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 OBJECTOR SUPPLEMENTAL FILINGS AND JOHNSON & JOHNSON'S OBJECTION TO LIQUIDATOR'S MOTION FOR APPROVAL OF CLAIM AMENDMENT DEADLINE

In accordance with the schedule set in the February 28, 2020 Scheduling Order, Christopher R. Nicolopoulos, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), submits this memorandum in response to the objection filed by Johnson & Johnson ("J&J") and the supplemental filings by Ms. Peeples and the AFIA Objectors.[1] In order to facilitate addressing the objections overall, the Liquidator also summarizes the status of the other objections.

A. Johnson & Johnson

J&J filed its objection on December 24, 2019, and the Liquidator moved to strike the objection as untimely on January 8, 2020. The Court denied the motion to strike at the February 28, 2020 status conference. The Liquidator accordingly submits this response to J&J's objection.

In its objection, J&J contends that the proposed claim amendment deadline does not strike a "reasonable balance between the expeditious completion of the liquidation and the

[1] In this response, the Liquidator uses terms as defined in the Liquidator's earlier filings: The Liquidator's Response to First Group of Objections to Motion for Approval of Claim Amendment Deadline (filed December 13, 2019 ("Liquidator's First Group Response"), the Liquidator's Response to MWCP's Objection to Motion for Approval of Claim Amendment Deadline (filed December 31, 2019) ("Liquidator's MWCP Response"), and the Liquidator's Response to AFIA Cedents' Objections to Motion for Approval of Claim Amendment Deadline (filed December 31, 2019) ("Liquidator's AFIA Response").

protection of unliquidated and undetermined claims, including third party claims," as required by RSA 402-C:46. However, J&J does not accurately portray the balance required by the statute, and it disregards the harm suffered by the Class II creditors with allowed claims.

1. As an initial matter, J&J has many claims that will not be affected by the claim amendment deadline. J&J reports that more than 15,000 talc lawsuits are pending against it. J&J Objection at 3. J&J can seek coverage for those known claims in the Home liquidation by identifying them in a filing with the Liquidator. So long as J&J does that before the claim amendment deadline, those claims will not be barred and can be considered for a potential Class II allowance (subject to coverage and valuation issues).

The Liquidator continues to be willing to negotiate with J&J, and is prepared to have settlement discussions including potential future claims until the deadline. However, J&J does not appear to be interested in pursuing settlement. While J&J says that that it is "willing to voluntarily resolve its claim" (J&J Objection at 6), it has not made a settlement demand despite repeated requests by the Liquidator. This may be explained by J&J's assertion that "the [talc] mass tort is not yet mature" (id.), but where J&J is not willing to even commence settlement negotiations, its complaints that the Liquidator has "unfair" negotiating leverage and that other policyholder claimants have been able to settle their claims ring hollow.

2. J&J's essential position is that the liquidation should remain open for as long as talc claims might continue to be made, that is, indefinitely. See J&J Objection at 9. However, the proper balancing of interests under the New Hampshire Insurers Rehabilitation and Liquidation Act, RSA 402-C ("Act") calls for a claim amendment deadline now.

The Act provides for the Liquidator to consider "a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined

claims, including third party claims." RSA 402-C:46, I. As described in the Liquidator's motion and subsequent filings, including the response to the objection of MW Custom Papers LLC ("MWCP"), the proposed claim amendment deadline reflects a proper balancing of the interests identified by the Legislature.

The phrase "expeditious completion of the liquidation" does not refer to "administrative difficulties" as J&J suggests (J&J Objection at 4). Instead, it requires a focus on the interest of the Class II priority creditors of the liquidation in obtaining the maximum distribution on their claims so that the liquidation can be closed. At this point, 17 years into the proceeding, more than 95% of the proofs of claim (including 95% of Class II proofs of claim) have been determined, and the allowed Class II claims now total $2.8 billion. Liquidator's Report of Claims and Recommendations as of March 9, 2020, Schedule 1 at 14 (filed March 16, 2020), approved by order dated April 14, 2020.[2] However, Class II creditors have received only a 30% distribution on their claims. They cannot receive the fullest possible distribution on their claims until after all other claims are determined, which requires a claim amendment deadline. Holding the liquidation open delays the fullest possible distribution, and (since creditors will not receive interest) the passage of time erodes the value of the allowances and the potential distribution. Depriving the Class II creditors of payment constitutes real and substantial harm. This harm did not exist in the Ambassador case cited by J&J and other objectors. In that case, the assets were sufficient to permit payment of all allowed policy-level claims "in full, plus interest" so that no policyholders were prejudiced by holding the liquidation open. In re Ambassador Ins. Co., 114 A.3d 492, 501 (Vt. 2015).

[2] The Court may take judicial notice of the Liquidator's reports, reports of claims and recommendations, and other filings in the liquidation proceeding. See Wellington v. Wellington, 88 N.H. 482 (1937) (court may take judicial notice of its own records for any purpose for which those records may become material).

Against this concrete prejudice to creditors, the Act provides for balancing of "the protection of unliquidated and undetermined claims." This phrase does not require holding the liquidation open for "as-yet-unfiled mass tort claims." J&J Objection at 5. The statutory phrase refers to "unliquidated" claims (known claims whose value has not been determined) and "undetermined" claims (known claims filed in the liquidation that have not yet been determined by the Liquidator). It does not address "contingent" claims (claims where liability is uncertain[3]), let alone unknown claims by potential plaintiffs that may be asserted in the future.

The Act's omission of contingent and potential claims from RSA 402-C:46, I, is significant. The Legislature was aware that claims may be contingent. See RSA 402-C:3, XVI (referring to any claim "whether matured or unmatured, liquidated or unliquidated, secured or unsecured, absolute, fixed or contingent"); RSA 402-C:37, II (e) (referring to a "contingent" claim becoming "absolute"); RSA 402-C:39, I, II (addressing particular "contingent" claims). The Legislature was also aware that unknown claims might become known and could then be filed. See RSA 402-C:37, II(a) (providing for an excused late filing where the "existence of a claim was not known to the claimant and . . . he filed within 30 days after he learned of it"). Nonetheless, the Legislature did not require consideration of contingent or unknown claims in the balancing under RSA 402-C:46, I. The Legislature chose to refer only to "unliquidated and undetermined" claims, and that phrase does not include unknown potential claims. See State v. Mayo, 167 N.H. 443, 452 (2015) ("[T]he expression of one thing in a statute implies the exclusion of another," and "[t]his principle is strengthened where a thing is provided in one part of the statute and omitted in another") (quoting State v. Etienne, 163 .H. 57, 73 (2011)).

[3] J&J "denies the allegations [against it] in each of the underlying complaints." J&J Objection at 3.

The Act calls for a practical ("reasonable") balance of interests. The Legislature's provision for a balancing of interests reflects a recognition that some interests cannot be fully protected and must yield to others. Here, the significant progress of the liquidation over 17 years described in the Liquidator's motion and subsequent filings, and the very real harm to the Class II creditors with $2.8 billion in claims caused by holding the liquidation open, supports approval of the claim amendment deadline so that the remaining claims can be identified and determined, the assets distributed, and the proceeding closed.

B. MW Custom Papers LLC

The Liquidator responded to MWCP's objection in the Liquidator's MWCP Response (filed December 31, 2019). Since that time, the Liquidator and MWCP have negotiated a settlement of MWCP's claim, and the Liquidator has moved for approval of the Settlement Agreement in the Liquidator's Motion for Approval of Settlement Agreement with WestRock, LLC and MW Custom Papers, LLC (filed April 16, 2020). In the Settlement Agreement (¶ 10), the parties acknowledge that the settlement will moot MWCP's objection, and MWCP agrees to withdraw the objection when the settlement is approved.[4]

C. New York Liquidation Bureau and MaryKnoll

The NYLB and Maryknoll filed objections concerning statutes in New York and Hawaii that "revive" previously barred sexual abuse claims. Neither the NYLB nor Maryknoll submitted supplemental memoranda. In the Liquidator's First Group Response, the Liquidator noted that these objections may become moot, and they now have. Even if the Court entered the Proposed Order at the scheduled hearing on June 23, 2020, the claim amendment deadline would

[4] MWCP did not file a supplemental memorandum, but it reserves the right to pursue discovery and to seek leave to file a late memorandum if the Settlement Agreement is not approved. The Liquidator objects to discovery but agreed not to object to a motion for leave to file a memorandum late. See Settlement Agreement ¶ 10.

not be until five months later in November 2020. This is after the period for the filing of "revived" claims ends on August 14, 2020 under N.Y. Civ. Prac. Law & Rules § 214-g and April 24, 2020 under Hawaii Rev. Stat. § 657-1.8(b), so any revived claims can be filed in the Home liquidation before the claim amendment deadline.

The Liquidator notes that there are bills pending in New York that, if enacted, would extend the "revival" period for sexual abuse claims in that state for two years and six months after the statute's effective date. N.Y. Assembly Bill No. 9036; N.Y. Senate Bill No. S07082. However, the possibility that previously time-barred sexual abuse claims might be made against Home insureds in New York if legislation is enacted does not warrant delay of the claim amendment deadline. Holding the liquidation open because of potential legislation is contrary to the interests of the policyholders and claimants with allowed claims, who cannot receive a final distribution until all claims are determined. If the possibility of legislation were enough to require that insurer liquidations remain open, none would ever close.

D. Patricia Erway, Edward Crosby, and Howard Campbell (workers' compensation claimants)

The Liquidator addressed the letters from three workers' compensation claimants, Patricia Erway, Edward Crosby, and Howard Campbell, in the Liquidator's First Group Response filed December 13, 2019. These claimants did not submit any supplemental memoranda. As set forth in the Liquidator's First Group Response, the objections raised in the letters should be overruled because (1) the three claimants have known claims and can preserve their rights against Home by filing a proof of claim before the claim amendment deadline, and (2) as to Ms. Erway's argument concerning her claim, the Liquidator does not review positions regarding coverage taken by guaranty associations in handling claims.

E. Linda Faye Peeples (a former employee, Class V claimant)

The Liquidator responded to the letter from Ms. Peeples in the Liquidator's First Group Response. Ms. Peeples submitted a further letter on or about April 1, 2020. Ms. Peeples does not actually object to the claim amendment deadline but requests that the Court re-examine her claim. As set forth in the Liquidator's First Group Response, the Court should overrule Ms. Peeples' objection and decline to re-examine her claim. The assignment of Ms. Peeples' claim to Class V priority was finally determined by the Referee's March 27, 2013 Order on the Merits in 2012-HICIL-55. There will be no distribution to Class V creditors, so there is no reason to address the merits of Ms. Peeples' claim.

F. AFIA Objectors (Zurich (and Württembergische), Resolute, Nationwide and Catalina, Class V claimants)

The Liquidator responded to the AFIA Objectors' objections in the Liquidator's AFIA Response filed December 31, 2019. On February 27, 2020, Resolute and Zurich filed motions for leave to file sur-replies, including their proposed sur-replies. The Court granted those motions on February 28, 2020 and April 2, 2020, respectively. Nationwide filed its sur-reply joining the arguments of Resolute and Zurich on March 27, 2020. Catalina did not file a supplemental memorandum. While the AFIA Objectors guise their argument as for the benefit of Class II claimants, they are Class V priority claimants. The Class II policyholders with open claims were given notice of the Liquidator's motion, and at this point there is only one policyholder – J&J – pursuing an objection. (As described above, MWCP will withdraw its objection when the settlement agreement is approved, and the NYLB and Maryknoll objections are moot). The AFIA Objectors do not speak for Class II.

1. The AFIA Cedents Do Not Have Class I Claims.

As an initial matter, Zurich contends that its claims have Class I priority. Zurich Sur-Reply at 2-3 ("50% of the claims of AFIA Cedents are accorded Class I priority status"). That is incorrect. "The claims of the AFIA Cedents based upon their pre-liquidation reinsurance contracts with Home fall into the 'all other claims' category of Class V. See RSA 402-C:44, V." In the Matter of Liquidation of Home Ins. Co., 154 N.H. 472, 477 (2006) ("Home I"). While the Cedents have a right under the AFIA Agreement to receive certain payments as administration costs, those payments are not payments on the AFIA Cedents' claims. As the Supreme Court held: "The proposed payments do not arise from the AFIA Cedents' Class V claims themselves, but rather as an inducement for the AFIA Cedents to file claims in the liquidation in order to bring a net benefit to creditors of the estate." Home I, 154 N.H. at 484.[5]

The AFIA Cedents are Class V claimants, and their ceded reinsurance claims to Home are properly the subject of the proposed claim amendment deadline. The contractual right to receive (through the Scheme) certain payments if reinsurance is collected (in excess of the deductions) is separate from the Class V claims, although dependent on them, and does not elevate AFIA Cedents' interests above those of Class II policy creditors. The insurer liquidation statutes are intended to protect the interests of the preferred, policy-level claimants ("people insured by Home, and people with claims against those insured by Home"), Home I, 154 N.H. at

[5] Zurich is also incorrect in asserting that the payments under the AFIA Agreement equal 50% of cedents' claims. As set forth in the Liquidator's AFIA Response at 5, the amount of the payments to the Scheme depends on the amount of reinsurance actually collected in cash (after CIC applies setoffs against amounts due), and is subject to deductions for (i) reinsurance claims that were satisfied by setoff between cedents and Home (since Home has satisfied its obligation to the cedents, it retains the reinsurance) and (ii) expenses of the Liquidator in collecting reinsurance and of the UK proceedings (since the U.S. estate paid the amounts to collect reinsurance and administer the UK proceedings, it is reimbursed). The Liquidator pays 50% of the remaining amount to the Scheme. Depending on the setoffs and the deductions, a cedent's claim may generate no payment at all to the Scheme.

488, and AFIA Cedents' Class V claims matter only to the extent that they generate reinsurance recoveries for Class II creditors.

Zurich mischaracterizes the Settlement Agreements between Zurich and Württembergische and the Liquidator. Those agreements settled arbitrations. They do not concern AFIA Cedents other than Zurich and Württembergische or have anything to do with incentivizing AFIA Cedents to pursue claims (the AFIA Agreement addresses that). The provisions cited by Zurich's affiants only obligate Home to administer "inwards" claims against Zurich and Württembergische, (that is the claims by others against those two AFIA Cedents), and provide that when such paid claims are agreed as against Zurich or Württembergische they will be automatically deemed part of Zurich's and Württembergische's proofs of claim for determination in the Home estate. See Zurich Settlement Agreement ¶ 6.3; Württembergische Settlement Agreement ¶ 15.2. The automatic inclusion of paid claims against the two companies in their proofs of claim is separate from the question whether those claims can be allowed in the estate and is not an agreement that claims can be submitted in perpetuity.

Similarly, the provision of the Scheme on which Zurich relies, Scheme Cl. 7.7.1, only concerns the termination of the Scheme. It says nothing about generally applicable limitations on claims in the New Hampshire Home liquidation proceeding. Neither the Settlement Agreements nor the Scheme have any bearing on whether the claim amendment deadline should be approved.

2. The Harm to Class II Creditors of Keeping the Liquidation Open Outweighs the Speculative Value of AFIA Cedent IBNR.

The AFIA Objectors fail to recognize the harm to Class II policy creditors in keeping the estate open: those creditors are deprived of payment while the value of their allowances erodes. Zurich, in particular, fails to acknowledge that in the Ambassador case the policy-level claimants

were paid "in full, plus interest" before the liquidator even sought a deadline, so there was no harm to policyholders in prolonging that liquidation. In re Ambassador Ins. Co., 114 A.3d 492, 501 (Vt. 2015). Here, the Class II policy creditors have received only a 30% distribution, will not be paid in full, and will not receive interest. Without a claim amendment deadline requiring claimants to identify and submit their claims so they can be determined, the Home liquidation will remain open and the Class II creditors with $2.8 billion of allowed claims will be prevented from receiving the fullest possible distribution on their claims.[6]

Zurich and Resolute contend that harm to the Class II policy creditors will be offset by the benefit of additional reinsurance. However, they fail to show either that there are legal mechanisms to estimate and determine IBNR and to collect reinsurance on IBNR, or that remaining IBNR for AFIA claims totals an amount that will yield reinsurance recoveries material to the liquidation.

1. The AFIA Objectors fail to articulate any legal basis for estimating and collecting reinsurance on IBNR. As set forth in the Liquidator's AFIA Response at 15-17 (and the Liquidator's MWCP Response at 3-8), the New Hampshire Act does not provide for "estimation" of IBNR as a way to determine claims, and reinsurers would not be obligated to pay an estimate if made.

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[6] Zurich has repeatedly asserted that the Liquidator has distributed "billions" to creditors. Zurich Objection at 3, 23; Zurich Sur-Reply at 5. That is wrong. The Class II creditors have been paid interim distributions totaling 30% on their claims. The Liquidator paid approximately $640 million in interim distributions to non-guaranty association creditors and $256 million in early access distributions to guaranty associations for a total of $896 million. Liquidator's Seventy-Sixth Report at 10, 12 ((March 16, 2020). (The Liquidator is holding approximately $817 million which can be distributed once all claims have been determined. Id. at 1.) Moreover, the $13 million cost of the liquidation is not "only 1.6%" of the assets held by the Liquidator. Zurich Sur-Reply at 5. It is an annual cost that will be incurred for each year the liquidation continues. Finally, the Liquidator pointed out that the 16 (now 17) year period from the initial filing deadline to the proposed claim amendment deadline is comparable to the period in other large insurer proceedings, especially as Home stopped writing insurance in 1995. Liquidator's Motion at 17. Zurich's sur-reply refers to the longer periods ("multiple decades") from the inception to the close of the proceedings, which is an irrelevant comparison. Zurich Sur-Reply at 6 (referring to Zurich's Objection at 24). Like those proceedings, the Home liquidation will necessarily continue for some time after the claim amendment deadline, as the Liquidator will need to determine the remaining claims and then distribute assets.

Since reinsurers have historically vigorously opposed estimation in insurer liquidations, the Liquidator asked Zurich and Resolute to explain and support their position if they actually wanted to pursue it. Liquidator's AFIA Response at 17. Neither Zurich nor Resolute responded. In their sur-replies, they do not attempt to explain on what basis estimation could be permissible or how it could lead to reinsurance collections. Instead, they ask – without citation of authority – the Court to create and mandate a process to have an independent actuary determine an IBNR value, and they then assume – again without citation of authority – that CIC would pay such a value. This is just an invitation to litigation. The New Hampshire Act does not provide for estimation (unlike the Missouri statute at issue in the case on which Zurich and Resolute seem to base their proposal, see Liquidator's AFIA Response at 17). In the absence of a statute providing for estimation and requiring payment based on it, reinsurers (here, CIC) would not be obligated to make a payment for potential future claims that have yet to be asserted (IBNR). The AFIA Objectors' request for an independent actuary to determine IBNR lacks a legal basis and would not result in the collection of reinsurance.

2. Even if there were legal mechanisms for estimation of AFIA Cedents' IBNR and collection of reinsurance on such estimates (which there are not), at this point it is speculative whether any material benefit to Class II creditors would result. The objectors do not offer estimates themselves, but attempt to fault the Liquidator for not quantifying the IBNR that would be cut-off. The AFIA Cedents' arguments overlook three critical points.

First, there can be no definitive IBNR number because IBNR is by definition a projection or estimation of claims that have not yet emerged, making any number just one in a wide range of possible outcomes. Indeed, contrary to their present position, Zurich and Resolute acknowledged this uncertainty in their initial objections. See Resolute Objection at 3;

Zurich Objection at 3. The potential variation in such estimates is demonstrated by the differing views of the AFIA Cedents and CIC when valuations were exchanged in 2012. As reported to the Scheme Creditors' Committee ("SCC"), which included Zurich (Agrippina), Württembergische, and Resolute (Equitas), CIC's overall valuation was 10% of the AFIA Cedents' values. Seventh Report to Scheme Creditors' Committee at 2-3 (December 4, 2012) (SCC Ex. B) (Cited reports to the SCC are attached as exhibits ("SCC Ex.") to the Affidavit of Peter A. Bengelsdorf, Special Deputy Liquidator, Regarding Reports to Scheme Creditors Committee).[7]

Second, the Liquidator does not have information to estimate IBNR, as it concerns the value of potential future claims against the AFIA Cedents. The AFIA Cedents' claims in the Home liquidation arise from their own obligations to underlying policyholders and cedents, and the IBNR at issue is an estimate of the AFIA Cedents' liability to those underlying policyholders and cedents for potential future claims. AFIA Cedents, and not the Liquidator, have the information concerning the underlying claims and their development, but they are unwilling to provide it. In March 2019, Zurich (implicitly recognizing the need for such information) urged the UK Scheme Administrators to obtain it from AFIA Cedents. Fourteenth Report to Scheme Creditors' Committee at 32 (March 20, 2020) (minutes of March 25, 2019 SCC meeting; Mr. Crabtree for Zurich) (SCC Ex. I). The Scheme Administrators wrote to SCC members twice requesting information but (as Zurich was informed) "the Scheme Administrators did not receive sufficient responses" from the Cedents. Id. at 19, 37 (reporting on "Action 1").[8]

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[7] The point was discussed at the SCC meeting on December 10, 2012, which Zurich (Agrippina), Württembergische, and Resolute (Equitas) attended. See Eighth Report to Scheme Creditors' Committee at 17-18, 19 (December 2, 2013) (minutes of December 10, 2012 meeting) (SCC Ex. C).

[8] Zurich attempts to put the onus of coming up with an estimate for its claims on CISUK (which is administering underlying inwards claims against Zurich and Württembergische, although not for other AFIA Cedents), but CISUK provides regular reports to Zurich and Württembergische with historical information about their paid losses and case

Third, the annual recoveries on AFIA claims over the past five years show that at this point the AFIA claims have limited value to the liquidation. The annual claims and recoveries over the past five years offer a rough gauge of the practical value of reinsurance recoveries concerning AFIA Cedents' claims to the liquidation. Liquidator's AFIA Response at 13-14. As set forth there, the annual benefit is about $900,000 per year. Since 2015, the claims by AFIA Cedents have come in at about $3 million per year resulting, after CIC offsets, in about $1.8 million per year of reinsurance collections which, after the split between the estate and the Scheme (and disregarding expenses and other deductions), has yielded about $900,000 per year in benefit to the estate. That is not a material number in the context of an estate with $2.8 billion of allowed Class II claims and annual operating expenses of approximately $13 million, and it does not warrant keeping the estate open.[9]

Another way of looking at it is to start with the $231 million estimate of potential AFIA claims from 2002 cited by Zurich. Zurich Sur-Reply at 9. Deducting the $134 million in AFIA claim allowances to date leaves $97 million. Zurich asserts there are $33.7 million of outstanding losses/case reserves (for the AFIA Cedents in the Rutty Pool, not for all AFIA Cedents). Zurich Objection at 22. The claim amendment deadline will not cut-off case reserves, so a maximum of approximately $63 million in IBNR could be affected. The benefit to Class II creditors from that IBNR would only be a fraction of it, since resulting reinsurance would be

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reserves pursuant to ¶ 6.8 of the Zurich Settlement Agreement and ¶ 14.2-.3 of the Württembergische Settlement Agreement. The Liquidator pointed this out to Zurich in a March 19, 2020 letter responding to the letter mentioned by Zurich at page 7 n. 2 of its sur-reply. Zurich has not responded.

[9] Zurich refers to these figures as "bald factual assertions" (Zurich Sur-Reply at 8) but the amounts for AFIA claims are just annual totals of claims reported in Liquidator's reports of claims and recommendations and approved by the Court. Those figures and the amount of reinsurance collected from CIC have been reported to the Scheme Creditors' Committee ("SCC") in the annual reports by the UK Scheme Administrators to which the AFIA Cedents have not objected. The Liquidator is submitting a summary as Exhibit A to this response and as SCC Ex. A. Copies of the relevant Reports to the SCC, including those for the years 2015 through 2019, are included as confidential exhibits E through I attached to the affidavit herewith submitted under seal.

reduced by CIC offsets and the expenses of collection and the UK proceedings and the remainder then shared with the Scheme. That benefit could only be realized over years, during which expenses of the liquidation would continue, the Class II creditors would not receive the fullest possible distribution, and the value of their allowances would be eroded. In the Liquidator's view, that benefit would not be material and does not warrant keeping the liquidation open.

3. The AFIA Objectors posit that CIC would be willing to commute if there were an independent estimate or if there were no claim amendment deadline. However, commutation is a voluntary act by a reinsurer, and CIC cannot be compelled to commute. Zurich and Resolute simply disregard the history of discussions over the past eight years as described in the UK Scheme Administrator's annual reports to the SCC, including Zurich and Resolute:

- In 2012, the Liquidator gathered information from AFIA Cedents and attempted to start "global" commutation discussions. Seventh Report at 2-3 (SCC Ex. B); Eighth Report at 19 (SCC Ex. C).
- After efforts over two years, in 2014 the parties were so far apart that the SCC was advised that the possibility of such a commutation "appears remote." Ninth Report to Scheme Creditors' Committee at 5 (December 1, 2014) (SCC Ex. D). This was discussed at the Scheme Creditors' meeting on December 8, 2014. See Tenth Report to Scheme Creditors' Committee at 17 (February 12, 2016) (minutes of December 8, 2014 SCC meeting attended by Württembergische and Resolute at which Ms. Ellis advised the SCC that "the likelihood of the parties being able to agree a global commutation was now considered to be remote.") (SCC Ex. E).[10]
- In 2014, CIC advised (and the SCC was informed) that CIC was "now prepared to consider the commutation of AFIA liabilities with individual cedents." Ninth Report at 6 (SCC Ex. D). This was discussed at the December 8, 2014 SCC meeting which Resolute and Württembergische attended. See Tenth Report at 18 (minutes of December 8, 2014 SCC meeting) (SCC Ex. E).
- Only one cedent of any significance, the Enstar Group, chose to negotiate a commutation with CIC. The SCC was consulted about the Enstar Group commutation in March and April of 2015, and the Liquidator then moved for approval of the commutation, which was approved in July 2015. Tenth Report at 5 (SCC Ex. E). The price was negotiated between Enstar and CIC. Liquidator's

[10] During this period, Resolute (Equitas) and Enstar engaged with CIC on a "reconciliation" process over their claims, as Zurich was aware. See Eighth Report at 19 (minutes of December 10, 2012 SCC meeting which Zurich and Württembergische attended) (SCC Ex. C); Ninth Report at 18 (minutes of December 9, 2013 SCC meeting which Zurich attended) (SCC Ex. D). This process did not produce results for Resolute.

Motion for Approval of Commutation Agreements with Enstar Companies ¶¶ 2, 4 (May 28, 2015).

- There have been no material commutations since. (The NCC commutation included a $100,000 allowance on AFIA claims. That sum is not material.)

In light of the harm to Class II creditors who will not receive the fullest potential distribution on their allowed claims until the end of the liquidation, only a substantial and demonstrable value could justify holding the liquidation open. However, there is no statutory mechanism to estimate IBNR or compel a reinsurer to pay IBNR, and the remaining benefit from AFIA Cedents' claims is speculative and not material. Any incremental reinsurance benefit that might be obtained by holding the liquidation open is outweighed by the annual cost of the liquidation and the substantial harm of depriving Class II creditors of distributions.

3. The Claim Amendment Deadline Should Apply To All Claimants, Including AFIA Cedents.

Resolute and Zurich contend that the claim amendment deadline should not apply to AFIA Cedents. However, allowing AFIA Cedents to continue filing claims while applying a deadline to all others is not practical, equitable, or legally supported. At a practical level, excepting AFIA Cedents from the claim amendment deadline will result in disputes and potential litigation over set-offs across priority classes as described in the Liquidator's AFIA Response at 18-19. The AFIA Objectors fail to address this issue. It is also likely to delay closure of the liquidation. Giving AFIA Cedents an exception now would push the debate over when to cut-off their claims into the future, when it will still need to be resolved, and will cause additional delay.

An exception would also be contrary to the policy of the Act to promote the interests of preferred Class II policy claimants. See Home I, 154 N.H. at 488. The AFIA Objectors' proposal would cut-off potential future claims of the preferred Class II policyholder claimants while allowing Class V claimants indefinite time to continue to assert claims. The intent of the Act is to protect policyholders, not favor Class V reinsured/cedent claimants.

Finally, Resolute's asserted authority on this point is irrelevant. RSA 402-C:26, II, does not support an exception from a final claim amendment deadline. The statute provides only that a liquidator may specify different initial filing dates for different types of claims. It concerns initial filing deadlines (such as the 2004 deadline), not a final deadline like the claim amendment deadline, and it provides no support for a complete exemption from deadlines as requested here. (The AFIA Cedents do not seek a different filing date but no filing date.) The discussion of "staggered bar dates" at page 246 of the NAIC Receiver's Handbook for Insurance Company Insolvencies (2018) ("Handbook") is similarly inapplicable. The phrase "bar date" in the Handbook also refers to an initial filing deadline, not a final deadline. See Handbook at 244 ("What is a Bar Date? A bar date (in some states called a filing date) is the deadline for filing proofs of claim against the estate."). Cf. id. at 247 (referring to final claims liquidation date). Notably, the objectors fail to cite any examples of insurer insolvencies with "staggered bar dates" even in the context of initial filing deadlines. The Liquidator is not aware of any insurer liquidation that had either a staggered initial deadline or a staggered final deadline.

4. The Claim Amendment Deadline Does Not Present A Subclass Issue.

The AFIA Objectors contend that they have been deprived of the "opportunity" to negotiate commutations, while policyholders have had an opportunity to negotiate settlements, and that this results in a "subclass" prohibited by RSA 402-C:44. The AFIA Objectors have not been deprived of any such opportunity but did not pursue it. As described at page 14 above, they were informed of the efforts toward a global commutation between 2012-2014; that the possibility of such a commutation became remote in 2014; that CIC was open to individual commutations in 2014; and that the Enstar group successfully negotiated such a commutation in 2015. In any event, the "no subclass" provision of the priority statute has no application here. It

requires that allowed claims in each priority class receive the same distribution percentage. It does not address other distinctions among claims.[11]

The "no subclass" provision is part of the priority statute, RSA 402-C:44, prescribing the priorities of claims in insurer liquidations. The last sentence of the first paragraph of the statute, immediately before the listing of priority classes I to X, provides: "No subclass shall be established within any class." As shown by its context, this provision is concerned with equality of distributions within a priority class. See Home I, 154 N.H. at 485 ("Payment of Class I administration costs, by definition, do not constitute a 'distribution' to a lower priority class, and therefore do not create a subclass of lower priority creditors."). It prevents claimants from pursuing (and liquidators from making) distributions on allowed claims within a particular priority at different rates and serves to ensure that the legislatively-established priorities are respected. See In re Coronet Ins. Co., 698 N.E.2d 598, 603 (Ill. App. 1998). It does not concern the determination of claims, the application of deadlines or other matters addressed outside the priority statute itself. See In the Matter of Liquidation of Home Ins. Co., No. 2016-0569, 2017 WL 5951591 at *5 (N.H. Oct. 27, 2017) ("We agree that the negotiated deductions in . . . the Settlement Agreement do not create a subclass in violation of RSA 402-C:44. Rather, the deductions to which the parties agreed represent an adjustment to the negotiated Recommended Amount upon which distributions to all Class II creditors will be made.").

[11] If there were a difference in treatment, it is justified. As set forth in the Liquidator's AFIA Response at 19-22, the claims of Class II policyholders and insureds need to be resolved because they stand to receive a distribution. Settlements provide a method of concluding a policyholder relationship and foreclosing further claims. By contrast, the claims of Class V claimants do not need to be determined because they will receive no distribution on their claims. The only reason for determining or commuting AFIA Cedents' claims (and making payment under the AFIA Agreement) is to produce a net benefit for Class II creditors from collection of reinsurance. See Home I, 154 N.H. at 484. When that benefit becomes immaterial and speculative, and the interests of Class II creditors are harmed by holding the liquidation open so there is no net benefit, there is no reason to determine or commute AFIA claims.

The claim amendment deadline does not create any differential distribution rates on allowed claims within a priority class, which is the concern of RSA 402-C:44.

CONCLUSION

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

Respectfully submitted,

CHRISTOPHER R. NICOLOPOULOS, INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, AS LIQUIDATOR OF THE HOME INSURANCE COMPANY,

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April 30, 2020

Certificate of Service

I hereby certify that copies of the foregoing Liquidator's Response to Supplemental Filings and Johnson & Johnson's Objection to Motion for Claim Amendment Deadline, and the Affidavit of Peter A. Bengelsdorf (including Exhibit A only), were sent this 30th day of April, 2020, by first class mail, postage prepaid to all persons on the attached service list. The Affidavit of Peter A. Bengelsdorf with Exhibits B-I is being filed under seal and served on counsel for Resolute and Zurich only.

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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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The Home Insurance Company, in Liquidation
Dollar Amount of AFIA Cedent Court-Approved Notices of Determination During 2015-2019

	2015[1]	2016	2017	2018	2019	5 Year Average
Total All AFIA Cedents	$4.0M[2]	$2.7M[3]	$3.2M[4]	$3.3M[5]	$2.0M[6]	$3.0M

The Home Insurance Company, in Liquidation
Dollar Amount Received from CIC Based on AFIA Cedent Notices of Determination During 2015-2019 (after setoffs)

	2015[1]	2016	2017	2018	2019	5 Year Average
Total All AFIA Cedents	$4.4M[2]	$0.4M[3]	$1.8M[4]	$1.8M[5]	$0.8M[6]	$1.8M

[1] 14 month SCC period of 11/1/14 – 12/31/15
[2] Tenth SCC Report, page 10 (excluding $14.3 million commutation for Enstar Group, Tenth SCC Report, page 6)
[3] Eleventh SCC Report, page 12
[4] Twelfth SCC Report, page 5
[5] Thirteenth SCC Report, page 5
[6] Fourteenth SCC Report, page 5 (includes $100,000 AFIA part of commutation for National Casualty Co.)

[1] 14 month SCC period of 11/1/14 – 12/31/15
[2] Tenth SCC Report, page 5 (excluding $14.3 million for Enstar Group commutation, Tenth SCC Report, page 6)
[3] Eleventh SCC Report, page 6
[4] Twelfth SCC Report, page 5
[5] Includes funds received in January 2019; Thirteenth SCC Report, page 6
[6] Includes $100,000 AFIA part of commutation for National Casualty Co.; Fourteenth SCC Report, page 5