarding the liquidation, including claims against debtors, in light of the public interests involved. Most significantly, it protects the Court's own orders from a collateral attack that is intended to nullify the results of years of litigation, avoid the Court's supervision of the liquidation and circumvent legislative policy. Courts frequently issue injunctions to protect their judgments and prevent relitigation. 17A Wright, Miller, Cooper & Amar, Federal Practice & Procedure § 4226 at 108 (2007) ("there are many cases in which injunctions have issued to prevent relitigation of matters that have been finally decided"). See, e.g., Regions Bank of Louisiana v. Rivet, 224 F.3d 483, 488-492 (5th Cir. 2000) (injunction to protect bankruptcy court order), cert. denied, 531 U.S. 1126 (2001); In re G.S.F. Corp., 938 F.2d 1467, 1474-79 (1st Cir. 1991) (same). Accordingly, "[c]ourts have been willing to enforce the preclusion effects of a judgment by enjoining arbitration or refusing to compel arbitration." 18B Wright, Miller & Cooper, Federal Practice & Procedure § 4475.1 at 512 (2002). See, e.g., John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 137-39 (3d Cir. 1998). Continued injunctive relief is appropriate here in light of the merits, the balance of harms, and the public interest.

A. CIC's New Claim Or Defense Is Barred And Cannot Now Be Asserted.

CIC should not be allowed to proceed with arbitration because its claim or defense is precluded by the res judicata and collateral estoppel effects of the Approval Order. The

contractual term CIC seeks to impose is also unenforceable as contrary to the statutes concerning reinsurer liability in insurer liquidation proceedings. Finally, CIC's attempt to prolong litigation over the AFIA Agreement by means of its long-delayed arbitration is barred by laches.

1. CIC's new challenge to the AFIA Agreement is precluded by res judicata.

The res judicata effect of the Approval Order prevents CIC from presenting new attacks on the AFIA Agreement. The principles of res judicata are well established in New Hampshire. "Spurred by considerations of judicial economy and a policy of certainty and finality in our legal system, the doctrines of res judicata and collateral estoppel have been established to avoid repetitive litigation so that at some point litigation over a particular controversy must come to an end." Eastern Marine Const. Corp. v. First S. Leasing, 129 N.H. 270, 273 (1987) (quotation omitted). "Res judicata, or claim preclusion, bars the relitigation of any issue that was or might have been raised in respect to the subject matter of the prior litigation." Appeal of the University System Bd., 147 N.H. 626, 629 (2002) (punctuation omitted), quoting Grossman v. Murray, 141 N.H. 265, 269 (1996). "Thus, a valid judgment finally negatives every defense that was or might have been raised." Osman v. Gagnon, 152 N.H. 359, 362 (2005) (quotation omitted).[5]

For the doctrine to apply, three conditions must be met: "(1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered on the first action." Osman, 152 N.H. at 362. These elements are satisfied here. First, the parties are the same. CIC and the Liquidator are parties to both the proposed arbitration and the Home liquidation proceeding, in which CIC was allowed to intervene. Second, the Approval Order is a final

[5] The res judicata effect of a court order should be determined by the Court, not by arbitrators. See John Hancock, 151 F.3d at 136-38 (citing cases under Federal Arbitration Act). That is particularly the case here, as this Court was not only the forum for the litigation over the AFIA Agreement but also is supervising the Home liquidation in accordance with the public policies of the Act.

judgment on the merits of the AFIA Agreement entered after exhaustive litigation and affirmed on mandatory appeal to the New Hampshire Supreme Court.[6]

Third, the "causes of action" involved are the same. As an initial matter, CIC's proposed arbitration and CIC's objection to the AFIA Agreement plainly "arise out of the same transaction or occurrence" – the negotiation and entry of the AFIA Agreement. See Appeal of Univ. System Bd., 147 N.H. at 629 (When "determining whether two actions are the same cause of action for the purpose of applying res judicata [courts] consider whether the alleged causes of action arise out of the same transaction or occurrence."); Eastern Marine, 129 N.H. at 273.[7] CIC intervened and objected to the AFIA Agreement on the grounds that it was unlawful, unnecessary, and not fair and reasonable to both ACE and to creditors. CIC specifically relied on its rights and obligations under the Assumption Agreement as the interests that supported its intervention. CIC now seeks to arbitrate over the AFIA Agreement under the Assumption Agreement. CIC's objection to the approval motion and its proposed arbitration substantially overlap and involve the same witnesses as were heard at the evidentiary hearing. The two matters clearly involve the same "[f]acts which give rise to one or more relations of right-duty between two or more persons." Eastern Marine, 129 N.H. at 275, quoting Black's Law Dictionary 201 (5th ed. 1979).

CIC had more than ample opportunity to present its arguments based on its alleged rights under the Assumption Agreement in responding to the Liquidator's motion for approval. CIC was aware of its argument regarding alleged breach of the Assumption Agreement when it made its objections, and it relied on its interests under the Assumption Agreement in successfully

[6] Orders in receiverships and bankruptcy proceedings are final for res judicata purposes where, as here, they "completely resolve" all the issues relating to a "discrete" claim. In re Iannochino, 242 F.3d 36, 43-44 (1st Cir. 2001) (quotation omitted).

[7] This case is quite different from Meier v. Town of Littleton, 154 N.H. 340, 343 (2006), in which the Supreme Court distinguished Eastern and Appeal of University System and concluded that it was not sufficient that two causes of action arise from the same transaction or occurrence. Meier involved two separate claimants, each of whom had a claim arising from the same automobile accident. The Court concluded that resolution of one of those claims did not have res judicata effect on the other. Id.

seeking to be heard in objection to the AFIA Agreement. Having chosen to intervene and object to the AFIA Agreement, and having received a full opportunity to litigate the issues, including discovery, an evidentiary hearing and appeals, CIC cannot now raise new grounds for objection in the guise of contractual arguments. See Iannochino, 242 F.3d at 41-43 (order approving fee application in bankruptcy bars malpractice claim).

The relief sought in CIC's proposed arbitration is barred because it "would nullify the initial judgment or would impair rights established in the initial action." Restatement (Second) of Judgments § 22(2)(b) (1982). This is true whether that relief is characterized as a claim or as a defense. See Iannochino, 242 F.3d at 42-43 (new claim barred); Puerto Rico Maritime Shpg. Auth. v. Federal Maritime Comm'n, 75 F.3d 63, 67-68 (1st Cir. 1996) (new defense barred). If arbitrators made a declaration as CIC requests, the Approval Order "would be rendered totally meaningless and there would be a concomitant waste of judicial resources." Puerto Rico Maritime, 75 F.3d at 67-68. Accordingly, the "cause of action" asserted in CIC's objections to the AFIA Agreement encompasses all possible grounds of objection, including those based on the Assumption Agreement, whether or not they were actually raised.

CIC notes that it purported to reserve its defenses under the Assumption Agreement in its initial 2004 objection. The reservation, however, only demonstrates that CIC knowingly split its arguments and consciously chose its strategy of piecemeal litigation. It does not provide a defense against res judicata, especially where CIC acted inconsistently by choosing in the evidentiary hearing to challenge the Liquidator's conduct and the fairness of the AFIA Agreement to ACE. There was no procedural barrier to CIC's advancing its contractual arguments as part of its objections to the Liquidator's request for approval of the AFIA Agreement. See Osman, 152 N.H. at 362-63 (small claims judgment has res judicata effect

because defendant and another were aware of potential counter-claim but failed to utilize procedures for transfer and filing claim in Superior Court while small claims matter was pending). Cf. Grossman, 141 N.H. at 270-71 (bankruptcy order permitting sale of property "free and clear" not res judicata where proceedings were under rule for adjudication of "simple issues" on an expedited basis without "full blown trials"). A purported reservation of rights does not allow a claim or defense to be split and later used to nullify the result of prior litigation. See Puerto Rico Maritime, 75 F.3d at 67 ("defendants can no more split defenses arising out of the same transaction or occurrence than plaintiffs can split claims")[8]; Flood v. Besser Co., 324 F.2d 590, 593 (3d Cir. 1963) (plaintiff's "attempted reservation" of claims for a future lawsuit was "wholly ineffective in light of the settled law against such splitting of a cause of action").[9] CIC could have objected to the AFIA Agreement based on alleged violations of the Assumption Agreement, and is precluded from doing so now.

Finally, the issues CIC now seeks to arbitrate were ripe in 2004. The conduct complained of had already occurred, and the ACE Companies themselves contended the matter was ripe. In the June 11, 2004 ACE Companies' Memorandum in Opposition to Liquidator's Motion to Dismiss, they said: "Here, the Liquidator admits that his sole motive for proposing the scheme at issue in this appeal is to increase his ability to collect money from certain of the ACE Companies. It is hard to imagine an injury that is more ripe, direct and certain." Liq. Ex. 7 at 10-11 n.6 (emphasis added). CIC's current suggestion that the issues were not previously ripe is further belied by its choice to challenge the necessity of the AFIA Agreement and the alleged unfairness of the Liquidator's conduct and the AFIA Agreement to ACE during the 2005

[8] The ACE Companies noted that their appeal from the 2004 approval order was, "for all practical purposes, a defense to the claims themselves." Liq. Ex. 7 at 12.

[9] This is not a case where the court expressly reserved a litigant's right to bring claims in a later action. See Apparel Art Int'l, Inc. v. Amertrex Ent. Ltd., 48 F.3d 576, 586 (1st Cir. 1995).

evidentiary hearing. The Court made findings on these issues in the Approval Order at 28-33. The issues were thus clearly capable of being adjudicated on an adequately developed record, and the AFIA Agreement's impact on CIC was direct and immediate, not speculative. See Petition of the State of New Hampshire (State v. Fischer), 152 N.H. 205, 210 (2005); Appeal of State Employees' Ass'n of New Hampshire, Inc., 142 N.H. 874, 878 (1998).

2. CIC's new attack is barred by collateral estoppel.

Even if CIC's arbitration were not precluded by res judicata, it cannot go forward because essential elements of the claim or defense have already been determined adversely to CIC. Collateral estoppel serves the same general purposes as res judicata - conservation of judicial resources and assuring the finality of judgments. See Eastern Marine, 129 N.H. at 273. "At its core, the doctrine of collateral estoppel bars a party to a prior action . . . from relitigating any issue or fact actually litigated and determined in the prior action." Daigle v. City of Portsmouth, 129 N.H. 561, 570 (1987). "Three basic conditions must, then, be satisfied before collateral estoppel will arise: the issue subject to estoppel must be identical in each action, the first action must have resolved the issue finally on the merits, and the party to be estopped must have appeared as a party in the first action, or have been in privity with someone who did so." Id. See Gephart v. Gaigneault, 137 N.H. 166, 177 (1993). The approval motion was litigated between the Liquidator and CIC to a final order, so the only question is the identity of issues.

The proposed arbitration rests on three principal assertions: (1) in negotiating and entering the AFIA Agreement, the Liquidator breached an obligation of "utmost good faith" to CIC; (2) the AFIA Agreement improperly increases CIC's obligations under the Assumption Agreement; and (3) the AFIA Agreement interferes with CIC rights and obligations to administer claims under the Assumption Agreement. See CIC Ex. E. While these issues are guised as

contract questions, their factual and legal underpinnings were actually litigated by CIC and the Liquidator and decided against CIC in the Approval Order.

First, in the course of litigating the fairness and reasonableness of the AFIA Agreement, CIC litigated the fairness of the Liquidator's conduct as to CIC. In the Order on Remand, the Court held that ACE might be prejudiced if denied "an opportunity to respond and demonstrate the potential harm" from the AFIA Agreement, and it allowed CIC to conduct discovery. Order on Remand at 5. The evidentiary hearing included wide-ranging testimony concerning the circumstances leading to the negotiation of the AFIA Agreement, including discussions with ACE, and the conduct of the negotiations. The Court made extensive findings concerning these matters. See Approval Order 15-33, 34-35. CIC expressly raised the propriety of the Liquidator's conduct by contending that the Liquidator "had not acted in 'good faith' when deciding to negotiate with the AFIA Cedents shortly after initial discussions over a commercial resolution with ACE." Approval Order at 14-15. The Court noted that "[t]he crux of ACE's argument is that Home was neither fair nor reasonable in the way it initiated discussions with ACE over a commercial resolution; changed course to commence negotiations with the AFIA Cedents; and only informed ACE after finalizing an agreement with the Cedents. As Mr. Wamser candidly testified, Ace felt that it had been 'suckered' by the Liquidator." Id. at 31.

The Court rejected these arguments and found that "ACE's argument is factually flawed." Approval Order at 31. See also Conclusion of Law 9 ("The Court concludes that the Liquidator acted as a reasonable liquidator would act under the circumstances in (i) assessing the information available, (ii) pursuing and negotiating the Agreement with AFIA Cedents, and (iii) endorsing the Agreement with AFIA Cedents.") In light of these findings, CIC's argument that the Liquidator breached some duty of "utmost good faith" cannot proceed. CIC had a full and

fair opportunity to challenge the Liquidator's conduct, did so aggressively, and lost. It cannot now reassert these arguments in the guise of a contractual defense.

Second, CIC litigated the question whether the AFIA Agreement was fair to CIC in providing an incentive to AFIA Cedents to prosecute claims so the Liquidator could collect reinsurance under the Assumption Agreement. The Court concluded it was. It found that "[i]f the agreement is upheld, however, ACE cannot argue that its liabilities as a substantial net debtor to the estate, are any greater than those reflected under the terms of the contracts governing the 1999 transaction with Cigna." Approval Order at 31. More specifically, the Court found that: "The Agreement is fair and reasonable to ACE. . . . The obligations of ACE are not increased over what they would have been had Home remained solvent and not been placed in liquidation. ACE offered no evidence to show that the Agreement harmed it. ACE would receive a windfall, compared to its obligations pre-liquidation, if AFIA Cedents did not file and prosecute their claims beyond offset." Finding 115. It further held that, under the insolvency clause in the Assumption Agreement, "[t]he claims are to be paid on the basis of Home's liability on the claims, without diminution because of Home's insolvency or because Home's liquidator has failed to pay all or part of a claim." Finding 13.[10]

CIC now wants to contend that the alleged "expansion" of its obligations pursuant to the AFIA Agreement breaches the Assumption Agreement. The Superior Court, however, found that affirming CIC's position would actually result in a "windfall," and that CIC's obligations are "not increased" over its obligations if Home had not become insolvent. The Supreme Court

[10] See also Finding 111 ([T]he Agreement is fair and reasonable. It is the result of extensive arms length negotiations and provides for contingent payments to provide the AFIA Cedents with reason to file and prosecute claims that they believe are valid but that they otherwise would not pursue. The Agreement's formula provides the AFIA Cedents with reason to prosecute claims, but only if the cedent involved believes the claim to be valid (otherwise the time and expense incurred by the AFIA Cedent in pursuing a claim will be lost). The formula makes the payments contingent upon success in collecting from ACE.")

agreed that "there is no doubt that the ACE Companies 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." Liquidation of Home, 154 N.H. at 488. It further held that this was contrary to statute: "This would frustrate the legislative purpose of obtaining full payment from reinsurers despite an insurer's insolvency." Id., citing RSA 402-C:36, RSA 405:49, I. Because the courts expressly rejected its position, CIC cannot now contend that it has a right to the "windfall" and to make less than full payment. Accordingly, CIC cannot now contend that its obligations have been somehow improperly expanded by the AFIA Agreement.

Third, CIC contends that the AFIA Agreement interferes with its rights to adjust claims. However, the Court ruled that "as a result of Home's liquidation, the AFIA Cedents' claims under the AFIA Treaties were required to be filed with and determined by the Liquidator, as opposed to Century (through ACE INA Services), subject to review and approval by the Court." Finding 24, citing RSA 402-C:37, 41, 45, 57. The Court also found that the Claims Protocol agreed between the Liquidator and CIC addresses these issues. Another reason for the Court's finding that "the Agreement is fair and reasonable to ACE" and that "[t]he obligations of ACE are not increased over what they would have been had Home remained solvent and not been placed in liquidation" is that CIC "will be involved in the determination of the AFIA Cedents' claims as provided in the negotiated Claims Protocol." Finding 115. Accordingly, CIC cannot now contend that the Liquidator's involvement in claims handling as required by statute and agreed in the Claims Protocol violated CIC's alleged rights to handle claims.

3. The contract term as asserted by CIC is contrary to the public policy of the Act and a related statute.

CIC's proposed arbitration has no merit for the further reason that, if the Assumption Agreement were construed as CIC contends, it would be contrary to the legislative policy of

collecting reinsurance fully, without diminution because of an insurer's insolvency. It is well established that the New Hampshire courts "will not enforce a contract or contract term that contravenes public policy." Harper v. Healthsource New Hampshire, Inc., 140 N.H. 770, 775 (1996). A contract term is against public policy if it is "injurious to the interests of the public" or "violates some public statute." Id., quoting 17A Am.Jur.2d Contracts § 263 at 267-68 (1991). Here, CIC in essence contends that the AFIA Agreement breaches the Assumption Agreement by permitting the Liquidator to pursue reinsurance that otherwise would not be collected because the AFIA Cedents would not prosecute claims which would receive no distribution. This is the very reason that the Court found that the AFIA Agreement was "necessary." CIC thus asserts a contractual right to the "windfall" identified by the Court and the Supreme Court. See Liquidation of Home, 154 N.H. at 488; Approval Order 31 and Finding 115.

CIC's asserted contractual right to this "windfall" contravenes public policy. It is injurious to the interests of insureds, creditors and the public sought to be protected by the Act, RSA 402-C:1, IV, and it specifically violates the policy of two statutes intended to prevent reinsurers from avoiding their obligations because of an insurer's insolvency. RSA 402-C:36; RSA 405:49. The Supreme Court cited those statutes in holding that depriving creditors of amounts CIC would have paid but for Home's insolvency "would frustrate the legislative purpose of obtaining full payment from reinsurers despite an insurer's insolvency." Liquidation of Home, 154 N.H. at 488.

The "Liability of reinsurer" provision expressly states that "[t]he amount recoverable by the liquidator from a reinsurer shall not be reduced as a result of delinquency proceedings" regardless of whether the reinsurance contract contains an insolvency clause. RSA 402-C:36 (emphasis added). The related "Insolvency, liability" statute effectively mandates an

"insolvency clause" by denying credit for reinsurance unless the contract "provides, in substance, that in the event of the insolvency of the ceding insurer, the reinsurance shall be payable by the assuming insurer on the basis of claims allowed against the ceding insurer in the insolvency proceedings . . . without diminution because of the insolvency of the ceding insurer." RSA 405:49, I (emphasis added).

> [The statute's] purpose is clear. If an insurer wishes to treat its reinsurance contracts as assets . . . those contracts must make the full amount of reinsurance payable to either the insurer or the [regulatory official] as liquidator . . . in the event of the insurer's insolvency. Although [the statute] appears to make the inclusion of an insolvency clause an optional matter, the insurer is effectively compelled to do so. Reinsurance loses most of its value if it cannot be credited as an admitted asset or a deduction from liability. [The statute] thereby functions to increase the size of the pool of available assets in which all of the insurer's creditors may share.

Skandia Am. Reinsurance Corp. v. Schenk, 441 F. Supp. 715, 725 (S.D.N.Y. 1977) (concerning N.Y. Ins. Law § 77). Under the insolvency clause, "when the insurer becomes insolvent the reinsurer's obligation with respect to an outstanding liability insured by the insurer becomes an asset of the insolvency estate. The amount of the obligation is not to be diminished because of the insolvency." Ainsworth v. Gen. Reinsurance Corp., 751 F.2d 962, 965 (8th Cir. 1985).[11]

The Assumption Agreement contains such an insolvency clause. It provides that: "In the event of the insolvency of a Seller [such as Home], this reinsurance shall be payable directly to such Seller, or to its liquidator . . . on the basis of the liability of such Seller without diminution because of the insolvency of such Seller." CIC Ex. A ¶ 6 (emphasis added). Thus, both under the independent force of RSA 402-C:36 and under the contractual insolvency clause included to

[11] See In re Midland Ins. Co., 79 N.Y.2d 253, 258 (1992) (insolvency clauses "even in the absence of a primary insurer's payment to policyholders, permit a liquidator to collect from the reinsurer the amount of reinsurance proceeds that would have become due if the ceding company had not become insolvent."); First Am. Ins. Co. v. Commonwealth Gen. Ins. Co., 954 S.W.2d 460, 465 (Mo. Ct. App. 1997) ("when a reinsured becomes insolvent, the insolvency clause operates to require the reinsurer to pay the full amount due under the reinsurance agreement for the underlying claim to the reinsured's receiver, who then uses the reinsurance proceeds and other assets to pay claims of all creditors").

comply with statutes such as RSA 405:49, I, CIC can have no contractual right to the windfall it seeks. Its position in the proposed arbitration is barred as violative of public policy.

4. CIC's claim is barred by laches.

CIC's arbitration demand is also barred by the equitable doctrine of laches. "Laches . . . is not a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced – an inequity founded on some change in the conditions or relations of the property or the parties involved." Premier Capital v. Skaltsis, 155 N.H. 110, 118 (2007), quoting In re Estate of Laura, 141 N.H. 628, 635 (1997). Laches "will constitute a bar to suit only if the delay was unreasonable and prejudicial." Premier Capital, 155 N.H. at 118, quoting Jenot v. White Mtn. Acceptance Corp., 124 N.H. 701, 710 (1984). The Court should consider "the knowledge of the plaintiffs, the conduct of the defendants, the interests to be vindicated, and the resulting prejudice." Id., quoting Miner v. A & C Tire Co., 146 N.H. 631, 633 (2001). "The trial court has broad discretion in deciding whether the circumstances justify its application." Id.

In this case, CIC was aware in March 2004 of the Liquidator's action in entering the AFIA Agreement and the alleged violation of its asserted rights under the Assumption Agreement. CIC specifically purported to reserve its rights to assert the claim in its Objection. Thus, CIC's four year delay in asserting the claim, until it demanded arbitration on April 1, 2008, "was not merely a result of the lack of awareness of the nature of the conduct;" instead, CIC, "after becoming aware of the [alleged] misconduct, slept on [its] rights." Healey v. Town of New Durham, 140 N.H. 232, 242 (1995), quoting Appeal of Plantier, 126 N.H. 500, 508 (1985).

CIC's delay in asserting its claim is plainly unreasonable. If CIC believed that it had valid arguments that the AFIA Agreement violated the Assumption Agreement and relieved CIC of its obligations to pay reinsurance on AFIA Cedents' claims, it should have raised them

because they were integrally connected to the Liquidator's motion for approval of the AFIA Agreement. Indeed, if CIC were correct (which it is not), then the AFIA Agreement serves no purpose. CIC's claim should have been asserted at the same time as its objection to the AFIA Agreement. The only explanation for the delay offered by CIC is that CIC had not been called upon to pay any money to the Liquidator. That is no ground for delay – CIC has owed amounts to the Liquidator but has been asserting the benefit of setoff since at least April 2005 (Liq. Ex. 13). As CIC recognized from its first filing in March 2004, the AFIA Agreement was intended to provide incentive for AFIA Cedents to prosecute claims that otherwise would not have been prosecuted so that the Liquidator could collect reinsurance. All that has happened since then is that this has come to pass (over CIC's objection and efforts to assert setoffs).

CIC's delay was also highly prejudicial to the Liquidator, the Home estate and Home's creditors. If CIC had made its demand at the time of its Objection, the Liquidator could have sought to require resolution in a single forum (see, e.g., the Liquidator's position that the matter is not properly the subject of arbitration at page 34) or at the least resolved in a coordinated and less burdensome fashion (e.g., unified discovery). Instead, after going through "complex, protracted and costly" litigation that occupied the time and attention of the liquidation leadership team and required the expenditure of fees that reduce the assets of the estate, CIC now seeks an arbitration that will require duplication of these efforts and more legal expense. Further, if CIC's arguments were correct (which they are not), then all the time and expense of the approval proceedings – and the investment of judicial resources – would have been wasted.

The prejudice to the Liquidator from potentially unnecessary litigation is not limited to the approval proceedings. Since the Approval Order, the Liquidator has devoted significant resources to determining CIC's contribution and reinsurance claims and to addressing CIC's

asserted setoffs. Claim and setoff issues have been litigated over the last two years before the Referee, in many instances this Court, and on one occasion (so far) the Supreme Court. If CIC had asserted its arbitration demand in March 2004, its claim would likely have been resolved by sometime in 2006. If CIC had prevailed, the Liquidator would not have incurred the time and expense of litigating with CIC over the claim and setoff issues, which matter only because the AFIA Cedents are asserting claims that result in reinsurance claims against CIC.

Finally, it appears that CIC is deliberately approaching this matter so as to cause the greatest amount of litigation expense, delay and uncertainty. CIC decided not to assert its demand for arbitration in March 2004, at the same time that it promised "complex, protracted and costly" litigation over the AFIA Agreement. Instead, it chose to wait until after the approval litigation had been long concluded and two further years had been spent on claim and setoff litigation. Only when the claims against CIC finally exceed its setoffs so that it had to pay money to the Liquidator did CIC make its demand and assert a reservation of rights as to all monies paid. Such a strategy is wholly contrary to the principles of efficient dispute resolution and minimizing legal expense that underlie the insurer liquidation statutes. It is inequitable and weighs strongly in favor of applying the equitable doctrine of laches here.

B. The Balance Of Harms And CIC's Dilatory Conduct Weigh Against Lifting The Injunction.

The balance of harms weighs heavily against lifting the injunction. Continuation of the stay does not harm CIC, since the Court has already found that the AFIA Agreement does not increase CIC's obligations over what they would be if Home had remained solvent. CIC's obligations are based on valid claims determined under the Claims Protocol based on CIC's recommendations and then approved by the Court. CIC only seeks to obtain through arbitration what the Court and the Supreme Court have held is a "windfall." On the other hand, lifting the

stay would significantly harm the Home estate and its policyholders and other creditors by requiring the estate to bear the significant expense of further proceedings with CIC that seek to reopen matters that have already been decided (or should have been raised and decided) in the approval proceedings. This reduces assets for payment of creditors. It also creates uncertainty over the validity of the AFIA Agreement – a matter already settled by the Court – which may deter the AFIA Cedents from prosecuting claims and thereby reduce reinsurance recoveries.

The Court should also weigh CIC's conduct and delay in balancing the equities. CIC's assertion of the challenges referred to in the demand for arbitration has been delayed and timed so as to maximize the length of litigation over the AFIA Agreement and the attendant uncertainty over its effectiveness. In its March 2004 filings CIC promised "complex, protracted and costly" litigation over the AFIA Agreement. It also consciously chose not to expressly raise arguments under the Assumption Agreement, but to attempt to reserve them for arbitration. Now, after almost two years of expensive litigation over the AFIA Agreement in this Court, the Supreme Court and English Court, and two further years of litigation over claims and setoffs before the Referee, this Court and the Supreme Court, CIC presents a renewed challenge to the AFIA Agreement in the form of an arbitration demand raising issues it identified in its first filing. CIC's conscious choice to delay and protract litigation bars it from equitable relief.

C. The Public Interest Supports The Continued Injunction.

The public interests generally underlying the stay – avoidance of unnecessary litigation expense and centralization of matters in the Court – support the injunction here. Application of the injunction is particularly appropriate, however, because the proposed arbitration is contrary to the specific public interest in collection of reinsurance. In upholding the necessity of the AFIA Agreement, the Supreme Court noted that "the purpose of RSA chapter 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." Liquidation of Home, 154 N.H. at 488, citing RSA 402-C:1, IV. Allowing CIC's proposed arbitration is contrary to this policy because it undercuts the Liquidator's ability to collect on the reinsurances that the Court held the AFIA Agreement was necessary to collect. Even more specifically, the Supreme Court noted that without the AFIA Agreement, CIC would "reap a substantial windfall," and that "[t]his would frustrate the legislative purpose of obtaining full payment from reinsurers despite an insurer's insolvency." Liquidation of Home, 154 N.H. at 488, citing RSA 402-C:36, RSA 405:49, I. Allowing CIC's arbitration to proceed would directly conflict with this legislative policy.

II. EVEN IF THE STAY WERE LIFTED, CIC'S ARGUMENTS SHOULD BE DETERMINED BY THE COURT AND NOT PRIVATE ARBITRATORS.

Even if the Court were to determine that the injunction should be lifted and CIC allowed to pursue its claim or defense, the matter should be heard by this Court, not private arbitrators. The Court should deny CIC's motion to compel arbitration because CIC has waived its right to pursue arbitration by choosing to litigate issues intertwined with its contract claims in the Court. In any event, matters of central importance to the liquidation should be addressed by the Court, not private arbitrators who have no public role.

A. CIC Has Waived Any Right To Arbitrate Matters Regarding The AFIA Agreement.

"It is well established that the right to arbitrate a contract may be waived." Second Congregational Society v. Stubbins, 108 N.H. 446, 447 (1968). Waiver "can be inferred from a course of conduct." Logic Assoc's, Inc. v. Time Share Corp., 124 N.H. 565, 571 (1984). "Any conduct of the parties inconsistent with the notion that they treated the arbitration provision as in effect, or any conduct that might be reasonably construed as showing that they did not intend to

avail themselves of such a provision, may amount to a waiver thereof." Id., quoting Second Congregational Society, 108 N.H. at 447-48. A party's "delay in asserting his arbitration rights is significant toward determining whether his participation in a lawsuit manifests affirmative acceptance of the judicial forum." Babcock v. Sol Corp., 118 N.H. 340, 342 (1978). Courts addressing waiver under the Federal Arbitration Act ("FAA") have looked to essentially the same standards. See Rankin v. Allstate Ins. Co., 336 F.3d 8, 12 (1st Cir. 2003) ("the components of waiver of an arbitration clause are undue delay and a modicum of prejudice to the other side"); Saga Communications, Inc. v. Voornas, 756 A.2d 954, 959 (Me. 2000) ("a course of action inconsistent with [the] present insistence upon [the] contractual right to arbitration").[12]

In this case, CIC asserted that it had arbitration rights in March 2004, yet it did not demand arbitration until April 1, 2008. It was content to litigate matters concerning the AFIA Agreement with the Liquidator in the Superior Court and the Supreme Court for 21 months (March 2004 to December 2006). During that time, CIC asserted standing based on the Assumption Agreement and presented to the courts the merits of its arguments concerning the Liquidator's conduct towards ACE in negotiating the AFIA Agreement, the alleged harm to CIC and the lawfulness of the AFIA Agreement. This constitutes unreasonable delay. Moreover, the extensive litigation involved discovery, an evidentiary hearing and two appeals. The burden of any further proceedings constitutes prejudice to the Liquidator. See Rankin, 336 F.3d at 14; National Found. For Cancer v. A.G. Edwards & Sons, 821 F.2d 772, 777 (D.C. Cir. 1987) (prejudice not necessary but "[b]eing compelled to bear the expenses of this proceeding constitutes prejudice").

[12] Waiver is not a matter for arbitrators. "[W]aiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court." Marie v. Allied Mortgage Corp., 402 F.3d 1, 14 (1st Cir. 2005). Accord, Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 217 (3rd Cir. 2007).

CIC's conduct is particularly unfair and prejudicial here because it now seeks a "second chance in another forum." Menorah Ins. Co. Ltd. v. INX Reinsurance Corp., 72 F.3d 218, 221 (1st Cir. 1995) quoting Jones Motors Co. v. Chauffeurs, Teamsters, and Helpers Local Union No. 633, 671 F.2d 38, 43 (1st Cir. 1982), cert. denied, 459 U.S. 943 (1982). Use of arbitration clauses to "forum shop" is discouraged and prejudicial both to the resisting party and to the interests of efficiency and economy that arbitration is often thought to promote. Id. at 222-23 ("Arbitration clauses were not meant to be another weapon in the arsenal for imposing delay and costs in the dispute resolution process."); National Found. for Cancer, 821 F.2d at 776 ("To give [defendant] a second bite at the very questions presented to the court for disposition squarely confronts the policy that arbitration may not be used as a strategy to manipulate the legal process."); Saga Communications, 756 A.2d at 962 ("The strong federal policy in favor of arbitration was not intended to provide litigants with successive opportunities to prevail through continued revisitation of the same issue in different forums, particularly when those litigants are running from an unfavorable result in the courts."). CIC's willingness to engage in extensive litigation over the AFIA Agreement and its conscious four year delay in demanding arbitration are inconsistent with the recently asserted right to arbitrate and show CIC's acceptance of the judicial forum. Such a "litigate first and arbitrate later" strategy waives the right to arbitrate.

B. CIC Seeks To Arbitrate Matters Of Public Import Regarding The Liquidation Of An Insurer That Under The Act Are Not Subject To Determination By Private Arbitrators.

In its proposed arbitration, CIC seeks to shift the dispute to a private forum that has no responsibility for considering the public interest reflected in the provisions of the Act. However, arbitration is inconsistent with the legislative scheme for liquidation of insolvent insurers, and it would be improper to relegate such matters of public import to private arbitrators. CIC's

assertions do not present a simple contract issue but an attack on both the Court's supervision of the liquidation exercised in the Approval Order and the legislative policy of fully collecting reinsurance notwithstanding an insurer's insolvency recognized in RSA 402-C:36, RSA 405:49, I, and by the Supreme Court in Liquidation of Home, 154 N.H. at 488. Since the Act does not permit arbitration here, the McCarran-Ferguson Act makes the FAA inapplicable.

1. Arbitration is not permitted by the Act where the public interests in insurer liquidations proceedings are at stake.

CIC seeks to arbitrate its assertion that the Liquidator's entry of the AFIA Agreement breached Home's obligations under the Assumption Agreement such that CIC does not reinsure claims submitted as a result of the AFIA Agreement. CIC Ex. E. This effort to avoid obligations to the insolvent insurer is a direct challenge to the policies of the Act "to protect preferred creditors by reserving assets for them," and to "obtain[] full payment from reinsurers despite an insurer's insolvency." Liquidation of Home, 154 N.H. at 488, citing RSA 402-C:1, IV, RSA 402-C:36, RSA 405:49, I. CIC also appears to contend that the Liquidator's involvement in claims (even as negotiated in the Claims Protocol) is inconsistent with CIC's right to administer claims. CIC Ex. E. This position directly attacks the provisions of the Act requiring claims determinations by the Liquidator subject to the control of the Court. RSA 402-C:38, RSA 402-C:41, RSA 402-C:45. Such matters may not be arbitrated consistent with the Act.

The Act's overarching purpose is "the protection of the interests of insureds, creditors, and the public generally." RSA 402-C:1, IV. The Act protects the public interest by making a public official, the Insurance Commissioner, the liquidator of an insolvent insurer with possession and title to its assets and rights of action, subject to the control of the Superior Court. See RSA 402-C:20; RSA 402-C:4, III; RSA 402-C:21, I; RSA 402-C:25, VI, XII. The provisions of the Act demonstrate an unmistakable legislative intent to centralize matters

concerning the liquidation, including litigation concerning the marshaling of the insurer's rights against debtors, in the liquidation court, by abating proceedings and extending personal jurisdiction over debtors, subject only to that court's determination that substantial justice requires litigation elsewhere. RSA 402-C:28, I; RSA 402-C:1, IV(e); RSA 402-C:4, V, VI. The Act also authorizes all manner of injunctions to prevent other proceedings and interference with the liquidation. RSA 402-C:5. The Act does not contemplate arbitration.[13]

Under this statutory scheme, arbitration of matters directly implicating the public policies of the Act is not permitted. As the New York Court of Appeals held concerning the New York insurer insolvency statute, the plan "[c]learly . . . emerge[s] that the [court], with the agency of the [insurance regulator], was intended to have exclusive jurisdiction of claims both for and against an insurance company in liquidation." Matter of Knickerbocker Agency, Inc., 4 N.Y.2d 245, 250 (1958). "[T]he Legislature never contemplated turning over [important questions of policy in the] liquidation proceedings . . . to private arbitrators to administer." Id. at 251. Thus, while there is no express provision requiring prosecution of such claims against debtors only in the liquidation court, "in keeping with the overall scheme and plan [of the statute], and in view of the fact that [the statute] contains no statutory authorization for arbitration, that the court may not be ousted of jurisdiction in favor of an arbitrative tribunal." Id. at 252. See Corcoran v. Ardra Ins. Co., Ltd., 77 N.Y.2d 225, 229 (1990) (denying arbitration of a reinsurer's claim that a reinsurance agreement had been repudiated where the liquidator did not permit the reinsurer to participate in claim proceedings), cert. denied, 500 U.S. 953 (1991); Covington v. American Chambers Life Ins. Co., 150 Ohio App. 3d 119, 124 (2002) (denying arbitration of dispute over debts and credits between liquidator and another insurance company).

[13] The Act refers to arbitration only once, as one of several ways of determining the value of security held by a secured creditor but expressly subject to control of the liquidation court. RSA 402-C:43, I(b), II.

Arbitration should be denied because of the public interests implicated in an insurer liquidation. "Arbitrators are private individuals, selected by the contracting parties to resolve matters important only to them. They have no public responsibility and they should not be in a position to decide matters affecting insureds and third-party claimants after the contracting party has failed to do so. Resolution of such disputes is a matter solely for the [regulatory official], subject to judicial oversight, acting in the public interest." Corcoran, 77 N.Y.2d at 233. See Benjamin v. Pipoly, 155 Ohio App. 3d 171, 183 (2003) ("it is clear from the statutory scheme that the General Assembly did not contemplate turning over the administration of liquidation proceedings and incidental actions to private arbitrators in forums shielded from public scrutiny, judicial review of which would be sharply limited"). Under the Act, "the court oversees the entire process." Liquidation of Home, 154 N.H. at 482.

Denial of arbitration is particularly appropriate here for two reasons. First, the reinsurance provided by the Assumption Agreement is the single largest asset of the Home estate, even though its value is uncertain. Approval Order 16, 20-21. Its collection is accordingly a matter of great concern to the estate and its creditors and therefore is of significant public interest. See Liquidation of Home, 154 N.H. at 488; Benjamin, 155 Ohio App. 3d at 184 ("causes of action . . . are an asset of the insolvent insurer even before the attendant legal and factual issues are fully and finally determined. In our view, compelling arbitration against the will of the liquidator will *always* interfere with the liquidator's powers and will *always* adversely affect the insolvent insurer's assets.") (emphasis in original). Second, in seeking to avoid its obligations to pay under the Assumption Agreement, CIC is directly challenging both the actions of the Court in approving the AFIA Agreement and the statutes stating the public policy of

collecting reinsurance without diminution because of the insurer's insolvency. See RSA 405:49 and RSA 402-C:36. In these circumstances, arbitration is not permitted by the Act.

2. The McCarran-Ferguson Act protects the Act from preemption by the Federal Arbitration Act.

CIC contends that the FAA compels arbitration here even if the New Hampshire Act prohibits it. However, the McCarran-Ferguson Act protects the New Hampshire Act from preemption. The McCarran-Ferguson Act provides that "[n]o act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012. It protects state laws from federal preemption when (1) the federal statute does not "specifically relate to the business of insurance," (2) the state statute was enacted "for the purpose of regulating the business of insurance," and (3) application of the federal statute would "impair, interfere, or supersede" the state statute. See United States v. Fabe, 508 U.S. 491, 500-01 (1993).

The FAA says nothing about insurance and does not "specifically relate" to it. Further, there is no question that application of the federal statute to require arbitration barred by the Act would "impair" or "interfere" with the state statute. The only open issue is whether the state statute was enacted for the purpose of regulating the business of insurance. The Act says it is. See RSA 402-C:1, IV ("The purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally . . . through . . . (f) Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business.") (emphasis added). While the cases are not uniform, leading cases have concluded that state insurer insolvency statutes regulate the business of insurance so that the FAA does not compel arbitration where the state statute bars it. See Davister Corp. v. United Republic Life Ins. Co., 152 F.3d 1277, 1282 (10th Cir. 1998) (Ohio Act consolidating all claims

in liquidation court and staying all proceedings regulates the business of insurance; refusal to compel arbitration affirmed), cert. denied, 525 U.S. 1177 (1999); Munich American Reinsurance Co. v. NAC Reinsurance Corp., 141 F.3d 585, 596 (5th Cir. 1998) (Oklahoma Act, in particular provisions vesting exclusive jurisdiction over delinquency proceedings in state court and authorizing court to enjoin action that interferes with delinquency proceeding, regulates business of insurance; reinsurer's action to compel arbitration dismissed), cert. denied, 525 U.S. 1016 (1998); Washburn v. Corcoran, 643 F. Supp. 554, 557 (S.D.N.Y. 1986) (FAA yields to New York Act that under Knickerbocker does not permit arbitration in insurer liquidations; arbitration of reinsurance dispute denied). Accordingly, the FAA does not compel arbitration here.

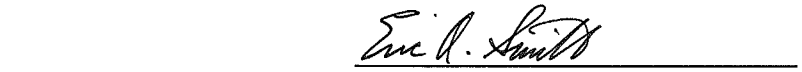
CONCLUSION

For the reasons stated, the Court should deny CIC's motion.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER OF INSURANCE OF THE STATE OF NEW HAMPSHIRE, SOLELY AS LIQUIDATOR OF THE HOME INSURANCE COMPANY,
By his attorneys,
KELLY A. AYOTTE
ATTORNEY GENERAL

J. Christopher Marshall
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3650



J. David Leslie
Eric A. Smith
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110-1700
(617) 542-2300

May 5, 2008

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Objection and Memorandum in Opposition to CIC's Motion to Lift Stay and to Compel Arbitration and the binder of Liquidator's Exhibits was sent, this 5th day of May, 2008, by overnight mail and email to counsel for CIC and by first class mail to all other persons on the attached service list.

Eric A. Smith

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 03-E-0106

SERVICE LIST

Lisa Snow Wade, Esq.
Orr & Reno
One Eagle Square
P.O. Box 3550
Concord, New Hampshire 03302-3550

Gary S. Lee, Esq.
James J. DeCristofaro, Esq.
Kathleen E. Schaaf, Esq.
Morrison & Foerster
1290 Avenue of the Americas
New York, New York 10104-0050

Peter Van Tol, Esq.
Lovells
590 Madison Avenue
New York, New York 10022

Gail M. Goering, Esq.
Adam Goodman, Esq.
Eric Haab, Esq.
Lovells
One IBM Plaza
330 N. Wabash Avenue, Suite 1900
Chicago, Illinois 60611

Peter G. Callaghan, Esq.
Preti, Flaherty, Beliveau, Pachos
& Haley, PLLP
57 North Main Street
P.O. Box 1318
Concord, New Hampshire 03302-1318

Martin P. Honigberg, Esq.
Sulloway & Hollis, P.L.L.C.
9 Capitol Street
P.O. Box 1256
Concord, New Hampshire 03302-1256

George T. Campbell, III, Esq.
Robert A. Stein, Esq.
Robert A. Stein & Associates, PLLC
One Barberry Lane
P.O. Box 2159
Concord, New Hampshire 03302-2159

David M. Spector, Esq.
Dennis G. LaGory, Esq.
Kristy L. Allen, Esq.
Schiff Hardin LLP
6600 Sears Tower
Chicago, Illinois 60606

Jack B. Gordon, Esq.
Fried, Frank, Harris, Shriver
& Jacobson, LLP
1001 Pennsylvania Avenue
Washington, D.C. 20004

Andrew W. Serell, Esq.
Rath, Young and Pignatelli
One Capital Plaza
P.O. Box 1500
Concord, New Hampshire 03302-1500

Stephan P. Parks, Esq.
Doreen F. Connor, Esq.
Wiggin & Nourie, P.A.
670 North Commercial Street, Suite 305
P.O. Box 808
Manchester, New Hampshire 03105-0808

Michael Cohen, Esq.
Cohen & Buckley, LLP
1301 York Road
Baltimore, Maryland 21093

David H. Simmons, Esq.
Mary Ann Etzler, Esq.
de Beaubien, Knight, Simmons,
Mantzaris & Neal, LLP
332 North Magnolia Avenue
P.O. Box 87
Orlando, Florida 32801