

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
SUR-REPLY IN SUPPORT OF THEIR 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"), by and through their attorneys, McLane Middleton, Professional Association and Freeborn & Peters, LLP, submit the following sur-reply ("Sur-Reply") to the Liquidator's Response ("Response" or "Resp.") to their Objection to The Liquidator's Motion for Approval of Claim Amendment Deadline ("Objection" or "Obj.").

INTRODUCTION

The Liquidator's Motion for Approval of Claim Amendment Deadline ("Motion" or "Mot.") seeks to prematurely end The Home's liquidation proceeding far earlier than other large insurance company liquidation proceedings and thereby: 1) forfeit reinsurance recoveries that would benefit priority creditors of the Estate and 2) bar claims by The Home's policyholders that will become ripe for filing over the next several years for losses arising from talc, child sexual abuse, and other long-tail liabilities of The Home. The Liquidator's Response fails to address the fact that the Scheme of Arrangement and the process approved by the New Hampshire Supreme Court bestows Class I status on amounts due the AFIA Cedents. Furthermore, the Liquidator has failed to advise this Court of the estimated amount of future claims (IBNR) he

seeks to cut off and the estimated amount of reinsurance recoveries on those claims that he seeks to surrender. In fact, he admits that he does not know the amount of IBNR his Motion would bar and the amount of reinsurance recoverables that would be lost.

By depriving priority creditors of the opportunity to file their claims in the Estate over the next several years, and thereby forfeiting the Estate's largest asset, the Motion is contrary to the best interests of priority creditors of The Home Estate. As the Liquidator admits, there are insufficient assets to pay all Class II creditors claims in full (Resp. at 9), and yet he is asking this Court for approval to squander the opportunity to increase substantially the assets of the Estate and pay more to Class II claimants. The primary beneficiaries of the Motion are the reinsurance debtors of The Home, which would reap an enormous windfall by being relieved of their obligations under their reinsurance contracts to pay the long-tail claims of The Home.

ARGUMENT

In his Response, the Liquidator makes five arguments against the Objection filed by the Objecting Creditors, which this Sur-Reply addresses in turn below.

I. At the Liquidator's Request, the New Hampshire Supreme Court Bestowed on AFIA Cedents Class I Creditor Priority Status, and Their Interests Are Aligned with the Interests of Class II Policyholder Creditors

The Liquidator attempts to make a false distinction between the interests of the Objecting Creditors and other AFIA Cedents, on the one hand, and the Class II creditors of The Home, asserting that New Hampshire law only seeks to protect insureds and not reinsureds. Resp. at 7-8. Thus, the Liquidator contends that the opposition of the Objecting Creditors and other AFIA Cedents should effectively be ignored.

This argument of the Liquidator does not stand up to scrutiny, as it ignores the fact that 50 percent of the claims of AFIA Cedents are accorded Class I priority status by order of the

New Hampshire Supreme Court, a status that the Liquidator himself petitioned the Court to bestow. Moreover, the claims of the AFIA Cedents, which the Liquidator petitions this Court to cut off prematurely, directly benefit Class II policyholder creditors. Under the Settlement Agreements between the AFIA Cedents (including the Objecting Creditors) and The Home Estate, The Home Estate committed itself to investigate, adjust and admit or refute liability for all claims brought by policyholders insured and cedent insurance companies reinsured by the AFIA Cedents. *See* Ex. A to Objection at ¶ 7; Ex. B to Objection at ¶ 7. In exchange for the filing of these claims by the Objecting Creditors (and other AFIA Cedents), The Home Estate benefits from reinsurance recoveries on these claims, which it would otherwise have not received if the AFIA Cedents never submitted claims. Those reinsurance recoveries are distributed to the Estate's priority creditors, with 50% going to pay Class II policyholder priority creditors of The Home (the vast majority of whom are probably unaware of this asset of The Home Estate).¹ The remaining 50% would be paid to the Objecting Creditors as costs and expenses of administering The Home Estate, which are given *Class I priority status*.

In *In re: the Liquidation of the Home Insurance Company*, 154 N.H. 472 (2006), the New Hampshire Supreme Court affirmed the Superior Court's ruling that payments to the Objecting Creditors and other AFIA Cedents are Class I administrative costs because they constitute the "actual and necessary costs of preserving or recovering the assets of the insurer under RSA 402-C:44, I" and that "proposed payments to the AFIA Cedents are necessary to collect and preserve assets of Home's estate." *Id.* at 478, 488. The Court further stated that the agreement between The Home Estate and AFIA Cedents "benefits the Class II claimants to Home's estate since it

¹ Thus, contrary to the argument advanced by the Liquidator (*see* p. 2 of Resp.), the fact that other Class II creditors did not mention in objections the effect of the Claim Amendment Deadline on reinsurance recoveries should not be considered determinative of how those creditors would react if they knew that the Liquidator proposes to forfeit the collection of the largest asset of The Home Estate.

increases the likelihood that their claims will be paid” and that the agreement was necessary “to assure that the largest single asset of the estate was not lost.” *Id.* at 490. By making claims to The Home Estate, the AFIA Cedents have provided an enormous benefit to Class II creditors by enabling The Home Estate to gather assets that would otherwise not been available. This valuable assistance – recognized by the New Hampshire Supreme Court – effectively entitles the Objecting Creditors to priority status as recipients of Class I payments in the amount of 50 percent of their underlying claims, with the other 50 percent benefitting policyholder creditors. This is the deal the Liquidator successfully petitioned the New Hampshire Supreme Court to endorse.

The Liquidator’s citations of New Hampshire law and precedent making the protection of preferred creditors’ interests paramount (*see* Resp. at 7) actually makes the Objecting Creditors’ case. The establishment of a claim amendment deadline would (1) deprive the AFIA Cedents as Class I creditors and policyholders as Class II creditors of their right to submit and recover on their IBNR claims and (2) substantially reduce the reinsurance recoveries and, ultimately, payments to priority creditors. Such an outcome is contrary to the stated goals of New Hampshire law.

II. The *Ambassador* Decision Provides a Framework with Which to Consider the Motion

The Liquidator next argues that the Court should ignore the Vermont Supreme Court’s recent decision in *In re Ambassador Ins. Co.*, 198 Vt. 341, 114 A.3d 492 (2015) as irrelevant to the situation presented here. The Liquidator relies on the fact that, in *Ambassador*, the estate had sufficient assets to pay all allowed policy-level claims made to date. Resp. at 8-9. Of course, if that were the only critical fact, the Vermont Supreme Court would not have proceeded to engage in a 4-factor test to determine whether a claims deadline should be established.

The Liquidator does not address the fact that the Vermont Supreme Court determined that establishment of an early final claim amendment deadline in the Ambassador liquidation 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. With regard to The Home, there are both unliquidated claims yet to be made, but also reinsurance recoveries to be collected that will increase The Home Estate’s assets and with it the amount of funds to be distributed to Class II policyholder creditors. An early claim amendment deadline would cut off long-tail claims arising from asbestos, talc, and child sex abuse litigation (among other kinds of claims that may be brought by policyholders) even though The Home Estate currently possesses over \$800 million in assets to pay a portion of those claims even before additional reinsurance recoveries are collected.

Meanwhile, the annual budget of The Home Estate’s administration costs have decreased by 50% over the last 15 years (*see* Mot. at 7), and likely will continue to decrease further. Those administrative costs constitute only 1.6% of the \$808.4 million in currently remaining assets of The Home Estate. Thus, there are ample assets to cover The Home Estate’s operating costs while additional claims are made against The Home Estate and additional reinsurance recoveries accumulate to pay those costs.

Moreover, given the billions in distributions already made to Class II policyholders, priority creditors have not had to wait to receive partial payments. The Liquidator concedes that additional interim distributions can be made on approved claims while the Liquidation remains open. Mot. at 2. Thus, priority creditors will not be disadvantaged by keeping The Home Estate open; in fact, they will benefit from The Home Estate’s reinsurance recoveries and will be able to submit additional claims for which The Home is liable.

Therefore, when searching for a reasonable balance between The Home Estate's assets, future liabilities, administrative costs, and ability to pay the currently filed and future claims of creditors, the weight of all the *Ambassador* factors demonstrates that it would be premature to set a claim amendment deadline now. The only way to maximize distributions to priority creditors and permit deserving creditors to submit more of their covered claims is to postpone the closing of the Estate. The Liquidator also ignores the fact that, 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. In their Objection, the Objecting Creditors listed eight such proceedings that lasted from 21 to 32+ years (and counting). Obj. at 24. Keeping this proceeding open without establishment of a claim amendment deadline at this time is in keeping with these precedents, particularly with the potential for IBNR claims to be made. Therefore, in order to effect a reasonable balance between the expeditious completion of the liquidation and the protection of future unliquidated and undetermined claims, the establishment of a claim amendment deadline at this time would be premature.

III. The Liquidator Acknowledges That He Has Not Calculated the Amount of Future Claims His Motion Would Bar or the Amount of Reinsurance Recoveries He Is Seeking to Forfeit

Next, the Liquidator concedes that the remaining value of reinsurance recoveries is uncertain. In so doing, the Liquidator also implicitly acknowledges that he has provided no analysis to this Court of not just the reinsurance recoveries The Home Estate will sacrifice by virtue of a premature claim amendment deadline, but also the amount of IBNR claims that all creditors of The Home Estate will be barred from filing.

The Liquidator is asking this Court to approve a claims amendment deadline with no information before the Court about the amount of future claims that will be forever barred.

These future claims represent liabilities for which policyholders of The Home paid premium for coverage, and which, by virtue of a premature claim amendment deadline, would have to be borne in their entirety by policyholders such as Johnson & Johnson, the Maryknoll Brothers, and many others.

The Liquidator faults the Objecting Creditors for failing to quantify their remaining IBNR. Resp. at 12. However, as the Objecting Creditors also explained in their Objection, the data they need to estimate those IBNR liabilities is in the hands of the Liquidator and The Home's major reinsurer, ACE/Chubb, which is also the party that stands to gain the most if a premature claim amendment deadline is imposed (because it will not have to pay reinsurance recoveries to The Home Estate). *See* Obj. at 28-30.²

Rather than imposing an early, premature claim amendment deadline, the Court should order the Liquidator to devise and come forward with a procedure for estimating the IBNR of the AFIA Cedents and policyholders with long-tail claims and use an independent actuary to set the IBNR. Rather than putting ACE/Chubb in charge of estimating the amount of IBNR the AFIA Cedents may claim, the Liquidator should have an entity without a conflict of interest provide that estimate. IBNR claims should then be settled prior to establishment of a claim amendment deadline and closure of The Home Estate. As it currently stands, ACE/Chubb has little incentive to negotiate a commutation with a claim amendment deadline potentially about to be established. It knows that if it waits for the implementation of a claim amendment deadline, it will not have to pay any amount of future claims. But if this Court sees to it that the Liquidator and ACE/Chubb settle future claims now – and then close The Home Estate – all creditors will benefit from the reinsurance recoveries that will follow.

² As stated at page 30 of the Objection, the Objecting Creditors request IBNR information from the Liquidator and/or ACE/Chubb. Pursuant to its rights under its settlement agreement with The Home, Zurich has also requested that information via correspondence dated today.

Meanwhile, as this Court has seen in the objections lodged against the Motion, there exist not just the potential long-tail claims to be brought by AFIA Cedents, but new claims related to the use of talc are also being brought against insured party Johnson & Johnson. And while the Liquidator tries to dispense with the objections raised by the New York Liquidation Bureau and the Maryknoll Brothers because the statute of limitation revival periods in New York and Hawaii for sexual misconduct will end later this year, additional statute of limitations revivals for sexual misconduct are being instituted across the nation.³ For example, since the time for submitting objections ended,⁴ New Jersey opened a two-year revival period on December 1, 2019 and California opened a three-year revival period on January 1, 2020. Other states are certain to follow in the years ahead as public pressure builds to ensure that survivors of sexual abuse are compensated for their claims.⁵ If a premature claim amendment deadline is imposed, however, policyholders will be left holding the proverbial bag for these claims, and victims might not receive as much compensation as they would if The Home Estate would contribute.

The Liquidator places great weight on bald factual assertions in his Response that reinsurance recoveries to The Home Estate from AFIA Cedents' claims averaged \$900,000 for each of the last five years, while the estate's administration costs (few of which are likely incurred in the process of collecting reinsurance) are currently \$13 million a year.⁶ The

³ For a regularly updated compendium of the rapidly changing developments on such revival laws in various states, see <https://www.childusa.org/sol>.

⁴ Policyholders with potential claims in any state where such a revival law may be passed in the future may be unaware of the risk associated with the establishment of a claim amendment deadline in this proceeding and thus did not object prior to the deadline here.

⁵ For example, a bill to revive the statute of limitations period for sexual misconduct in another major state, Florida, was introduced in late 2019. <https://cbs12.com/news/cbs12-news-i-team/look-back-law-could-revive-thousands-of-florida-child-sex-abuse-cases>.

⁶ The Liquidator also claims this amount will be reduced by offsets ACE/Chubb can make in the future, though the Liquidator acknowledges that it has been able to successfully challenge some of these asserted offsets in the past. Resp. at 13, n. 7. And the Liquidator does not acknowledge that there may be other reinsurance that The Home

Liquidator cites to no factual evidence supporting his figures. In addition, that \$900,000 average annual amount expressly *excludes* reinsurance recoveries following the \$14.3 million commutation with AFIA Cedent Enstar, which the Liquidator acknowledges included amounts for Enstar's IBNR claims, and for which The Home Estate collected reinsurance recoveries from ACE/Chubb. Resp. at 13, n.8. If the other AFIA Cedents, including the Objecting Creditors, are afforded time and the opportunity to commute their IBNR claims against the Estate as Enstar already has done, then the amount of reinsurance recoveries for the benefit of priority creditors would be even greater. Indeed, in their Objection, the Objecting Creditors pointed to the Liquidator's 2002 statement that it would be able to collect a total of \$231 million in future reinsurance recoverables arising from the claims of AFIA Cedents. Obj. at 7-8. And while the Liquidator now seeks to minimize that 2002 calculation as a mere "illustration," surely the Liquidator intended the New Hampshire Supreme Court to rely on that represented fact which was expressly cited in the New Hampshire Supreme Court's opinion. *In re Liquidation of Home Ins. Co.*, 154 N.H. at 477.

In any event, the allowance and settlement of known claims as well as IBNR (and the pace of that activity) is within the control of the Liquidator and ACE/Chubb. And if the Liquidator is concerned about the size of the Estate's administrative costs, then the appropriate action to bring those costs to an end, while benefitting The Home's creditors, is to adopt a procedure to facilitate commutations, obtain reinsurance recoveries on those commutations, and only thereafter close The Home Estate.

Estate can collect. For example, The Home has reinsurance contracts with BAFCO (now CIRC) which cover the business in question and are recognised by the Explanatory Statement accompanying the Scheme of Arrangement as "most valuable."

IV. The Home Estate Does Not Need to Be Kept Open Indefinitely, but the Process Must Recognize and Account for the Existence of Future Claims

For its fourth argument, the Liquidator alleges that the Objecting Creditors are essentially proposing to keep The Home Estate open indefinitely and it raises several related points to further this argument.

First, the Liquidator writes that IBNR cannot properly be estimated and allowed. As an initial point, IBNR can certainly be estimated, despite the Liquidator's failure to do so here. The Liquidator can settle with claimants for future claims, just as it already has with USF&G, Enstar, and Nationwide. *See* Obj. at 32. And the Liquidator can then recover on its reinsurance from ACE/Chubb *on future claims* to the benefit of all creditors. After all, ACE/Chubb has already paid reinsurance on future claims from other AFIA Cedents. Indeed, this eventuality was the very purpose of section 2.12 of the Scheme, which allows the Liquidator to enter into compromises with reinsurers of The Home, including ACE/Chubb for amounts including IBNR. Ex. E to Obj.

Second, the Liquidator writes that the Objecting Creditors are arguing for their claims to extend longer than others. While the Objecting Creditors are arguing that the deadline should not be imposed upon them, it is also arguing that the deadline not be imposed on other creditors. In any case, the reality is that, as discussed above, payments to the Objecting Creditors are Class I administrative costs. Because the Objecting Creditors receive payment for administrative costs (as opposed to payment for claims), there is actually no circumstance in which the Objecting Creditors will receive claim payments after any deadline for any creditor passes.

Third, the Liquidator insists that ACE/Chubb must be a part of any commutation discussion and ACE/Chubb cannot be compelled to commute. As described in the Objection, 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 to Obj. at ¶¶ 12-13; Ex. B to Obj. at ¶¶ 12-13. While the Scheme authorizes the Liquidator to enter into commutations with The Home's reinsurers, unbeknownst to the Objecting Creditors, the Liquidator ceased pursuing a commutation with ACE/Chubb. Though the Liquidator claims that the Objecting Creditors should have known as of 2015 that fellow AFIA Cedent Enstar was settling with ACE/Chubb, the circumstances of that may have been particular to Enstar (for example, it could hypothetically have been part of a broader deal between Enstar and ACE/Chubb) and the Objecting Creditors had no cause to believe the Liquidator was ceasing all efforts of its own.⁷

Currently, ACE/Chubb benefits from being the repository of knowledge on IBNR *and* the party that the Liquidator insists with which the AFIA Cedents must settle. Fundamentally, ACE/Chubb has no incentive to commute when it knows a claim amendment deadline is being established. By seeking to establish such a deadline without alerting the Objecting Creditors and other AFIA Cedents, the Motion actively works against the interests of the Objecting Creditors, and thus against the interests of all Class II creditors who will not benefit from the potential reinsurance recovery. If the Court denies the Motion and no claim amendment deadline is set, the Objecting Creditors expect that ACE/Chubb will be far more interested in settling future claims, which will then benefit The Home Estate.

Fourth, the Liquidator explains its settlement of some future claims with some policyholders as appropriate voluntary compromises. That, of course, is acceptable, but the rule of equality requires similarly situated creditors to be treated equally. Obj. at 33. By settling with some other AFIA Cedents and then announcing a claim amendment deadline with no

⁷ Indeed, as the Response points out, the AFIA Agreement prohibits AFIA Cedents from bypassing the Liquidator and pursuing cut-through agreements to recover directly from ACE/Chubb. *See* Resp. at 4, n. 2.

forewarning, the Objecting Creditors are suddenly unable to settle the same IBNR claims that similarly situated parties have commuted.

V. The Proposed Deadline Is Contrary to the Purpose of the Scheme

The Liquidator's final argument in response to the Objection is that the Scheme of Arrangement was not meant to keep this liquidation proceeding open indefinitely. This is a misstatement of the Objecting Creditors' position. As described in the Objection, the purpose of the Scheme of Arrangement (and the New Hampshire Supreme Court's 2006 ruling) is to allow the Liquidator to collect claims – including IBNR – from The Home's reinsurers. Obj. at 4, 9-10. The Scheme does not terminate until the liabilities of the Objecting Creditors and the other AFIA Cedents are discharged in full (which would maximize reinsurance recoveries for The Home Estate) or unless the Scheme Creditors and the Liquidator conclude that the Scheme is no longer in the interests of the Scheme Creditors. Ex. E to Obj. at ¶ 7.1.1.

By seeking to establish a claims amendment deadline without agreement of the Objecting Creditors, and without advising them that they (and not the Liquidator, pursuant to ¶ 2.12 of the Scheme) needed to negotiate a commutation with ACE/Chubb, the Liquidator seeks to unilaterally and effectively bring the Scheme to an end while future liabilities still exist. Contrary to the Liquidator's final argument, the Objecting Creditors are not arguing that The Home liquidation proceeding must remain open indefinitely. Rather, the Objecting Creditors seek the denial of the Motion, the opportunity and time to commute with The Home Estate, and then the orderly conclusion of this liquidation proceeding once all reinsurance recoveries are made available for the benefit of all priority creditors of The Home Estate and Class I administrative payments made to the Objecting Creditors and other AFIA Cedents.

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Zurich Insurance plc German Branch's and Württembergische Versicherung AG's Sur-Reply in Support of the Objection to Liquidator's Motion for Approval of Claim Amendment Deadline was sent this 27th day of February 2020 by first class mail, postage prepaid to all persons on the attached service list.



Mark C. Rouvalis

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