

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

**JOHNSON & JOHNSON'S OPPOSITION TO
LIQUIDATOR'S MOTION TO STRIKE OBJECTION**

This Court possesses the discretion to permit Johnson & Johnson (“J&J”) to object to the Liquidator’s Motion for Approval of Claim Amendment Deadline (the “Motion”). As set forth in J&J’s previous submissions¹ and further explained herein, the Court should exercise that discretion to allow and consider J&J’s Objection to the Liquidator’s Motion for Approval of Claim Amendment Deadline (the “Objection”). J&J did not receive notice of the Motion from the Liquidator, and received the notice through another party only after the deadline for responding had passed. J&J was therefore, through no fault of its own, unable to object to the Motion before the deadline. Given these unique circumstances, and J&J’s prompt submission of its Objection before briefing was completed or argument scheduled, J&J respectfully requests the Court permit the Objection.

I. Background.

J&J currently faces more than 15,000 underlying lawsuits alleging injury arising from or relating to the use of products containing talc, over the course of decades (the “Talc Claims”). See Affidavit of Thomas W. Ladd in Support of Johnson & Johnson’s Opposition to Motion to

¹ See Johnson & Johnson’s Objection to Liquidator’s Motion for Approval of Claim Amendment Deadline and Affidavit of Thomas W. Ladd in Opposition to Motion for Approval of Claim Amendment Deadline, submitted on December 23, 2019 and filed on December 24, 2019.

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Strike (“Ladd Aff.”) at ¶¶ 3-4.² J&J denies the allegations in each of the underlying complaints. *Id.* ¶ 5. The Talc Claims as a mass tort remain in the preliminary stages of litigation. New complaints are filed every week. *Id.* ¶ 6. Only a small number have gone to trial, and a smaller number have settled. *Id.* Juries returned verdicts for J&J in some cases, and for the claimants in others. However, no jury verdict in a talc case against J&J has been upheld on appeal. *Id.*

During the period from 1973 through 1981, Home Insurance Company and its former subsidiary City Insurance Company (referred to collectively hereinafter as “Home”) sold umbrella/excess insurance coverage to J&J totaling nearly \$120 million in annual limits. *Id.* ¶ 2. A substantial amount of this coverage is first layer excess and low-level excess coverage, often attaching at \$3.5 million or \$4.1 million. *Id.*

On June 10, 2019, J&J submitted proofs of claim for the Talc Claims, under policies sold by Home. *Id.* ¶ 9. Since submitting its proofs of claim, J&J has cooperated with the Liquidator to facilitate an orderly and thorough evaluation of J&J’s claims as they develop. *Id.* ¶¶ 11-12.

II. J&J’s Objection to the Liquidator’s Motion

J&J was quite surprised to receive the notice of the Liquidator’s Motion for Approval of Claim Amendment Deadline from a third party on November 20, 2019, after the deadline to file objections had already passed. *See* Ladd Aff. ¶ 14.³ J&J lacks any knowledge of the Liquidator’s notice and mailing procedures, and therefore is not in a position to dispute the Liquidator’s descriptions of its efforts to notify claimants, including J&J, of the Motion. Ladd

² For previously-submitted discussion of this background, see the Affidavit of Thomas W. Ladd in Support of Johnson & Johnson’s Objection to Liquidator’s Motion for Approval of Claim Amendment Deadline (“December Ladd Aff.”) ¶¶ 2-9.

³ *See also* December Ladd Aff. ¶ 13.

Aff ¶ 13. However, J&J can state with confidence that, if the Liquidator did mail the notice, neither J&J nor its counsel received it. *Id.*

In the weeks following November 20, 2019 (which included the Thanksgiving holiday), J&J evaluated whether to submit an objection, conferred with counsel, and ultimately drafted the Objection it submitted on December 23, 2019. Ladd Aff. ¶ 15. J&J argued that the proposed claim amendment deadline would unduly prejudice the claims of policyholders, like J&J, facing developing and ongoing long-tail liabilities, without achieving any proportionate benefit to the orderly administration of the liquidation. *See Johnson & Johnson's Objection to Liquidator's Motion for Approval of Claim Amendment Deadline* (submitted on December 23, 2019 and filed on December 24, 2019).

J&J acted within a far shorter timeframe than the approximately 60 days afforded to all other claimants who actually received the Liquidator's notice. Liquidator's Motion to Strike Johnson & Johnson's Objections to Liquidator's Motion for Approval of Claim Amendment Deadline ("Liquidator Br.") ¶ 3. It acted promptly and of its own accord; no other party solicited, requested, or otherwise encouraged J&J to make an objection. Ladd Aff. ¶¶ 14-15. J&J rejects entirely the Liquidator's bald suggestion that J&J acted at the behest of, or to advance the interests of, some other party. *Id.*

III. The Court Should Exercise Its Discretion to Permit J&J's Objection

In these circumstances, the Court should exercise its discretion to permit J&J's Objection. The Liquidator wrongly dismisses the fact that J&J did not actually receive from the Liquidator the required notice of the Motion. Liquidator Br. ¶¶ 10, 15-18. In *Cote* – the very case the Liquidator relies on – the Supreme Court of New Hampshire clearly stated that the “presumption that a properly addressed mailed communication has been received” exists *only* “in the absence of other evidence to the contrary.” *Cote v. Cote*, 123 N.H. 376, 378 (1983). There, the Supreme

Court specifically refused to apply the presumption where the intended recipient stated he did not actually receive the mailing. *Id.* So too is the case here, where J&J’s counsel, the intended recipient, has submitted an affidavit clearly stating he did not receive the mailing. Ladd Aff. ¶ 13.⁴

Nor does RSA 402-C:26, III support the Liquidator’s sweeping assertion that insurer liquidations require only mailing, without regard to actual receipt. That provision relates only to notice of the liquidation itself (and related claims filing information), and applies only to claimants attempting to challenge “the distribution of the assets of the insurer.” Other portions of the statute discourage draconian application of deadlines, including the admonition that, where good cause is shown, “the liquidator shall recommend and the court shall permit” late-filed claims. RSA 402-C:37. Here, J&J does not seek to challenge any distribution of assets that has already taken place. It merely seeks to be heard on the Liquidator’s Motion.

The Court should also reject the Liquidator’s proposed two-pronged “test,” which the Liquidator appears to have fashioned from whole cloth for the purpose of its motion to strike. The Liquidator would require J&J to demonstrate – beyond what it has already stated in its Objection⁵ – that it “acted with diligence in asserting its objection once it was on notice of the Liquidator’s Motion,” (Liquidator Br. ¶ 19), but J&J has already established it acted within approximately half the time afforded to other claimants who actually received the Liquidator’s notice. *See* Liquidator Br. ¶¶ 2-3; Ladd Aff. ¶ 15. In such circumstances, no further showing of “diligence” is warranted; but should the Court require it, J&J can clearly make that showing here,

⁴ *See also* December Ladd Aff. ¶ 13.

⁵ *See, e.g.,* December Ladd Aff. ¶¶ 9-13.

as it acted promptly and with due deliberation in deciding upon, drafting, and filing its objection. Ladd Aff. ¶¶ 14-15.

The Liquidator's purported concern that another objector "solicited" J&J's objection is a straw man. *See* Liquidator Br. ¶ 19. It is not clear to J&J, and the Liquidator has not explained, why such a "solicitation" would be relevant or problematic, or why the risk looms so large that J&J must affirmatively disprove it as the impetus for J&J's Objection.⁶ In any event, nothing in J&J's Objection suggests any "solicitation" took place, or that J&J is otherwise acting as a puppet rather than protecting its own interests as one of Home's policyholders with substantial insurance coverage at stake for a significant developing mass tort. As stated unequivocally above, no other party solicited, requested, or otherwise encouraged J&J to make an objection. Ladd Aff. ¶¶ 14-15.

Finally, separate from its proposed two-part test, the Liquidator warns that if the Court permits J&J's Objection, a slippery slope of negative consequences will follow. But none of those consequences is likely to come to pass, nor does any of them outweigh the reasons for affording J&J an opportunity to be heard. The Liquidator predicts that if the Court permits J&J's Objection, determination of the Liquidator's Motion "will become an iterative, rolling process of new objection followed by a Liquidator's response." Br. ¶¶ 12-13. But the Liquidator posits that its notification procedure was sound. Liquidator Br. ¶¶ 3, 8-9. If that is the case,⁷ there are likely few or no other would-be objectors similarly situated to J&J, which: (i) appears to have been the victim of a fluke postal system error, and (ii) nevertheless prepared and submitted its Objection promptly, before the Court approved a briefing schedule, and well in advance of the

⁶ Presumably, if another objector were truly interested in J&J objecting, it would have "solicited" that objection before the deadline, not after it.

⁷ J&J lacks knowledge of this one way or the other. Ladd Aff. ¶ 13.

argument date (which the Court had not even set at the time of J&J's Objection). In short, permitting J&J's Objection in these unique circumstances is hardly likely to invite a cascade of additional objections, and consideration of J&J's Objection alone will neither unduly burden the Liquidator with responding, nor materially extend the determination of the Motion.⁸

IV. Request for Oral Argument

J&J requests oral argument on the Liquidator's Motion to Strike.

* * *

For all of the reasons set forth above, J&J requests the Court deny the Liquidator's Motion to Strike J&J's Objection.

Dated: January 17, 2020

Respectfully submitted.

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⁸ The Liquidator should not be heard to complain about the burden of responding specifically to J&J's Objection, as it characterizes J&J's arguments as essentially duplicative of those raised by other objectors. Liquidator Br. at 5 n. 2. While J&J does not necessarily agree with that characterization, the Liquidator's view presumably would shape the nature of the response and the burden on the Liquidator to prepare it.

Certificate of Service

I hereby certify that a copy of the foregoing Opposition to Liquidator's Motion to Strike Objection and Affidavit of Thomas W. Ladd in Opposition to Motion to Strike Objection was served this 17 of January, 2020 by First-Class Mail, postage prepaid to all persons on the attached service list.



David Himelfarb

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