THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Docket No. 217-2003-EQ-00106

In the Matter of the Liquidation of
The Home Insurance Company

LIQUIDATOR'S RESPONSE TO MWCP'S OBJECTION TO MOTION FOR APPROVAL OF CLAIM AMENDMENT DEADLINE

John R. Elias, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), submits this response to the objection filed by MW Custom Papers LLC ("MWCP"), successor to Mead Corporation ("Mead"), to the Liquidator's Motion for Approval of Claim Amendment Deadline.

In its objection, MWCP contends that the Liquidator must either (1) keep the liquidation open indefinitely, or (2) estimate and allow potential claims that may be filed in the future ("incurred but not reported claims"). The first disregards the interests of the Class II claimants with allowed claims totaling $2.73 billion in receiving the fullest possible distribution on their claims, and the second is inconsistent with the New Hampshire Insurers Rehabilitation and Liquidation Act, RSA 402-C ("Act"). MWCP also complains that a deadline disadvantages it in settlement negotiations. However, the progress in the liquidation and the interests described in the Liquidator's motion support approving a claim amendment deadline now in order to identify the remaining claims so they may be determined, assets distributed, and the proceeding closed. Of the 273 policyholders who still have open claims, MWCP is the only one that filed a general objection by the November 18, 2019 deadline.[1]

[1] The Catholic Foreign Mission Society of American Inc. aka Maryknoll Father and Brothers, a policyholder in Hawaii, and the New York Liquidation Bureau objected based on "revival" statutes for sexual abuse claims in those two states. Those objections are likely to become moot. See Liquidator's Response to First Group of Objections

Background

Home issued a number of policies to Mead for various policy periods between December 1, 1968 and June 10, 1976. The policies were all excess policies, and they attach above underlying limits of $4.3 million, $5.3 million, or $20.3 million depending on the years involved. MWCP has asserted a claim for coverage of underlying asbestos bodily injury cases. MWCP maintains that some Home policies are "presently being implicated" by paid losses, and it contends that they will continue to be implicated by underlying asbestos claims "into the foreseeable future." MWCP Objection at 2. MWCP's submissions to the Liquidator anticipate asbestos claims will implicate Home policies through the year 2050.

ARGUMENT

The Liquidator has moved for approval of a claim amendment deadline because it is necessary to bring this liquidation to closure. The Liquidator cannot make the fullest distribution to the claimants with allowed Class II policy-related claims (who will receive a percentage distribution) until all claims are determined. Further, since the liquidation cannot pay interest (which is assigned to priority Class VII under RSA 402-C:44), the delay in distribution erodes the value of the claimants' allowed claims. Courts supervising insurer liquidations commonly approved final deadlines so that claims may be identified and resolved in order to protect the interests of such claimants. See Liquidator's Motion for Approval of Claim Amendment Deadline at 10 & n. 9 (citing cases). As set forth in the motion, the Liquidator believes that this proceeding has now progressed to the point that the balance of interests clearly weighs in favor of establishing such a deadline here. Holding the proceeding open indefinitely, as MWCP advocates, would also delay indefinitely the final (and fullest possible) distribution to the

(filed December 13, 2019). Another policyholder, Johnson & Johnson, filed an untimely objection on December 24, 2019, which the Liquidator received on December 26, 2019.

claimants with Class II claims. MWCP's arguments lack merit, and the Court should approve the proposed claim amendment deadline.

I. THE NEW HAMPSHIRE ACT DOES NOT PROVIDE FOR ESTIMATION AND ALLOWANCE OF UNKNOWN "INCURRED BUT NOT REPORTED" CLAIMS.

MWCP contends that the New Hampshire Act requires that contingent – unknown or "incurred but not reported"– claims participate in a liquidation. "Incurred-But-Not-Reported Reserves" (or "IBNR") are "reserves set aside before claims are even filed, based upon historical data, including loss experience." Ostrager & Vyskocil, Modern Reinsurance Law and Practice, § 1:03 (3d ed. 2014). They must be distinguished from case reserves. Case reserves reflect known claims, see id. (definition of "Loss Reserves"), and the claim amendment deadline will not cut off such claims, although their value will need to be demonstrated.

A. MWCP principally relies on the language of RSA 402-C:39, III that "[a] claim may be allowed even if contingent, if it is filed in accordance with RSA 402-C:37, II." This provision does not require that potential future claims be allowed. MWCP's position disregards other provisions of the Act and leads to the absurd result that the liquidation must remain open indefinitely (in this case, potentially for decades). However, the courts "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result" and "do not consider words and phrases in isolation, but rather within the context of the statute as a whole." E.g., White v. Auger, 171 N.H. 660, 666 (2019) (quoting Petition of Carrier, 165 N.H. 719, 721 (2013)).

RSA 402-C:39, III specifies that contingent claims must be filed "in accordance with RSA 402-C:37, II." RSA 402-C:39, III (emphasis added). The cited section in turn requires that contingent claims be "absolute" to be deemed timely filed. RSA 402-C:37, II concerns "excused" late filings, that is, late filings for which there is "good cause." The subsection that

addresses contingent claims permits excused late filing of contingent claims where "a claim was contingent and became absolute, and was filed within 30 days after it became absolute." RSA 402-C:37, II(e) (emphasis added). This provision contemplates the allowance of known claims, not potential claims that have not been identified.

RSA 402-C:37, II(a) similarly provides that (formerly) unknown claims are deemed timely and may participate in dividends where "existence of a claim was not known to the claimant and . . . he filed within 30 days after he learned of it." RSA 402-C:37, II(a). If the Act contemplated claims for IBNR or required that potential claims be addressed, there would be no need for provisions to permit late filing of contingent claims when they become absolute or unknown claims when they become known.

Notably, the provision addressing policyholders (like MWCP) who are subject to third party claims concerns known claims, not the possibility of claims. RSA 402-C:40 provides that "[w]henever a third party asserts a cause of action against an insured of an insurer in liquidation, the third party may file a claim with the liquidator." RSA 402-C:40, I (emphasis added). It then goes on to provide "[w]hether or not the third party files a claim, the insured may file a claim on his own behalf in the liquidation." RSA 402-C:40, II (emphasis added).

In any event, the Act does not require that contingent claims be allowed. RSA 402-C:39, III contains an express limitation on even those contingent claims that become absolute. The statute provides: "It [a contingent claim filed within 30 days after it became absolute] may be allowed and may participate in all dividends declared after it is filed, to the extent that it does not prejudice the orderly administration of the liquidation." RSA 402-C:39, III (emphasis added). The underscored language makes clear that there is no mandatory right to have contingent claims

addressed. Even a contingent claim that has become absolute and thus "may be allowed" cannot participate if it prejudices the orderly administration of the liquidation.

At bottom, MWCP asserts that the Liquidator is required to protect IBNR claims. However, while RSA 402-C:37, II provides that the Liquidator "shall" permit late filing of claims for good cause, that does not require that claims be filed indefinitely. As noted above, the statute limits good cause for the filing of contingent claims to where "a claim was contingent and became absolute, and was filed within 30 days after it became absolute," RSA 402-C:37, II(e), and it limits good cause for the filing of previously unknown claims to claims that are filed "within 30 days after [the claimant] learned of it." RSA 402-C:37, II(a). Moreover, even late claims (of any type) for which good cause exists can participate only if payment on them "will not prejudice the orderly administration of the liquidation." RSA 402-C:37, II. MWCP's position that IBNR must be protected by holding the liquidation open indefinitely renders these provisions superfluous, contrary to the usual principles of statutory construction. See White, 171 N.H. at 666-67 ("The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.") (quoting Garand v. Town of Exeter, 159 N.H. 136, 141 (2009); id. at 667 (declining to adopt construction that would render provision "meaningless").

B. Properly interpreted, the Act permits contingent claims to be included in the liquidation so long as the liquidation is ongoing, but allows them to be cut off when the balance of interests weighs in favor of taking steps to determine all claims so that a final distribution can be made. The Act expressly contemplates that claims may be cut off, as it provides in several places that claims may not participate in distributions when that would "prejudice the orderly administration of the liquidation." RSA 402-C:37, II and III; RSA 402-C:39, III. The Act also

provides for balancing, as it directs the Liquidator to "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." RSA 402-C:46, I. By providing for a "balance," this provision recognizes that the "expeditious" completion of the liquidation can require that claims be unprotected.

The Legislature's specification that the claims that are to be considered in the balance under RSA 402-C:46 are "unliquidated and undetermined claims" is significant. The Legislature referred to "contingent" claims in other parts of the Act, but it did not include them here. The ordinary meaning of "unliquidated and undetermined" claims refers to known claims filed in the liquidation whose value has not yet been determined. It does not reasonably include claims by unknown claimants who have not yet asserted a cause of action against the insured.[2]

In sum, the proposed claim amendment deadline properly "cuts off" unknown claims (IBNR) effective at the deadline. While claims may continue to be filed during the liquidation, the Act does not require that the liquidation remain open until all possible potential claims that could ever be made have been made. Instead, the Act provides for a balance of interests in light of the progress of the liquidation. As explained in the Liquidator's motion, the Liquidator believes that such a balancing now requires that a claim amendment deadline be established to identify remaining claims so they may be determined, the assets distributed, and the liquidation closed. The liquidation has progressed to the point that the interests of the claimants with the

[2] MWCP refers to the Act's purpose of providing for "[e]quitable apportionment of any unavoidable loss." RSA 402-C:1, IV(d). However, any filing deadline bars some claims, and every liquidation must come to an end. This general statement of purpose does not require that the liquidation be held open for years waiting for claims against MWCP while claimants with allowed Class II claims, including those of policyholders who have settled, are deprived of payment. That would not be equitable or consistent with the purpose of the liquidation.

$2.73 billion of allowed Class II claims in receiving as full a distribution as possible outweigh the interests of those who may be subject to potential claims over the next three decades.

C. As an alternative, MWCP contends that the Liquidator should estimate and allow IBNR in the liquidation. MWCP cites a Missouri decision as support, but that decision turned on statutory provisions expressly permitting estimation not found in New Hampshire.

In Angoff v. Holland-America Ins. Co. Trust, 937 S.W.2d 213 (Mo. Ct. App. 1996), the Missouri Court of Appeals upheld estimation because "[t]he General Assembly specifically endorsed IBNR claims in [Mo. Rev. Stat.] § 375.1212.4." Id. at 217. Section 375.1212.4 provided an arbitration process for determination of IBNR:

> The liability of the insurer relating to liabilities incurred, but for which claims relating to such liabilities are not reported, accrued or claimed, shall be determined with reference to the provisions of this subsection. In such an event, the amount of such liabilities shall be calculated, at their present value, by a panel appointed pursuant to this subsection. The liquidator and the claimant shall each appoint one arbitrator, and the court shall appoint a special magistrate who shall preside over all proceedings under this subsection. Thereupon, the panel shall hear and determine the amount of such liabilities . . . .

937 S.W.2d at 216 n.9. The court also referred to Mo. Rev. Stat. § 375.1220.2 providing that:

> If the fixing or liquidation of any claim or claims would unduly delay the administration of the liquidation . . . the determination and allowance of such claim or claims may be made by an estimate. Any such estimate shall be based upon an actuarial evaluation made with reasonable actuarial certainty or upon another accepted method of valuing claims with reasonable certainty.

937 S.W.2d at 217. See id. at 215 n. 4 (quoting statute). The New Hampshire Act has no provisions like these authorizing estimation and allowance of IBNR claims.

Leading cases in other states have rejected estimation of IBNR as inconsistent with liquidation statutes. In re Liquidation of Integrity Ins. Co., 193 N.J. 86, 935 A.2d 1184 (2007); Quackenbush v. Mission Ins. Co., 46 Cal. App. 4th 458, 54 Cal. Rptr. 2d 112 (1996). In Integrity, the liquidator proposed a liquidation plan that would have allowed actuarial estimation

of IBNR. Integrity, 935 A.2d at 1186. The New Jersey Supreme Court ruled that the plan conflicted with the New Jersey statutes because N.J.S.A. 17:30C-28(a)(1) required that claims be "absolute" to be allowed and that IBNR was not. Id. at 1190-91.[3] "IBNR claims are actuarial estimates and are, therefore, not absolute." Id. at 1190. The court added:

> Because the process by which the Liquidator proposes to estimate IBNR claims of necessity entails looking outside of each claim to other similar claims in respect of their very existence, nature, extent and cost, IBNR claims fail to satisfy that most basic of requirements in order to be "absolute": that in order for a claim to participate in the liquidation of an insolvent insurer's estate, the claim, in each of its fundamental respects, must stand on its own, and not by reference to any other claim.

Id. at 1191. In Quackenbush, the liquidator also proposed a liquidation plan that would have permitted him to actuarially estimate future IBNR losses and then collect reinsurance on them. Quackenbush, 54 Cal. Rptr. 2d at 115-16. The California Court of Appeal struck down the plan as in conflict with the California statutes. It concluded that Cal. Ins. Code § 1025 prohibited claimants with future IBNR claims from participating in the liquidation until liability for and the amount of the claims became certain. Id. at 114, 117.[4]

While the New Hampshire Act is not identical to the New Jersey or California statutes, it focuses on known and absolute claims as described above. The Act does not support mandatory estimation and allowance of projected future claims.

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[3] The statute provided (id. at 1189): "No contingent claim shall share in a distribution of the assets of an insurer which has been adjudicated to be insolvent . . ., except that such claims shall be considered, if properly presented, and may be allowed to share where (1) Such claim becomes absolute against the insurer on or before the last day fixed for filing of proofs of claim against the assets of such insurer[.]"

[4] The statute provided (id. at 114): "Claims founded upon unliquidated or undetermined demands must be filed within the time limit provided in this article for the filing of claims, but claims founded upon such demands shall not share in any distribution to creditors . . . until such claims have been definitely determined, proved and allowed. Thereafter, such claims shall share ratably with other claims of the same class in all subsequent distributions. An unliquidated or undetermined claim or demand within the meaning of this article shall be deemed to be any such claim or demand upon which a right of action has accrued at the date of the order of liquidation and upon which the liability has not been determined or the amount thereof liquidated."

II. THE LIQUIDATOR MAY PROPERLY SETTLE POLICYHOLDER CLAIMS INCLUDING SOME IBNR BUT IS NOT REQUIRED TO DO SO.

The Liquidator has sought to address issues concerning policyholders who may face future claims through settlements. The Act provides the Liquidator with broad discretion to settle claims, subject to the Court's control, in furtherance of the liquidation where a reasonable basis for liability and value can be shown. The Liquidator is expressly authorized to "compound, compromise or in any other manner negotiate the amount for which claims will be recommended to the court," RSA 402-C:45, I, and "do such other acts not herein specifically enumerated or otherwise provided for as are necessary or expedient for the accomplishment of or in aid of the purpose of liquidation." RSA 402-C:25, XXII. Pursuant to these provisions, the Liquidator has entered many comprehensive policy release settlements with policyholders to finally resolve their claims in the liquidation, which may include paid losses, case reserves (known but still outstanding claims), and an element for potential future claims (IBNR). The Liquidator has sought and received approval of the Court for the settlements. See, e.g., Motion for Approval of Settlement Agreement with Trane U.S., Inc. (May 13, 2019), granted June 3, 2019; Motion for Approval of Commutation with Northwestern National Insurance Company and Settlement Agreement and Assignment of Distribution with AK Steel Corporation (February 17, 2006), granted March 10, 2006.

These settlements resolve the policyholder's claims completely by obtaining a policy release. They further the purposes of the liquidation by concluding the relationship with the policyholder and reducing the inventory of claims and avoiding the possibility that the policyholder will later reappear to assert further claims. This moves the liquidation toward closure by winnowing down the claims in a permanent fashion. The Liquidator has considered the potential for additional claims in these settlements in order to achieve finality.

The critical point about these settlements is that they are voluntary compromises. To the extent that they may involve future claims, the policyholder and the Liquidator must come to an agreement. A policyholder cannot compel the Liquidator to allow such claims. See Fuller-Austin Insulation Co. v. Highlands Ins. Co., 135 Cal. App. 4th 958, 38 Cal. Rptr. 3d 716, 742 (Cal. Ct. App. 2006) ("While calculating the aggregate value of present and future asbestos claims is helpful and often necessary in other contexts, no authority exists for utilizing such a valuation to affix an insurer's indemnity obligation."); see id., 38 Cal. Rptr. 3d at 746. The Liquidator similarly cannot compel a policyholder to agree to a value for them.

In the Liquidator's view, the time for attempting to advance the liquidation by negotiating comprehensive settlements with policyholders is coming to an end. As noted in the Liquidator's motion, the remaining policyholders in many instances involve high excess coverage and have been unwilling to discuss such settlements. That is their right. However, in light of the significant progress that has been made in resolving claims over the 16 years of liquidation, the 24 years that have passed since Home's last policy (and, for instance, the 43 years since MWCP's last Home policy), the ongoing costs of the liquidation, and the $2.73 billion of allowed Class II claims that are not receiving the fullest possible distribution, a claim amendment deadline is now appropriate to move the liquidation toward closure and permit a full distribution.

MWCP protests that it wishes to negotiate a settlement and that the claim amendment deadline puts it in an unfair negotiating position. The Liquidator will not comment on settlement negotiations. However, the Liquidator notes two points. First, he has successfully reached settlements with many policyholders seeking coverage for underlying asbestos claims over the

past 16 years. Second, no other policyholder timely objected to the proposed claim amendment deadline on such grounds.

CONCLUSION

The Court should overrule MWCP's objection, grant the Liquidator's motion and approve the proposed claim amendment deadline.

Respectfully submitted,

JOHN R. ELIAS, INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, AS LIQUIDATOR OF THE HOME INSURANCE COMPANY,

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December 30, 2019

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Response to MWCP's Objection to Motion for Claim Amendment Deadline was sent, this 30th day of December, 2019, by first class mail, postage prepaid to all persons on the attached service list.

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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

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