

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

**MOTION FOR LEAVE TO FILE SURREPLY TO LIQUIDATOR'S RESPONSE TO
AFIA CEDENTS' OBJECTIONS TO MOTION FOR APPROVAL OF CLAIM
AMENDMENT DEADLINE**

Indemnity Marine Assurance Co., Nederlandse Reassurantie Groep NV, NRG Victory Reinsurance Limited, NRG Fenchurch Insurance Company Ltd. New Zealand Reinsurance Company, Tenecom Limited, Underwriters at Lloyd's of London, Winterhur Swiss Ins. Co., and Would Auxiliary Corp. Ltd. (together, the "Objectors"), by and through their attorneys, Pastori | Krans, PLLC and Day Pitney, LLP, move this Court for leave to file a surreply to the Liquidator's Response to AFIA Cedents' Objections to Motion for Approval of Claim Amendment Deadline. The Liquidator does not object to the Objectors' request for leave to file a surreply. In support of this motion, the Objectors state as follows:

1. The Liquidator filed a Motion for Approval of Claim Amendment Deadline.
2. Several objections were filed to the Motion.
3. The Objectors filed their Objection to the Liquidator's Motion for Approval of Claim Amendment Deadline on November 18, 2019 (the "Objection"), arguing that the establishment of the deadline was fundamentally unfair to the Objectors in light of the Agreement between them and the Liquidator and detrimental to the Estate because the deadline would potentially foreclose the possibility of additional revenue flowing to the Estate. The Objectors requested that the Court deny the Liquidator's Motion, or, in the alternative, hold the motion in abeyance until a procedure could be drafted regarding post-deadline recognition and

payment of reserves respecting incurred but not reported (IBNR) claims, and adjusted case reserves on previously reported claims.

4. On December 30, 2019, the Liquidator filed a Response to the AFIA Cedents' various Objections to Motion for Approval of Claim Amendment Deadline (the "Response").

5. In the Response, the Liquidator argued, among other things, that: (1) the Court should focus on the allowed claims of Class II policy holders and their interests because no other class of claimant will receive payment under the Liquidation; (2) holding the liquidation of the Estate open prejudices those Class II claimants with allowed claims; (3) the uncertainty surrounding the value of the outstanding AFIA reinsurance claims favors closing the liquidation in light of the established obligations to Class II claimants; and (4) the Objectors alternatives are proposals that would essentially result in keeping the Estate open indefinitely.

6. On December 30, 2019 the Liquidator also filed a request for status conference, reasoning that such a conference would help the Court to determine how to proceed on the pending Motion for Approval of Claim Amendment Deadline and twelve objections filed in response.

7. The Court scheduled a Status Conference for Friday, February 28, 2020.

8. In anticipation of the upcoming Status Conference, pursuant to Superior Court Rule 13A, the Objectors seek leave of the Court to file a surreply to the Liquidator's Response in order to address the arguments made by the Liquidator that: (1) alternative procedures for closing the estate will result in an indefinite liquidation; (2) Class II claimants will be prejudiced if the claims amendment deadline is not uniformly established for all claimants; and (3) the estimation of IBNR is unnecessary.

9. The Objectors respectfully submit that a surreply may be helpful to the Court in resolving the complex issues raised in the Objection and Response and determining the best process for proceeding to resolve the issues raised by the parties.

10. Accordingly, the Objectors seek leave to file a surreply in the form attached hereto as Exhibit A.

11. Counsel for the Objectors contacted counsel for the Liquidator, Attorney Eric A. Smith, who represented that the Liquidator does not oppose the relief requested in this motion.

WHEREFORE, the Objectors respectfully request that this Court:

A. Grant the Objectors' Motion for Leave to File a Surreply to the Liquidator's Response; and

B. Grant the Objector's such further relief as the Court deems just and reasonable.

Respectfully submitted,

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NRG Victory Reinsurance Limited,
NRG Fenchurch Insurance Company Ltd,
New Zealand Reinsurance Company,
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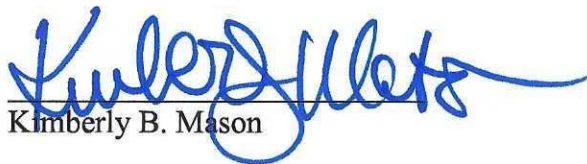
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Dated: February 27, 2020

CERTIFICATE OF SERVICE

I hereby certify that a copy of Motion for Leave to File Surreply to Liquidator's Response to AFIA Cedent's Objections to Motion for Approval of Claim Amendment Deadline was sent this 27th day of February 2020 by First-Class Mail to all persons on the attached service list.


Kimberly B. Mason

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Exhibit A

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

SURREPLY IN SUPPORT OF OBJECTION TO THE LIQUIDATOR'S
MOTION FOR APPROVAL OF CLAIM AMENDMENT DEADLINE

Indemnity Marine Assurance Co., Nederlandse Reassurantie Groep NV, NRG Victory Reinsurance Limited, NRG Fenchurch Insurance Company Ltd, New Zealand Reinsurance Company, Tenecom Limited, Underwriters at Lloyds of London, Winterhur Swiss Ins. Co., and World Auxiliary Corp. Ltd. (together, the “Objectors”) submit this Surreply in support of their Objection to the Liquidator’s Motion for Approval of Claim Amendment Deadline (the “Objection”).

I. Introduction

On December 30, 2019, the Liquidator filed a Response to AFIA Cedents’ Objections (the “Response”), which continues to seek the premature closure of this Liquidation by arguing that: [1] the Objectors seeks to “keep the estate open indefinitely;” and [2] the New Hampshire’s Insurers Rehabilitation and Liquidation Act (the “Act”) requires the establishment of a single Claim Amendment Deadline (“CAD”). Each assertion is incorrect. The Objectors request that the Liquidation remain open until future claims (IBNR) can be appropriately valued. Alternatively, if the Liquidator’s general rush to closure is to be countenanced, the Claim Amendment Deadline should at least be extended as to the Objectors, because their unique status benefits the Estate and its Class II claimants through the recovery of retrocessional cover from ACE/Chubb.

The Liquidator, on the other hand, seeks the Court's authority to cutoff IBNR – and therefore forfeit the reinsurance recoveries the Estate would otherwise receive from ACE/Chubb in connection with that IBNR – without providing the Court with any evidentiary basis for such an Order. The Court should decline that invitation because it is contrary to the Act's stated purpose, which is “the protection of the interests of insureds, creditors and the public generally,” and specifically provides for the “[e]quitable apportionment of any unavoidable loss.” RSA 402-C:1, IV & IV(d).

**II. Objectors Do Not Seek An Indefinite Liquidation,
They Do Request A Fair Closure Based On Evidence**

The Objectors never requested an indefinite Liquidation. They did, however, request that the Motion be held in abeyance until such time as a procedure has been agreed for the recognition and payment of IBNR. In its Response, the Liquidator admits that the “remaining AFIA IBNR value is unclear” but surmises (without an evidentiary basis) that “it does not warrant keeping the liquidation open.” But the Liquidator's unsupported assumptions are an insufficient basis on which to close the Liquidation and deprive the estate of the retrocessional recoveries otherwise due from ACE/Chubb.

As the Liquidator has previously touted, The Home's liquid assets have increased from approximately \$12.7 million (2003) to \$810.1 million (2019) and “most” of this increase is attributable to reinsurance recoveries. See Liquidator's Motion For Approval of 2020 Compensation Plans, Paragraph 2. Yet the Liquidator is seemingly uninterested in valuing the remaining IBNR and resulting retrocessional recovery due from ACE/Chubb. Instead, it provides fuzzy math to suggest that the value of the AFIA Agreement to the Estate is “about

\$900,000 per year.”¹ This is not the proper method for estimating IBNR. *See e.g. Angoff v. Holland-America Ins. Co. Trust*, 937 S.W.2d 213 (Mo. App. 1996) (approving liquidation plan that authorized the filing of IBNR claims based on actuarial evaluations).

ACE/Chubb have handled the AFIA claims since 2004. It has the data necessary to estimate the remaining IBNR, and the retrocessional payments that ACE/Chubb would be required to make with respect to such future claims. Allowing ACE/Chubb control of that process, however, would be placing the fox in charge of the henhouse. Accordingly, rather than prematurely entertaining the CAD, the Court should order the Liquidator to formulate a procedure for estimating the AFIA Cedents’ IBNR, and that process should include the use of an independent third-party actuary. Once that independent valuation has been concluded, the parties can work to resolve these exposures (*e.g.*, through commutations) and bring additional retrocessional recoveries into the Estate before establishing a CAD and seeking to close the liquidation.

III. The Act Does Not Require A Single “One Size Fits All” Deadline

If the Court is inclined to grant the CAD, however, that Deadline should be held in abeyance with respect to the Objectors. This will allow an informed assessment of whether the continued operation of the AFIA Agreement does in fact produce a net benefit to the Estate. In its Response, the Liquidator opposes this alternative based on the argument that a single claim deadline has to be established for all claimants. (Resp. at 17-19.) But the Act contains no such mandate.

¹ For example, the Liquidator excludes the \$14.4 million Enstar commutation from its analysis, notwithstanding that a proper valuation of the IBNR would make similar commutations more likely. The Liquidator’s calculations also utilize a static cost of \$13 million in administration expenses, although that number has steadily declined over the life of the Estate and would likely dramatically decrease if the CAD were applied only to the non-Objectors, as set forth below.

Contrary to the Liquidator's arguments, the Act expressly allows the establishment of different claim deadlines. RSA 402-C:26, II provides that "*the liquidator may specify different dates for the filing of different kinds of claims.*" Thus, the Act provides a means by which the Liquidator can uphold the priority of the Class II claims while also continuing to implement the Agreement. By providing specific authority within the Act for the establishment of differing bar dates, the Legislature recognized that there could be liquidation proceedings wherein the interests of equity and the goal of minimizing unavoidable loss would not be served by a one-date-fits-all approach.

This same principle has been acknowledged by the National Association of Insurance Commissioners in its 2018 version of the *Receiver's Handbook for Insurance Company Insolvencies* (the "NAIC Handbook"). While acknowledging that staggered bar dates are not employed frequently, the NAIC states that there are situations that justify the usage of staggered bar dates. (NAIC Handbook at 246.) The Liquidator should, within the authority of RSA 402-C:26, II and in furtherance of the Act's broader purposes, establish an extended claim deadline applicable to a specific "kind of claim" – *i.e.*, the kind of claim that generates additional income to the Estate – specifically the claims of the Objectors as AFIA Cedents, submitted pursuant to the Agreement. Allowance of time for the development and submission of such claims will result in retrocessional recovery payments into the Estate for the benefit of Class II policyholder claims.

The Liquidator asserts that such a claimant-specific approach would create a subclass within the Class V claimants, in violation of RSA 402-C:44. (Resp. at 18.) But the NAIC recognized the possibility of intra-class distinctions when it cautioned receivers to be "aware of fairness issues if different bar dates are used for the same classes of claims." (NAIC Handbook at 246.) In other words, establishing different dates is *not per se* improper.

Prohibition of subclasses is a principle that relates to equity among creditors, and it is pertinent only where a possibility of recovery from the Estate by a particular creditor class actually exists. As all parties acknowledge, there is no possibility here of any Class V recovery from the Estate. To permit purely theoretical concerns about creation of subclasses to defeat an approach that preserves additional cash flow into the Estate is at odds with the Act's purposes.

The Liquidator relies on a series of hypothetical scenarios relating to offsets and potential litigation in an attempt to support the contention that "a separate claims amendment deadline for a class of claims is neither legal nor practical." (Resp. at 19.) As noted in the preceding paragraphs, however, setting a separate deadline is authorized. Moreover, it is practical within the particular circumstances of this liquidation proceeding. Establishing an extended deadline applicable to the reinsured claims subject to the Agreement should largely achieve the closure and administrative efficiencies sought by the Liquidator. But it will do so without cutting off the additional cash inflow to the Estate from the proceeds of retrocessional claims.

IV. Conclusion

The Liquidator's Motion is premature and unsupported by evidence. It should be denied and the Liquidator should be ordered to formulate a procedure for estimating the AFIA Cedents' IBNR using the services of an independent third-party actuary. Alternatively, if the Court is inclined to establish the Claim Amendment Deadline, that Deadline should be held in abeyance with respect to the Objectors. This will allow an informed assessment of whether the continued operation of the AFIA Agreement does in fact produce a net benefit to the Estate. Extending the Claim Amendment Deadline, at least as to the Objectors, is not only feasible but also preferable as a means to avoid loss to the Objectors and the Estate. Moreover,

it permits the Court to comply with the Act, which demands that liquidation be accomplished so as to affect an “equitable apportionment of unavoidable loss.” RSA 402-C:1, IV(d).

Respectfully submitted,

INDEMNITY MARINE ASSURANCE CO.,
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NRG VICTORY REINSURANCE LIMITED,
NRG FENCHURCH INSURANCE COMPANY LTD,
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Dated: February 27, 2020

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Surreply in Support of Objection to the Liquidator's Motion for Approval of Claim Amendment Deadline was sent this 27th day of February 2020 by First Class Mail to all persons on the attached service list.



Kimberly B. Mason

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