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

ZURICH INSURANCE PLC, GERMAN BRANCH AND WÜRTTEMBERGISCHE VERSICHERUNG AG'S OBJECTION TO THE LIQUIDATOR'S MOTION FOR APPROVAL OF CLAIM AMENDMENT DEADLINE

[ORAL ARGUMENT REQUESTED]

Zurich Insurance plc, German Branch and Württembergische Versicherung AG (hereinafter, "Objecting Creditors") oppose the Liquidator's Motion for Approval of Claim Amendment Deadline ("Motion") because, *inter alia*, the proposed accelerated deadline fails to strike a "reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims" as required by RSA 402-C:46, I. As set forth below, this Motion is premature and not in the best interests of creditors, including Class 2 creditors whose claims at present will not be paid in full by The Home Insurance Company ("The Home Estate") if the Motion is granted.

While there is no binding New Hampshire authority directly on point, the Vermont Supreme Court addressed and denied such a motion of a liquidator in another insurer insolvency proceeding, *In re Ambassador Insurance Co.*, 198 Vt. 341, 114 A.3d 492 (2015) (hereinafter, "the *Ambassador* Decision"). The Vermont Supreme Court employed a well-considered framework for analyzing whether a proposed final claim amendment deadline in an insurance liquidation proceeding would foster a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims of creditors. Specifically, the Vermont Supreme Court held that courts facing this issue should analyze and

weigh the following four factors: "(1) the company's remaining assets; (2) the nature and amount of its remaining liabilities; (3) the administration costs of the estate; and (4) the extent to which delay in termination of the liquidation proceedings results in a delay of full payment to priority claim holders." *Ambassador*, 114 A.3d at 500. The Vermont Supreme Court, after considering facts similar to those relevant to The Home Liquidator's Motion before this Court, denied the Ambassador liquidator's motion. Four years after the *Ambassador* Decision, the lower court supervising the Ambassador liquidation has not yet imposed a final claim amendment deadline, enabling creditors of the Ambassador Estate to continue submitting newly reported additional claims against those creditors' insurance policies and reinsurance contracts that were previously incurred but not yet reported claims ("IBNR").

Here, all four factors weigh in favor of denying the Liquidator's Motion to impose, at this time, a final claim amendment deadline that would deprive The Home Estate of substantial additional reinsurance recoveries/assets, to the detriment of The Home Estate's creditors.

- First, The Home Estate still has over $800 million in undistributed assets and, in addition, has substantial reinsurance recoverables due to The Home Estate on non-contingent claims that will further augment the Estate's on-hand assets in the foreseeable future. Indeed, the Liquidator reported to this Court on September 18, 2019 that "***the collection of reinsurance is the principal remaining asset-marshaling task of the Liquidator.***"
- Second, the remaining IBNR claims (and the substantial reinsurance assets that will eventually be due from The Home's reinsurers on those claims) that the Motion seeks to cut off are long-tail claims insured or reinsured by The Home Insurance Company ("The Home") arising primarily from products injurious to humans (such as asbestos, silica, and talc) and harmful acts that occurred many years ago (such as child sexual abuse and

sports head injuries) and which, by their nature, take decades to become reported claims. Nowhere in his Motion does the Liquidator even attempt to quantify the enormous amounts of claims against The Home Estate arising from such IBNR of the Objecting Creditors ***and other creditors*** that would be entirely cut off by the premature and unjustifiably early claim amendment deadline the Liquidator asks this Court to impose. Indeed, the Joint Provisional Liquidator and Scheme Administrator[1] of The Home's United Kingdom branch admitted as recently as last month that at this time, "***estimated future values [of IBNR] are subject to significant uncertainty and simplistic assumptions that may result in a wide range of possible outcomes***."

- Third, the annual costs to administer The Home Estate are modest when compared with the current assets of The Home Estate, and these administrative expenses have declined substantially over the course of the Liquidation. More importantly, the additional assets the Liquidator will be able to collect in the future from The Home's reinsurers as IBNR losses "crystallize" into actual reported claims over time (or are crystallized via actuarial estimation and included in agreed settlements of final amended claims between creditors and The Home Estate) will serve to substantially augment the assets of the Estate, to the considerable benefit of the priority creditors of The Home Estate.
- Finally, the Liquidator has made numerous interim distributions to priority Class I and II creditors, totaling billions of dollars to date, and keeping the Liquidation open would not delay further interim distributions to these priority creditors. It is common for liquidation

[1] The Scheme is discussed in further detail in Section III of the Background Section below. It effectuates a settlement agreement whereby the Objecting Creditors and other AFIA Cedents are obligated to submit claims reinsured by The Home so that the Liquidator can collect reinsurance from The Home's reinsurers (called "retrocessionaires"), including ACE/Chubb which reinsures 100% of The Home's Rutty Pool liabilities.

proceedings of property/casualty insurance companies with long-tail IBNR liabilities to last multiple decades,[2] so granting the Motion to impose an early final claim amendment deadline only 16 years after The Home was placed into liquidation would be contrary to the precedent established by other liquidations. Simply put, affording The Home's creditors additional time to present IBNR claims that will crystallize into reported claims[3] in the coming years will increase reinsurance recoveries for The Home Estate, and thus increase the assets available to make payments to priority creditors of The Home Estate.

Further, this Court should also decline to impose a final claim amendment deadline on the Objecting Creditors and other similarly situated creditors of The Home due to the unique circumstances in this matter. Without any advance notice to the Objecting Creditors, the Liquidator filed his Motion seeking to cut off their future IBNR claims despite his representations to AFIA Cedent creditors and to the New Hampshire courts in 2005-06 that The Home Estate would achieve substantial amounts of reinsurance recoveries arising from the non-contingent and IBNR claims of the AFIA Cedents if the New Hampshire courts would uphold the settlement agreements with the Objecting Creditors and other AFIA Cedents. Specifically, (1) the proposed early claims amendment deadline is fundamentally at odds with the settlement agreements that the Liquidator entered into with the Objecting Creditors and other AFIA Cedents in 2004 and 2006 (the "Settlement Agreements"), as well as the Scheme of Arrangement that the Liquidator initiated to collect non-contingent and IBNR claims from The Home's reinsurers; and (2) the information that the Objecting Creditors require to submit their final claims for non-

[2] For example, as discussed in Section I(C)(4) of the Argument section below, several insurance liquidation proceedings have spanned nearly thirty years and more.

[3] These IBNR claims can also be crystallized if AFIA Cedents and the Liquidator reach agreement on the amount of IBNR that this Court should approve, based on sound actuarial estimates of such remaining IBNR. As discussed further below, certain creditors have reached such agreements with the Liquidator, and this Court has approved claims that include IBNR.

contingent claims, as well as IBNR claims, is within the possession and control of the Liquidator and/or its claims handler, and the proposed 150-day deadline for submitting their final amended claims does not give the Objecting Creditors sufficient time to calculate these case reserves and IBNR claims and negotiate commutations with the Liquidator that reliably estimate the value of those outstanding losses/case reserves and crystallize that remaining IBNR for inclusion in their final amended claims. Thus, the Court should decline to impose a final claim amendment deadline at this time.

Alternatively, if this Court elects to set a final claim amendment deadline at this time, then it should carefully select a date that will allow the Objecting Creditors and other creditors of The Home Estate to include their IBNR claims as part of their final amended claims in The Home Estate.[4] The Liquidator has permitted other creditors to include IBNR claims in settlements with The Home Estate, so the Liquidator should be estopped from refusing to allow the Objecting Creditors to include IBNR claims here. RSA 402-C:46 mandates a reasonable balance between the Liquidator's desire for an expeditious completion of the Liquidation and "the protection of unliquidated and undetermined claims, including third party claims." Thus, RSA 402-C:46 accords IBNR claims protection, and this Court should afford creditors with those claims sufficient time to calculate and present those claims under a claims amendment deadline that provides ample time for IBNR to be included. Imposing the premature claims amendment date requested by the Liquidator would unfairly discriminate against the Objecting Creditors and other creditors whose IBNR claims have not been crystallized as part of approved final amended claims. There is simply no reason to treat the IBNR claims of the Objecting Creditors differently than those of other creditors by rushing the claims amendment deadline.

[4] As discussed in Section III of the Argument section below, several other entities have entered into settlement agreements with the Liquidator containing IBNR components.

The Objecting Creditors request oral argument on the Motion and this Objection.

BACKGROUND

On June 13, 2003, the Court declared The Home insolvent and appointed the Insurance Commissioner as the liquidator (the "Liquidator") pursuant to the New Hampshire Insurers' Rehabilitation and Liquidation Act, RSA 402-C. Pursuant to the original order, the deadline for filing initial claims was June 13, 2004. On June 3 and June 4, 2004, the Objecting Creditors filed their initial proofs of claims. (*See* Affidavit of Dirk Eichler, attached as Exhibit A, at ¶ 3; *see also* Affidavit of Robert Bühler, attached as Exhibit B, at ¶ 3.) The proofs of claim explicitly stated that the Objecting Creditors' reinsurance claims against The Home Estate were unquantified, that The Home and its reinsurer had been handling the claims on behalf of the Objecting Creditors and only they were in a position to fully quantify those claims, and that the Objecting Creditors' claims included IBNR. *See* Ex. A at ¶ 4; Ex. B at ¶ 4.

I. The Rutty Pool

The Objecting Creditors were both members of a group, or "pool," of insurance companies that underwrote insurance and reinsurance risks through the M.E. Rutty Underwriting Agency Limited (the "Rutty Pool").[5] *See* Ex. A at ¶ 5; Ex. B at ¶ 5. The annual participations of the two Objecting Creditors varied. Zurich Insurance plc, German Branch ("Zurich") took part in the Rutty Pool from 1962 to 1967, and Württembergische Versicherung ("Württembergische") took part from 1964 to 1967.[6] *See* Ex. A at ¶ 5; Ex. B at ¶ 5.

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[5] Zurich Insurance plc, German Branch is the successor-in-interest to Agrippina Versicherung Aktiengesellschaft, an original Rutty Pool member. (Ex. A at ¶ 5.)

[6] Württembergische Feuerversicherung, Aktiengesellschaft in Stuttgart was the original name of the member of the Rutty Pool in 1964-1967 and its business is currently the responsibility of Württembergische Versicherung AG within the Wüstentrot & Württembergische AG group. (*See* Ex. B at ¶ 5.)

In 1977, The Home, through The Home's United Kingdom branch and the American Foreign Insurance Association ("AFIA"), entered into reinsurance contracts with the Objecting Creditors and other Rutty Pool members (collectively referred to as "AFIA Cedents") whereby The Home reinsured 100% of the Rutty Pool liabilities of the AFIA Cedents. *See In re Liquidation of Home Ins. Co.*, 154 N.H. 472, 474 (2006).

In 1984, as part of the Insurance and Reinsurance Assumption Agreement between Insurance Company of North America ("INA"), The Home, and the AFIA Cedents, INA agreed to reinsure 100% of The Home's reinsurance obligations for the Rutty Pool liabilities. *See id.* Since that time, INA and its successor Century Indemnity Company, both member companies of the ACE/Chubb Group ("ACE/Chubb"), have been obligated to pay The Home for its reinsurance obligations to the AFIA Cedents, including the Objecting Creditors.[7] *Id.* at 475.

II. The Settlement Agreements Between The Home and The AFIA Cedents

After these liquidation proceedings commenced in 2003, the Liquidator proposed and entered into the Settlement Agreements between The Home Estate and the respective Objecting Creditors (as well as the other AFIA Cedents), under which each AFIA Cedent undertook to continue submitting all of its Rutty Pool claims to the Liquidator, who in turn would submit them to ACE/Chubb and other reinsurers of The Home. *See* Ex. A at ¶ 6; Ex. B at ¶ 6. At the time, the Liquidator reported to the Court that The Home Estate had IBNR claims against its reinsurers, which the Settlement Agreements would enable the Liquidator to collect. *See* the March 26, 2004 Affidavit of Jonathan Rosen, attached as Exhibit C, at ¶¶ 2-3. Through these proposed Settlement Agreements with AFIA Cedents, the Liquidator informed the New Hampshire courts in 2006 that he would be able to recover an estimated $231 million of reinsurance from The Home's

[7] The Home Estate may recover this reinsurance from ACE/Chubb without having to first pay the claims of the Objecting Creditors or other creditors of the Estate. *See* RSA 402-C:36.

reinsurers for the enormous benefit of the priority creditors of The Home Estate. *See In re Liquidation of Home Ins. Co.*, 154 N.H. at 477. This $231 million figure specifically included actuarial IBNR estimates, a figure that The Home advised the courts that it expected to increase. Ex. C at ¶ 3, fn. Over time, even though claims have matured and been reported to the AFIA Cedents and in turn The Home Estate, the IBNR of the AFIA Cedents in fact ***increased***. In 2012, the Scheme Administrator reported to Scheme creditors that IBNR on the AFIA liabilities of The Home Estate was estimated to be $313,848,000. *See* December 4, 2012 Report of the Scheme Administrator, attached as Exhibit D, at 2.

Under these Settlement Agreements, The Home Estate committed itself to investigate, adjust and admit or refute liability for all claims brought by policyholders and cedent insurance companies insured and reinsured by the AFIA Cedents, including the Objecting Creditors. *See* Ex. A at ¶ 7; Ex. B at ¶ 7. In exchange for the filing of these claims by the Objecting Creditors and other AFIA Cedents against The Home Estate that would enable The Home Estate and its priority creditors to benefit from reinsurance recoveries, the Liquidator undertook to distribute half of the net reinsurance recoveries (estimated in 2006 to be $69 million) to the AFIA Cedents, including the Objecting Creditors, and use the remainder to pay priority creditors of The Home Estate pursuant to the priority distribution order of creditors set forth under New Hampshire law. *See In re Liquidation of Home Ins. Co.*, 154 N.H. at 477. Thus, recoveries of a substantial percentage of their IBNR claims against The Home Estate were part of the bargained-for consideration due the Objecting Creditors and other AFIA Cedents when they entered into these Settlement Agreements.

ACE/Chubb objected to these agreements, but the New Hampshire Supreme Court ruled in 2006 that the Settlement Agreements were fair and reasonable. *See generally In re: the*

Liquidation of the Home Insurance Company, 154 N.H. 472 (2006). The Supreme Court found that "[ACE/Chubb] would reap a substantial windfall in the absence of the proposed agreement by depriving Home's creditors of the amounts they would have paid but for Home's insolvency. This would frustrate the legislative purpose of obtaining full payment from reinsurers despite an insurer's insolvency." *Id.* at 488 (citing RSA 402–C:36 and RSA 405:49, I).

Further, the Court found 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 . . . . [New Hampshire law] provides that the statute should be 'liberally construed' to effectuate this purpose." *Id.* at 488 (citing RSA 402-C:1, IV; RSA 402-C:1, III). Moreover, the Court concluded, "the AFIA Cedents' claims are significant, totaling approximately $231 million. The substantial dollar amount of these claims suggests that ***it is reasonable to assume that collection proceedings would be lengthy, complex, and difficult.*** Most importantly, as the superior court properly concluded, ***the agreement benefits the Class II claimants to Home's estate since it increases the likelihood that their claims will be paid.***" *Id.* at 490 (emphasis added).[8] Thus, the New Hampshire Supreme Court upheld the Settlement Agreements and The Home is contractually bound to handle the Objecting Creditors' claims, collect reinsurance recoveries, and distribute a portion of such recoveries to the Objecting Creditors, with the remainder available to pay Class II creditors.

III. United Kingdom Scheme of Arrangement

Pursuant to the Settlement Agreements with the Objecting Creditors and other AFIA Cedents, a scheme of arrangement between The Home and the AFIA Cedents (the "Scheme") was implemented pursuant to § 425 of the English Companies Act of 1985. *See* the Scheme,

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

attached as Exhibit E. The Scheme creates a dynamic to secure the Liquidator's recovery of reinsurance of AFIA Cedents' claims from ACE/Chubb and other reinsurers, which to date has resulted in many millions of dollars of recoveries for The Home Estate (and which in turn have been distributed to The Home Estate's priority creditors and to the AFIA Cedents).[9] *See* Ex. E.

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

Due to the long-tail nature of much of the Rutty Pool business, which includes liability for asbestos, pollution and other types of long-tail claims, the injured parties continue to file claims against the policyholders and ceding insurers of the Rutty Pool members, including the Objecting Creditors, and those claims are reinsured by The Home and, in turn, ACE/Chubb. *See* Ex. A at ¶ 8; Ex. B at ¶ 8. The precise amount of IBNR at present is not known to the Objecting Creditors. *See* Ex. A at ¶ 9; Ex. B at ¶ 9. The Liquidator represented to the Objecting Creditors on November 15, 2019 that he "has not calculated the amount of IBNR of the AFIA Cedents that would be cut off" by his proposed claim amendment deadline. *See* E-mail of David Leslie, attached as Exhibit G. As the Joint Provisional Liquidator and Scheme Administrator of The Home's United Kingdom branch admitted as recently as last month, "***estimated future values [of IBNR] are subject to significant uncertainty and simplistic assumptions that may result in a***

[9] As of December 31, 2015, ACE/Chubb alone had already paid $83.7 million to The Home Estate net of offsets. (*See* excerpt of March 10, 2017 Report of the Scheme Administrator, attached hereto as Exhibit F.)

wide range of possible outcomes." *See* October 3, 2019 email from Patrick Brazzill, Joint Provisional Liquidator and Scheme Administrator, attached hereto as Exhibit H.[10]

When the Scheme began, the Liquidator recognized that the potential for recoveries made reinsurance one of The Home Estate's "most valuable assets in relation to AFIA." *See* Ex. E, Part I, Explanatory Statement, Section C, ¶ 8. This remains true today. Via the Scheme, The Home Estate continues to receive reinsurance recoveries to this very day that are then used to pay the priority creditors of The Home Estate and the bargained-for consideration due to the AFIA Cedents. Indeed, the Liquidator reported to the Court on September 18, 2019 that ***"[t]he collection of reinsurance is the principal remaining asset-marshaling task of the Liquidator."*** *See* Liquidator's 74th Report, attached hereto as Exhibit I, at ¶ 16 (emphasis added).

Thus, the Objecting Creditors and other AFIA Cedents, as well as policyholder creditors of The Home Estate, still have substantial amounts of contingent IBNR claims that have yet to be submitted to the Liquidator but which will eventually crystallize and become non-contingent claims if the Motion is denied and The Home Estate remains open for a number of years. These claims will continue to benefit the priority creditors of The Home Estate and will prevent ACE/Chubb from gaining an unfair windfall to the detriment of those creditors and the AFIA Cedents, to whom the Liquidator owes a contractual obligation to pursue IBNR claims under the Settlement Agreements. Imposing a final claims amendment deadline at this time would deprive The Home Estate's creditors of the amounts they would have been paid but for The Home's insolvency. Granting the Motion "would frustrate the legislative purpose of obtaining full payment from reinsurers despite an insurer's insolvency." *See In re Liquidation of Home Ins. Co.*, 154 N.H. at 488 (citing RSA 402–C:36 and RSA 405:49, I).

[10] Privileged communications within this email have been redacted.

At this time, the Objecting Creditors lack sufficient information to provide a reasoned estimate of their IBNR claims to the Liquidator and this Court. To enable themselves to calculate the IBNR load factors and include them in their claims, the Objecting Creditors are seeking detailed claims information from the Liquidator and the Liquidator's agent, ACE/Chubb, which handles these claims as described above. To date, neither the Liquidator nor ACE/Chubb has shared with the Objecting Creditors their IBNR figures for the AFIA Cedents as a whole, nor sufficient information to enable the Objecting Creditors to calculate themselves their IBNR load factors to be used in their final amended claims against The Home Estate. For these reasons, the Objecting Creditors are requesting from the Liquidator and/or its agent ACE/Chubb: 1) the amount of IBNR of the AFIA Cedents that the Liquidator and/or ACE/Chubb estimates will be cut off if the Liquidator's Motion is granted (and an explanation of the calculation that is sufficient to be subjected to independent analysis, verification and potential challenge); and 2) the component of that IBNR attributable to the Objecting Creditors so they can then enter into negotiations to attempt to agree upon the IBNR factor and use that number in final settlements of their claims with the Liquidator, for approval by this Court. The Objecting Claimants reserve their rights to seek the assistance of this Court to obtain this essential information.

IV. The Liquidator's Motion

On July 31, 2019, the Liquidator filed the Motion at issue asking the Court to impose on creditors of The Home Estate a final claim amendment deadline of 150 days after the entry of the Court's order granting the Motion. Inexplicably, the Liquidator gave no advance notice of his Motion to the Objecting Creditors, nor, on information and belief, the other approximately 1,000 creditors whose claims would be adversely impacted if the Motion were granted.

The Motion seeks, among other things, to cut off IBNR claims of The Home Estate's remaining creditors and to set a definitive date for creditors to report to the Liquidator their final remaining non-contingent claims. If granted, the Motion would deprive The Home Estate of reinsurance recoveries on enormous amounts of long-tail IBNR claims that are actuarially projected to be reported in the future, after the proposed 150-day deadline, against the creditors' insurance policies and reinsurance contracts.

On August 19, 2019, this Court entered an order directing any objections to the Motion be filed no later than 90 days from the date of the order. The Objecting Creditors now timely file their Objection to the Motion.[11]

ARGUMENT

This Court should follow the well-reasoned four-factor analysis of the *Ambassador* Decision. The facts before the Court strongly support the conclusion that the Liquidator's proposed unreasonably short deadline that he sprung on creditors without any advance notice fails to strike a "reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims." *Ambassador*, 114 A.3d at 500 (internal quotation marks omitted); *see also* RSA 402-C:46, I. Therefore, the Objecting Creditors respectfully request that this Court deny the Motion and decline to impose a final claims amendment deadline at this time. If the Court determines that a claim amendment deadline should be imposed, then the Objecting Creditors respectfully request that the Court take evidence and select a date that provides all creditors sufficient time to calculate their IBNR and negotiate with the Liquidator its inclusion in their approved claims.

[11] The Objecting Creditors sought the Liquidator's agreement to a one-week extension to file this Objection, which the Liquidator refused. The Objecting Creditors filed a request with this Court seeking an extension.

In addition to the factors employed by the Vermont Supreme Court in the *Ambassador* Decision, three other factors unique to this case justify the Court's denial of the Motion. First, the proposed deadline contravenes the fundamental underpinning of the Settlement Agreements that the Liquidator entered into with the Objecting Creditors and other AFIA Cedents. Second, the Motion is at odds with the binding Scheme of Arrangement the Liquidator initiated, as the Scheme does not authorize the imposition of such a truncated deadline. Third, it is too early to set a final claim amendment deadline at this time because the Objecting Creditors require a significant amount of information to quantify the amount of their IBNR claims, which is in the possession or control of the Liquidator and/or ACE/Chubb, and which the Objecting Creditors cannot reasonably obtain and use to calculate their IBNR claims in the proposed 150 days.

Finally, the Liquidator's Motion, if granted, would unfairly discriminate against the Objecting Creditors. The Liquidator previously reached settlements with other creditors, including other AFIA Cedents, and obtained this Court's approval of final claims of those creditors that include IBNR. For example, in 2015 and 2019, respectively, this Court, upon motions filed by the Liquidator, approved settlements between The Home Estate and Enstar and National Casualty Company (other AFIA Cedents), that included IBNR. Thus, as a matter of fairness and equity, the Objecting Creditors should receive the same treatment.

I. Based on the Four-Factor Analysis Employed in the *Ambassador* Decision, This Court Should Decline to Set the Final Claims Deadline Proposed in the Motion.

Liquidators of insolvent insurance companies do not possess unfettered discretion in setting a final claim amendment deadline. The *Ambassador* Decision identified four factors supervising courts should consider when determining whether a requested final claim amendment deadline achieves a "reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims." *Ambassador*, 114 A.3d

at 500 (internal quotation marks omitted). Those four factors are: (1) the insolvent insurance company's remaining assets; (2) the nature and amount of the company's remaining liabilities; (3) the administration costs of the company's estate; and (4) the extent to which delay in termination of the liquidation proceedings would result in a delay of full payment to priority claim holders. *Ambassador*, 114 A.3d at 500.[12] Here, all four factors weigh against establishing a final claims amendment deadline at this time.

A. The *Ambassador* Decision.

The *Ambassador* Decision involved an insolvent property/casualty insurer domiciled in Vermont that was placed into receivership in 1983. *Id.* at 493. The court issued a liquidation order in 1987 and set a deadline of March 1, 1988, for the filing of initial claims and accompanying proofs of loss. *Id.* In the course of the liquidation process, the liquidator secured approximately $347 million in assets for the estate. *Id.* at 494. By the time the Vermont Supreme Court rendered the *Ambassador* Decision in 2015, the liquidator had roughly $92 million in undistributed assets remaining. *Id.*

In the early 1980's – before the liquidation proceedings began – Ambassador issued two long-tail occurrence-based excess liability policies to AP Green Industries, a manufacturer of products containing asbestos. *Id.* at 495. Each policy provided for $10 million in excess coverage. *Id.* By the early 2000's, AP Green's liability for asbestos claims covered by those excess policies reached the levels that could have eventually triggered the policies. *Id.* Eventually, AP Green assigned all of its claims against Ambassador to National Indemnity Company ("NICO"). *Id.*

[12] The Liquidator cited *Ambassador* in passing on page 11 of its Motion, but did not advise the Court of these factors or the substance of the *Ambassador* decision.

Meanwhile, in June 2010, years after the insurer was placed into liquidation, the liquidator "filed a motion with the superior court to establish a deadline by which all claimants, including those who previously filed policyholder-protection claims, would need to file final and complete proofs of claim." *Ambassador*, 114 A.3d at 496. NICO objected on the grounds that it was too soon to set a deadline because it would unreasonably limit claimants' ability to submit proof of long-tail claims under the two excess policies. *Id.* The lower court rejected NICO's arguments and set a final deadline for submitting claims. *Id.*

On appeal, the Vermont Supreme Court analyzed whether the trial court unreasonably imposed a final claims amendment date that was too early. *Id.* at 497. The Court discussed two "legal considerations" that affected whether the final claim date was reasonable. First, "any final claim date must be consistent with the terms and goals of the liquidation order," including distributing assets "in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third-party claims." *Id.* at 498 (internal quotation marks omitted).[13] Second, "any final claim date must be consistent with the critical goal of the liquidation process: the protection of the public in general and policyholders in particular." *Id.* The Vermont Supreme Court found:

> The policyholders in this case paid good money for the insurance they purchased. Members of the public who have sustained injuries for which the policyholders are liable may also suffer if the contracted-for insurance is not available to the policyholder[s]. When an insurer is insolvent, frustration of some policyholders' contractual expectations and a lack of coverage for some injured innocent third parties may be inevitable, **but courts and liquidators should be loath to cut off**

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

valid claims in the face of ample funds to pay those claims without good reason.

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

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

After acknowledging these legal principles and key facts, the Court concluded that when determining whether the liquidator's proposed final claim amendment date strikes a reasonable balance between the expeditious completion of the liquidation and the protection of future unliquidated and undetermined claims, "courts should consider, among other factors: (1) the company's remaining assets; (2) the nature and amount of its remaining liabilities; (3) the administration costs of the estate; and (4) the extent to which delay in termination of the liquidation proceedings results in a delay of full payment to priority claim holders." *Id.* at 500.

The Court then evaluated and applied these four factors and held that the trial court's final claim amendment deadline date failed to strike a "reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined

claims." *Ambassador*, 114 A.3d at 500. (internal quotation marks omitted). The Court "recognize[d] that this liquidation has continued for quite some time—nearly three decades—**but the length of the liquidation is not in and of itself sufficient to justify cutting off valid but not fully ripe claims under the Ambassador policies** when funds remain to pay those claims and the estate can be administered economically." *Id.* at 501 (emphasis added). By denying the liquidator's motion for a final claim amendment deadline that was not appropriate at that time, the Court's decision has allowed the *Ambassador* liquidation proceeding to continue *without fixing a final cutoff date for amendments of claims*, thereby permitting IBNR to develop into non-contingent paid claims that can be included in the creditors' claims against the Ambassador estate. Nearly five years after the *Ambassador* decision, the liquidation is ongoing, and creditors' claim amendments continue to be accepted with no deadline in place for finalizing claims.[14]

B. This Court Should Employ the Four Factors Test of the *Ambassador* Decision as Persuasive Authority.

While the *Ambassador* Decision is not binding precedent in New Hampshire, for the following reasons this Court should give considerable weight to it as persuasive authority in determining whether to grant or deny The Home Liquidator's Motion.[15]

- To begin with, the statutory language interpreted and applied by the Vermont Supreme Court is identical to the language of the New Hampshire insurance insolvency statute at issue here.

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

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

- Second, there is no New Hampshire case law directly on point addressing the question at issue, and no court other than Vermont's highest court has addressed the issue.[16]
- Third, the *Ambassador* Decision is particularly persuasive authority because the facts and issues involved are directly on point with the facts and issues raised by the Liquidator's Motion.
- Fourth, no court has since criticized the reasoning or result of the *Ambassador* Decision. To the contrary, a leading secondary source, Corpus Juris Secundum, has recognized the *Ambassador* Decision as a chief case on the subject of the reasonableness of a claim filing deadline proposed by an insurance company liquidator. *See* 44 C.J.S. Insurance § 258 (citing to the four factors from *Ambassador* in explaining the policy behind setting a reasonable final claims amendment deadline in insurance liquidation proceedings).

C. Application of the Four Factors of the *Ambassador* Decision to The Home Liquidator's Motion.

The application of the four factors from the *Ambassador* Decision establishes that the Liquidator's requested final truncated claim amendment deadline of 150 days from the date the Court rules on the Motion does not strike a reasonable balance between the completion of The Home liquidation and the protection of unliquidated and undetermined claims of creditors against the Home Estate.

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[16] Given the lack of case law on point, the *Ambassador* Decision cited several cases only for broad propositions of law, but ultimately its key analysis focused on public policy considerations rather than prior case law. The *Ambassador* Decision also cited to an article published in the Tort & Insurance Law Journal; M. Veed, *Cutting the Gordian Knot: Long-Tail Claims in Insurance Insolvencies*, 34 Tort & Ins. L.J. 167 (Fall 1998) (attached hereto as Exhibit J.) The article addresses how the "principal objective of any insolvency proceeding is to allocate the insufficient assets of the insolvent entity ratably among its creditors, while causing as little collateral damage as possible," and that, due to the nature of long-tail claims, achieving this objective generally requires liquidation estates that span multiple decades. *Id.* at 170.

1. The Home's Remaining Assets.

As detailed in the Liquidator's Motion, The Home had approximately $808.4 million in undistributed assets as of May 31, 2019 (*see* Mot. at 6); substantially more than the $92 million in assets that remained in the Ambassador estate at the time of the Vermont Supreme Court's decision. More importantly, postponing the imposition of the claim amendment deadline proposed by the Liquidator will enable The Home Estate to collect substantially more assets from The Home's reinsurers as IBNR becomes reported claims and the Liquidator agrees on claims of creditors that include IBNR. Thus, there are substantial assets remaining in The Home Estate, and even more reinsurance assets that have yet to be recovered. In fact, in the Liquidator's Motion and accompanying affidavit, the Liquidator acknowledges that reinsurance recoveries are still an outstanding asset. *See* Mot. at 7; *see also* Bengelsdorf Aff. at ¶ 14. Notably, the Liquidator neglects to apprise the Court of the amount of IBNR that will be cut off and the considerable reinsurance recoveries that would be lost to The Home Estate and its priority creditors if the Motion is granted.

Further, the Liquidator claims that he has not quantified the actuarially estimated remaining IBNR claims that AFIA Cedents will file against The Home Estate if the Motion is denied, nor has the Liquidator calculated the resulting reinsurance claims that he is seeking to forfeit. Thus, the Liquidator amazingly claims he does not know the amount of IBNR claims that will be cut off if the Motion is granted. Rather, the Liquidator merely acknowledges that such IBNR would be cut off but dismisses the resulting prejudice that the premature claim amendment deadline would impose on creditors, including Class II's priority policyholder creditors, by summarily and vaguely asserting that waiting for long-tail claims to emerge will "prejudice the orderly administration of the liquidation...." *See* Mot. at 14.

But the Liquidator ignores the following facts that argue against granting the Motion: (1) The Home Estate's current assets of $808.4 million are sufficient to make additional significant partial payments to Class II policyholder creditors whose claims have been approved by this Court; (2) at present, there are insufficient assets in The Home Estate to pay the approved claims of Class II creditors in full; (3) the early claim amendment deadline would preclude Class II priority creditors from making claims against The Home Estate for additional liabilities that have not yet been reported to these policyholders; and (4) leaving the Liquidation open will enable the Liquidator to collect substantially more reinsurance assets over time as IBNR becomes reported claims and the Liquidator agrees on IBNR figures to be included in creditors' final amended claims approved by this Court, all for the benefit of Class II policyholder creditors and the AFIA Cedents to which the Liquidator owes obligations under the Settlement Agreements. These facts warrant keeping the Liquidation open indefinitely to ensure that more of the long-tail IBNR claims of these creditors will be paid. *See Ambassador*, 114 A.3d at 498 ("liquidators should be loath to cut off valid claims in the face of ample funds to pay those claims without good reason").

2. The Nature and Amount of the Home's Remaining Liabilities.

The remaining IBNR liabilities for the Objecting Creditors, as well as the other AFIA Cedents and the policyholder creditors of The Home, derive in large measure from general liability insurance policy long-tail claims. Long-tail claims include losses arising from exposure to asbestos, silica, talc, pollution, and other latent injuries, such as sports head injuries and child abuse, the latter of which has been the subject of very recent amendments to statutes of limitations in various states prompting new claims being brought under decades-old insurance policies. As the Liquidator acknowledges in his Motion, long-tail claims "depend upon complex

underlying facts or lawsuits and emerge over time," and can take "many years" for such claims to implicate coverage from policies, as well as reinsurance contracts, issued or entered into by The Home. *See* Mot. at 5. Granting the Liquidator's Motion would preclude claims against The Home Estate for these claims.

By themselves alone, the Objecting Creditors and the other Rutty Pool members have approximately (a) $25.9 million in reported outstanding losses/case reserves for known asbestos claims; (b) $4.2 million in outstanding losses/case reserves for reported outstanding losses/case reserves for environmental claims; (c) $1.7 million for reported outstanding losses/case reserves for health claims; and (d) $1.9 million in reported outstanding losses/case reserves for "other" long-tail claims. *See* Ex. A at ¶ 10; Ex. B at ¶ 10. On top of these known claims that have not yet been quantified with certainty, there are considerable IBNR losses that the Objecting Creditors, other AFIA Cedents, and other creditors with IBNR claims (including Class II priority policyholder creditors) will be reporting to the Liquidator over the coming years. Thus, just as in the *Ambassador* liquidation, here there are substantial long-tail claims that will not be reported for years or included in settlement agreements between the Liquidator and creditors, making an early deadline unreasonable because it would deny coverage for these claims (as well as decrease additional reinsurance recoveries that will be available to pay creditors' claims if the deadline is postponed).

Therefore, the remaining long-tail claims in this proceeding weigh heavily against setting a final claims amendment deadline at this time.

3. The Administration Costs of the Home Estate.

The Liquidator's Motion concedes that the operating costs for this liquidation have decreased significantly from an annual budget of $26.9 million in 2004 to an annual budget of

$13.9 million in 2019. *See* Mot. at 7. Thus, the operating costs if the Liquidation remains open are decreasing and are relatively modest, especially compared with the $808.4 million in currently available assets of The Home Estate and the substantial additional reinsurance recoverables that could be recovered from The Home's reinsurers for their share of creditors' IBNR claims.

There are ample assets remaining to cover the operating costs of The Home Estate for many years, and because additional reinsurance recoveries will be made as a result of delaying the claim amendment deadline indefinitely, there will be more than enough assets to cover future operating costs of the Liquidation. Thus, this factor weighs against granting the Liquidator's Motion.

4. The Extent to Which Delay in Termination of the Home Liquidation Will Result in Delay of Full Payment to Priority Claim Holders.

Declining to set a final claims amendment deadline at this time will not prevent or unduly delay partial payments to policyholders in the interim. As mentioned in his Motion, the Liquidator has been making billions of dollars of interim distributions to Class II policyholders on their approved claims throughout this proceeding. *See* Mot. at 3-4, 6-7. Therefore, Class II policyholders of The Home have not had to wait to receive partial payments. Further, the Liquidator has made no showing that The Home Estate cannot continue to make such additional interim distributions on approved claims in this proceeding while the Liquidation remains open; rather, in the Motion, the Liquidator acknowledges that "it may be possible to make additional interim distributions...." Mot. at 2.

In addition, "the length of the liquidation is not in and of itself sufficient to justify cutting off valid but not fully ripe claims under the Ambassador policies when funds remain to pay those claims and the estate can be administered economically." *Ambassador*, 114 A.3d at 501. Thus,

the mere fact that a denial of the Motion will result in delaying the conclusion of this Liquidation does not, in and of itself, warrant granting the Motion to the detriment of future long-tail claimants and creditors.

In fact, due to the nature of long-tail claims, it is common for insurance liquidation proceedings of large property/casualty insurers such as The Home to last multiple decades. *See Ambassador Insurance Company, Inc.*, 198 Vt. 341, 114 A.3d 492 (2015) (thirty-two years, beginning in 1987 and no claim amendment deadline has been set); *In re Liquidation of Integrity Ins. Co.*, 193 N.J. 86, 935 A.2d 1184 (2007) (nearly thirty years, beginning in 1987 and concluded in 2016, https://www.nj.gov/dobi/finreceivership/integrityfinalorder160106.pdf); *In re Liquidation of Midland Ins. Co.*, 16 N.Y.3d 536, 947 N.E.2d 1174, 1176 (2011) (nearly thirty years; entered into liquidation proceedings in 1986 and final claim amendment deadline of December 31, 2015, http://www.nylb.org/Documents/Midland_POC2015Order.pdf); *Pac. Mut. Life Ins. Co. of Cal. v. McConnell*, 44 Cal. 2d 715, 719, 285 P.2d 636, 637 (1955) (nearly thirty years; entered into liquidation proceedings in 1937, was still proceeding through the judicial system in 1955, and closed in 1967, https://www.caclo.org/perl/companies.pl?closed=1).[17] These other proceedings demonstrate how unusually early it would be to impose a final claim amendment deadline on The Home's creditors now, after only sixteen years have elapsed, particularly given the massive

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

size of this Liquidation and the fact that Class II policyholder creditors' reported claims would not be paid in full if the Motion is granted, and their IBNR claims would also be barred.

Therefore, based on the well-reasoned analysis of the *Ambassador* Decision, the proposed deadline of 150 days from the date the Motion would be granted does not strike a "reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims" as required by RSA 402-C:46, I. Thus, the Court should deny the Liquidator's Motion and should not impose a final claims deadline at this time.

II. Apart from the Four Factors from *Ambassador*, This Court Should Deny the Liquidator's Motion for Three Additional Reasons Unique to the Objecting Claimants' Circumstances.

A. Imposing a Deadline at this Time Conflicts with the Prior Settlement Agreements Between the AFIA Cedents and the Liquidator.

Additionally, the Liquidator should be estopped from imposing the proposed deadline on the Objecting Creditors and other AFIA Cedents because the deadline is at odds with the Settlement Agreements the Liquidator invited and entered into with the Objecting Creditors and other AFIA Cedents in the early 2000s. At that time, the Liquidator negotiated a deal with the Objecting Creditors that benefitted both parties – and the priority Class II creditors of The Home Estate. The Liquidator represented to this Court and the New Hampshire Supreme Court that $231 million of reinsurance assets would be collected if the Court approved the Settlement Agreements. That amount ***included*** IBNR. The Objecting Creditors' ability to recover a portion of that IBNR was part of the offered consideration for their entering into those Settlement Agreements. Now, in 2019, the Liquidator has abruptly changed the position he argued to the New Hampshire courts in 2005-06 and makes his Motion for a premature claim amendment

deadline that would deprive the Objecting Creditors and the Class II priority creditors of any benefit of the remaining IBNR claims.

Furthermore, Paragraph 6.3 of the Agrippina/Zurich Settlement Agreement and Paragraph 13 of the Württembergische Settlement Agreement provide that The Home Estate will respond to claims asserted by policyholders against the Objecting Creditors' policies and "do all things necessary to have [The Home's] obligations admitted into Home's estate." Ex. A-2 at ¶ 6.3.2; *see also* Ex. B-2 at ¶ 13. The proposed claims amendment deadline ends the process of accepting The Home Estate's obligations and cuts off the flow of future reinsurance recoveries the Liquidator once touted to this Court. If IBNR would be cut off now by the Liquidator's proposed claim amendment deadline, then when future claims are reported and brought by policyholders and cedent insurers of the AFIA Cedents, the Objecting Creditors would lose the bargained-for reinsurance coverage from The Home and The Home Estate would not be able to collect reinsurance from ACE/Chubb to pay Class II priority creditor claims.

On the other hand, if the Liquidator's Motion is denied, The Home and ACE/Chubb will continue to handle future claims brought against the Objecting Creditors and the other AFIA Cedents, and reinsurance recoveries arising from those claims will benefit The Home Estate and the AFIA Cedents as all parties envisioned when they entered into these Settlement Agreements. The Objecting Creditors will also have more time to negotiate settlements with the Liquidator that include an IBNR load factor, which would not be possible if the proposed 150-day deadline is imposed.

B. Imposing a Deadline at this Time Conflicts with the Scheme of Arrangement that Binds The Home Estate.

The Scheme of Arrangement initiated by and binding upon The Home Estate is also at odds with the Liquidator's proposed early claim amendment deadline. As explained above at

pages 8-9, the Scheme authorizes the Liquidator to enter into commutations with The Home's reinsurers, but, unbeknownst to the Objecting Creditors, the Liquidator ceased pursuing a commutation with ACE/Chubb. By closing the door to IBNR claims of the AFIA Cedents, the Liquidator can no longer use the AFIA Cedents' IBNR claims to obtain additional reinsurance recoveries from ACE/Chubb and other reinsurers that benefit Class II creditors and the Objecting Creditors.

Prior to the filing of the Motion, the Objecting Creditors believed that the Liquidator was endeavoring to obtain such a commutation with ACE/Chubb in accord with the Scheme. Ex. A at ¶¶ 12-13; Ex. B at ¶¶ 12-13. In fact, however, the Liquidator's counsel has now admitted that the Liquidator is not seeking any such commutation with ACE/Chubb. *See* E-mail of David Leslie, Ex. G. Thus, the Liquidator has frustrated the purpose of the Scheme to maximize reinsurance recoveries for the benefit of all Class II creditors of The Home Estate by not settling the AFIA Cedents' IBNR claims with ACE/Chubb and now seeking to cut off remaining IBNR that can be used to recover additional amounts from all of The Home Estate's reinsurers, including ACE/Chubb.

Furthermore, the Scheme, which was approved by a court in the United Kingdom, does not terminate until the liabilities of the Objecting Creditors and the other AFIA Cedents are discharged in full. The establishment of a premature claim amendment deadline would deny the rights of the Objecting Creditors (and other Scheme Creditors) who are entitled to enforce the obligations the Liquidator agreed to assume, by acting in their interests to commute IBNR with reinsurers of The Home and only terminate the Scheme when all of The Home's liabilities are properly discharged in full or the Scheme comes to an end pursuant to the other terms of the Scheme. The Liquidator has not sought to modify the terms of the Scheme or to seek approval of

a court in the United Kingdom for that purpose. Thus, the Liquidator cannot be allowed to evade its responsibilities under the Scheme and its binding Settlement Agreements with the Objecting Creditors and other AFIA Cedents by prematurely cutting off the IBNR claims that were a central component of the Scheme.

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

Granting the Liquidator's Motion and imposing a 150-day deadline would impose severe and unfair hardship on the Objecting Creditors because they do not presently possess the information necessary to calculate their IBNR claims and quantify the fair value of their case reserves.

Under the terms of the respective Settlement Agreements between the Liquidator and each of the Objecting Creditors, the claims against Rutty Pool members are handled, adjusted, and settled by The Home, either through itself or through ACE/Chubb. *See* Ex. A at ¶ 7; Ex. B at ¶ 7. Those Settlement Agreements expressly provide that "The Home shall, either itself or through AISUK,[18] have the sole right to and will investigate, adjust and admit or refute liability for such claims in the name and with the authority (which is hereby granted and/or confirmed)" of the Objecting Creditors. *See* Ex. A-2 at Section 6.3; *see also* Ex. B-2 at Section 13. Those Settlement Agreements further provide that The Home will either itself, or through ACE/Chubb, advise the Objecting Creditors of adjusted claims and provide information needed by the Objecting Creditors "for the determination of claims in Home's estate." *See* Ex. A-2 at Section 6.3; *see also* Ex. B-2 at Section 13.

[18] AISUK has been succeeded in this role by CISUK, an ACE/Chubb entity.

Currently, claims against the insurance policies and reinsurance contracts of the Rutty Pool members are submitted directly to ACE/Chubb by the policyholders and ceding insurers of Rutty Pool members. While quarterly reports of gross reserves are shared with the Objecting Creditors, the Objecting Creditors do not have sufficient information to be able to estimate their IBNR with confidence and then attempt to commute those IBNR claims with the Liquidator. *See* Ex. A at ¶ 14; Ex. B at ¶ 14. That detailed information is in the possession of the Liquidator and/or ACE/Chubb. *See* Ex. A at ¶ 9; Ex. B at ¶ 9. Since 2009, Württembergische has had regular conversations with representatives of the Liquidator regarding the inwards claim exposures of the Rutty Pool that The Home, and in turn ACE/Chubb, fully reinsure. *See* Ex. B at ¶ 11. Zurich has also had such regular conversations since 2015. *See* Ex. A at ¶ 11. These discussions have also addressed the Liquidator's efforts to negotiate a settlement with ACE/Chubb relating to the AFIA Cedents' exposures, including IBNR. *See* Ex. A at ¶ 11; Ex. B at ¶ 11.

On December 12, 2011, the Liquidator wrote the Objecting Creditors regarding a potential settlement with ACE/Chubb. *See* Ex. A at ¶ 12; Ex. B at ¶ 12. On April 13, 2012, Württembergische and Zurich each responded separately that their assessments of future claims were dependent on data in ACE/Chubb's possession. *See* Ex. A at ¶ 12; Ex. B at ¶ 12. Since that time, the Objecting Creditors have been repeatedly assured that a settlement with ACE/Chubb would be pursued, but have not received any details of such negotiations, nor have they received any IBNR methodology or calculation used by the Liquidator in those negotiations, despite the Objecting Creditors' requests. *See* Ex. A at ¶ 13; Ex. B at ¶ 13. It is the Liquidator and ACE/Chubb that are best placed to provide a reasoned estimate of this IBNR, given their central roles and access to the necessary information (*see* Ex. A at ¶ 13; Ex. B at ¶ 13), and their refusal

to update the Objecting Creditors have prevented the Objecting Creditors from taking their own action to attempt to properly settle the IBNR claims the Liquidator now seeks to cut off prematurely.

This imbalance in information highlights the unfairness of the Liquidator's Motion. The Objecting Creditors and other AFIA Cedents agreed to help the Liquidator collect substantial amounts of claims from ACE/Chubb, including IBNR, when they entered into the Settlement Agreements and established the Scheme together with the Liquidator. Now, without providing any advance notice to the Objecting Creditors (despite regular discussions with the Liquidator's representatives and the Scheme Administrator), the Liquidator has suddenly requested a claim amendment deadline earlier than in other analogous insurance liquidations and has sought to cut off IBNR claims that form an important component of the consideration offered to the AFIA Cedents in 2004 in return for their agreement to settle. Meanwhile, the Liquidator did not inform the Objecting Creditors about any progress in settling with ACE/Chubb or the abandonment of those efforts, and the Objecting Creditors have not engaged in their own settlement discussions with the Liquidator regarding their future claims because they lack the information they require to calculate with confidence their IBNR claims against The Home Estate.

For these reasons, the Objecting Creditors are requesting from the Liquidator and/or its agent ACE/Chubb: 1) the amount of IBNR of the AFIA Cedents that the Liquidator and/or ACE/Chubb estimates will be cut off if the Liquidator's Motion is granted (and an explanation of the calculation that is sufficient to be subjected to independent analysis, verification and potential challenge); and 2) the component of that IBNR attributable to the Objecting Creditors so they can then enter into negotiations to agree upon the IBNR factor and use that number in final settlements of their claims with the Liquidator, for approval by this Court. The Objecting

Claimants reserve their rights to seek the assistance of this Court to obtain this essential information.

It is worth noting that, in his Motion, the Liquidator suggests that creditors with remaining unresolved proofs of claim are merely "resistant" or unwilling to quantify or settle their claims. Mot. at 18. The Liquidator offers no evidence or proof to support this contention. In any case, the Objecting Creditors are certainly not recalcitrant claimants who have dallied and failed to present settled claims to the Liquidator. The Objecting Creditors have been waiting for IBNR to crystallize into reported claims, and for the outcome of the Liquidator's commutation negotiations with ACE/Chubb.[19] And if the Objecting Creditors had the information ACE/Chubb possesses regarding IBNR, they could at least attempt to agree upon final claim settlements that include their IBNR with The Home Estate, which would move this Liquidation that much closer to finality.

It is unreasonable to set a final claims amendment deadline when the information needed by the Objecting Creditors to calculate and present their amended claims is in the hands of The Home and/or ACE/Chubb. And by cutting off these future claims, the Liquidator's Motion seeks relief that would interfere with the Objecting Creditors' rights under the respective Settlement Agreements with the Liquidator, and would harm the Class II creditors in this matter. Thus, the

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[19] Indeed, the Liquidator argues in its Motion that the Court should set a claims amendment deadline in order to "motivate claimants that have been slow or reluctant to resolve or amend their open proofs of claims...." (Mot. at 16.) This is a misleading characterization that ignores the reality of the nature of long-tail claims. There is nothing that the Objecting Creditors could do to expedite reporting of long-tail IBNR claims other than wait for the injuries from the underlying asbestos exposure, environmental pollution, etc. to be reported as claims, which can take years (even decades). Moreover, the Objecting Creditors cannot move forward with negotiations with the Liquidator to agree on an IBNR load factor for their claims until they receive essential information from the Liquidator and/or ACE/Chubb. Thus, rather than motivate actions by the Objecting Creditors, the Motion makes it virtually impossible for the Objecting Creditors to include in their claims any remaining IBNR.

same principle that guided the New Hampshire Supreme Court to approve the Settlement Agreements with the Objecting Creditors in 2006, namely that all Class II creditors would greatly benefit from future reinsurance recoveries, counsels against the establishment of such a premature claims amendment deadline.

Therefore, for these additional reasons, the Court should deny the Liquidator's Motion and reject imposing a final claims amendment deadline in this matter.

III. Alternatively, If This Court Does Set a Final Claims Deadline, Then This Court Should Allow the Objecting Creditors to Submit IBNR Claims to The Home Estate.

In the alternative, if the Court grants the Liquidator's Motion and schedules a final claim amendment deadline, then the Objecting Creditors should be permitted to submit their IBNR claims as part of their final amended claim against The Home Estate for approval, just as the Liquidator has approved IBNR claims of other AFIA Cedents and other creditors.

For example, on February 25, 2019, the Liquidator filed a motion for approval of his settlement/commutation agreement with United States Fidelity and Guaranty Company ("USF&G"), another insurance company cedent creditor of The Home Estate, that involved both reinsurance that cedent creditor USF&G purchased from The Home and reinsurance The Home purchased from USF&G. *See* Motion for Approval of Reinsurance Commutation Agreement with USF&G, attached as Exhibit K, at ¶ 4. Paragraph 9 of the motion makes clear that the settled amount includes the agreed value of each party's IBNR claim against the other. *Id.* at ¶ 9.

Similar motions to approve commutations/settlements with AFIA Cedents Enstar and National Casualty Company (*i.e.* Nationwide) were filed in 2015 and August 2019, respectively, and these included those AFIA Cedents' claims under the reinsurance agreement with The Home, and also expressly stated that the net agreed amount included offsets of both parties' IBNR claims against one another. *See* Motion for Approval of Reinsurance Commutation with

National Casualty, attached as Exhibit K, at ¶ 10. Now, however, the Liquidator seeks to block the Objecting Creditors from receiving compensation for their IBNR claims despite the fact that their similarly situated fellow AFIA Cedents did receive such credit for their IBNR claims.

It would be patently unfair for the Liquidator to treat the Objecting Creditors' IBNR claims differently than those of other creditors. Liquidation proceedings in other states frequently recognize the "rule of equality" among creditors, providing that no creditor can be paid in full unless all similarly situated creditors can be in full as well. *See, e.g., In re Pac. Coast Bldg.-Loan Ass'n of Los Angeles*, 15 Cal. 2d 134, 147, 99 P.2d 251, 257 (1940) (defining the "principle of equality among creditors" as the rule that "one creditor is not entitled to payment of interest on his claim in receivership, bankruptcy, or other form of liquidation, . . . where the assets are not sufficient to pay the principal of all claims in full"); *In re Workmen's & Suffolk Mut. Ins. Co.*, 71 Misc. 2d 614, 615, 336 N.Y.S.2d 389, 390 (Sup. Ct. 1972), modified, 42 A.D.2d 215, 345 N.Y.S.2d 64 (1973) ("It is, of course, a general principle of equity that persons in the same class should be treated alike, *i.e.*, equally or proportionately."); *Washington v. Merit Mut. Ins. Co.*, 5 Ill. App. 3d 742, 745, 284 N.E.2d 304, 306 (1972) ("The general rule is that all creditors are entitled to share equally in the assets of an insolvent company in proportion to their claims."); *Gen. Reinsurance Corp. v. Am. Bankers Ins. Co. of Fla.*, 996 A.2d 26, 34 (Pa. Commw. Ct. 2009) ("State insolvency statutes . . . are designed to give all creditors in the same priority class an equal share of the insolvent insurer's estate"). Thus, just as other reinsureds that are similarly situated creditors were able to settle their IBNR claims with The Home Estate,[20] so should the Objecting Creditors.[21]

[20] Moreover, no reinsurer (including ACE/Chubb) opposed the settlement of future liabilities with USF&G, Enstar, Nationwide, or direct policyholders. Therefore, these reinsurers, which

Finally, as noted above, the New Hampshire Supreme Court upheld the Objecting Creditors' Settlement Agreements premised on the undertaking of the Liquidator to collect hundreds of millions of dollars in reinsurance recoveries (including for IBNR). *See In re Liquidation of Home Ins. Co.*, 154 N.H. 472, 477, 490 (2006). Thus, the Liquidator has no basis to completely reverse course and reject IBNR claims when it has accepted such claims throughout this proceeding. Indeed, part of the bargained-for consideration that induced the Objecting Creditors (and undoubtedly the other AFIA Cedents) to enter into the Settlement Agreements was the Liquidator's undertaking to allow them to eventually submit their IBNR portions of their claims and collect the agreed portion of the reinsurance recoveries on those claims via the Scheme. To deny them their IBNR claims is not only inconsistent, but denies them the bargained-for consideration underlying those Settlement Agreements.

CONCLUSION

Wherefore, for the reasons contained herein, the Objecting Creditors respectfully request that the Court deny the Liquidator's Motion and refuse to enter a final claims amendment deadline at this time. Oral argument on this Objection is also requested.

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were on notice of these policyholder AFIA Cedent settlements, have waived any right to challenge IBNR claims being admitted as valid claims in The Home estate.

[21] While the settlement agreements Liquidator has entered into with direct policyholder creditors do not expressly refer to "IBNR" claims under the policies, these settlements clearly included some amount of IBNR since they settled any claims that have been or ever could be asserted under the policies. *See, e.g.*, August 2019 Motion for Approval of Settlement with Bridgestone Americas Tire; January 30, 2019 Motion for Approval of Settlement with the Order of Friars Minor Province of the Immaculate Conception (which settled any child sexual abuse claims that had yet to be reported and which now presumably are being made against that policyholder in light of state laws allowing claims that were previously time barred under applicable statute of limitations); August 15, 2018 Motion for Approval of Settlement with the Parishes within the Archdiocese of Saint Paul and Minneapolis; May 25, 2018 Motion for Approval of Settlement with U.S. Silica; and April 26, 2017 Motion for Approval of Settlement Agreement with Pittsburgh Corning Corporation Asbestos Personal Injury Settlement Trust.

Respectfully submitted,

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**Pro Hac Vice Admission To Be Filed*

Certificate of Service

I hereby certify that a copy of the foregoing Zurich Insurance plc German Branch's and Württembergische Versicherung AG's Objection to Liquidator's Motion for Approval of Claim Amendment Deadline and its attached exhibits was sent this 18th day of November 2019 by first class mail, postage prepaid to all persons on the attached service list.

/s/ Mark C. Rouvalis

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 217-2003-EQ-00106

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