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 MOTION TO RECONSIDER THE ORDERS GRANTING THE LIQUIDATOR'S MOTION FOR APPROVAL OF CLAIM AMENDMENT DEADLINE WITH REQUEST FOR A HEARING

Pursuant to Rule 12(e) of the Rules of the Superior Court of the State of New Hampshire, Zurich Insurance plc, German Branch and Württembergische Versicherung AG (the "Objecting Creditors") respectfully submit the following Motion for Reconsideration to the Court's two January 28, 2021 orders (the "Orders") regarding and approving The Liquidator's Motion for Approval of Claim Amendment Deadline (the "Motion"). As set forth below, the Orders are premised on mistakes of law and fact, and on issues that the Court overlooked. The Objecting Creditors request that the Orders be reconsidered and modified as a result.[1] Further, the Objecting Creditors request the Court clarify whether the Orders, as reconsidered, operate as a final decision on the merits for purposes of appeal to the New Hampshire Supreme Court.

I. The Liquidator Does Not Have the Power to Disavow Post-Liquidation Contracts, Such as the Agreements with the Objecting Creditors

The Order regarding the Motion correctly describes that the Objecting Creditors "contend that the proposed Claim Amendment Deadline is contrary to prior agreements reached with the Liquidator as part of the AFIA Scheme." Order at 13.[2] As detailed at pp. 25-26 of the Objecting Creditors' November 18, 2019 Objection and at p. 3 of the Objecting Creditors' February 27,

[1] Separately, the Objecting Creditors have filed simultaneously a companion motion to stay the Orders with a request for hearing pending reconsideration and appeal, if necessary.

[2] Unless otherwise noted, all references to the "Order" are to the Order regarding the Motion.

2020 Sur-Reply in Support of Their Objection to the Motion, under the agreements between the Objecting Creditors and the Liquidator on behalf of the Home, the Liquidator committed to investigate, adjust and admit or refute liability for all claims brought by policyholders insured and cedent insurance companies reinsured by the Objecting Creditors. *See* Feb. 27, 2020 Sur-Reply at 3 (internal citations omitted). In exchange for the filing of these claims by the Objecting Creditors (and other AFIA Cedents), the Home benefits from reinsurance recoveries on these claims, which it would otherwise have not received if the AFIA Cedents had never submitted these claims. Per the agreement with AFIA Cedents and the Scheme of Arrangement approved therein, those reinsurance recoveries by the Home are distributed to the Estate's priority creditors, with 50% going to pay Class II policyholder priority creditors of the Home and the remaining 50% to the Objecting Creditors as costs and expenses of administering the Home estate, which are given ***Class I priority status***. Ex. 1 to Liquidator's Resp. to AFIA Objections. The New Hampshire Supreme Court stated that the agreement with the AFIA Cedents "benefits the Class II claimants to Home's estate since it 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." *In re: the Liquidation of the Home Insurance Company*, 154 N.H. 472, 490 (2006).

In their objection and sur-reply, the Objecting Creditors explained that the premature imposition of a claim amendment deadline at this time would be fundamentally at odds with the Liquidator's binding contractual agreements. The Liquidator negotiated a deal with the Objecting Creditors that benefitted both parties – and the priority Class II creditors of the Home. The Liquidator represented to this Court and the New Hampshire Supreme Court that $231 million (including IBNR) of reinsurance assets would be collected if the Courts would approve

the AFIA Agreement. *See id.* at 477. The Objecting Creditors' ability to recover that IBNR was the essential consideration given to them in return for entering into their various agreements.

Furthermore, ¶ 6.3 of the Agrippina/Zurich Settlement Agreement and ¶ 13 of the Württembergische Settlement Agreement (each with the Liquidator) obligate the Home to adjust and respond to claims asserted by policyholders against the Objecting Creditors' policies and "***do all things necessary*** to have [Home's] obligations admitted into Home's estate." *See* Objecting Creditor's Nov. 18, 2019 Objection at p. 26 (internal citations omitted) (emphasis added).[3] The proposed deadline is directly at odds with this binding obligation of the Home, as it would terminate the Home's obligations and forfeit the flow of reinsurance recoveries the Liquidator previously touted to this Court and the New Hampshire Supreme Court as an enormous benefit to the Home's priority creditors. If IBNR would be cut off now by the Liquidator's proposed deadline, the Objecting Creditors would lose the bargained-for reinsurance coverage from Home and the Home estate would forfeit substantial reinsurance recoveries the Liquidator can use to pay Class II priority creditor claims.

The Court's Order regarding the Liquidator's motion does not address these issues, stating that the Court need not "further address any of the AFIA cedents' claims for breach of contract or any settlement agreements" because the Liquidator has the broad power to "disavow any contracts to which the insurer is a party." Order at 14 (citing RSA 402-C:25, XI). This finding, which was not addressed in the parties' briefs (and is a power never claimed or invoked by the Liquidator) merits reconsideration because it is manifestly incorrect as a matter of law.

[3] The Liquidator then contracted with Century Indemnity Company ("CIC") to provide claim handling services. The statement at p. 4 of the Order that AFIA Cedents entered into a Claims Protocol with CIC is incorrect, as only the Home in Liquidation and CIC are parties to the Claims Protocol. *See* Ex. 2 to Liquidator's Dec. 30, 2019 Response to AFIA Cedents' Objections.

A. Other State Courts Have Applied the Same Statutory Language Only to Pre-Liquidation Contracts of the Insurer

While there is no New Hampshire precedent applying RSA 402-C:25, XI,[4] several other states have the same statutory language in their own insurance receivership acts. Courts in these states have repeatedly defined this broad power only as one that applies to pre-liquidation agreements. None has authorized a liquidator to disavow a contract entered into by a liquidator.

In *Benjamin v. Pipoly*, 800 N.E.2d 50 (Ohio Ct. App. 2003), the Ohio Court of Appeals applied Ohio R.C. 3903.21(A), which, using verbatim language as the New Hampshire statute, states that a liquidator may "enter into such contracts as are necessary to carry out the order to liquidate, and to affirm or disavow any contracts to which the insurer is a party." In that case, the Ohio court wrote that "when a liquidator is appointed by court order, as in the instant case, she is not automatically bound by the ***pre-appointment*** contractual obligations of the insurer" and that unless the liquidator adopted those agreements, they "may not be enforced against her." *Id.* at 59 (emphasis added).

In *State ex rel. Wagner v. Kay*, 722 N.W.2d 348 (Neb. Ct. App. 2006), the Nebraska Court of Appeals applied the same statutory language, which also exists in Neb. Rev. Stat. § 44-4821(1)(m). There too, the Court wrote that a liquidator is "not automatically bound by the ***preappointment*** contractual obligations of the insurer." *Id.* at 357-58 (emphasis added).

Similarly, in *First Am. Ins. Co. v. Commonwealth Gen. Ins. Co.*, 954 S.W.2d 460 (Mo. Ct. App. 1997), a Missouri liquidator applying § 375.1182.1, R.S. Mo. 1994, which also contains language verbatim to the New Hampshire statute at issue here, argued that Missouri law grants "broad authority to disaffirm ***pre-liquidation*** agreements." *Id.* at 469 (emphasis added). Of

[4] RSA 402-C:25, XI states that, subject to a court's control, a liquidator may "Enter into such contracts as are necessary to carry out the order to liquidate, and affirm or disavow any contracts to which the insurer is a party."

course, as recognized in this Court's Order, the agreements between the Liquidator and the Objecting Creditors were all entered into ***post-liquidation***.

B. The Liquidator Has Agreed to Be Bound by the Agreements

As an initial matter, because the agreements are post-liquidation agreements, the Liquidator has committed the Home estate to be bound by them and to fulfill the Home's contractual obligations. Indeed, at the December 11, 2020 oral argument, the Liquidator did not shy away from these obligations, but instead expressly confirmed them, stating that the Liquidator contractually agreed the Home "was responsible for the administration of those claims … and this was negotiated during the Liquidation. … And we have confirmed that on multiple occasions … we do not back away from that." Ex. A, Oral Argument Tr. at 42:8-14.

Moreover, in *Allied Fidelity Ins. Co. v. Continental Illinois Nat'l Bank & Trust Co.*, 677 F. Supp. 562 (N.D. Ill. 1988), a federal court examined an Indiana statute, Ind. Code § 27-9-3-9(b)(11), which also has the same "affirm or disavow" language as the New Hampshire statute. Once again applying the statute in the context of a pre-liquidation agreement, the court held that by signing certifications required under a letter of credit, the Liquidator had "manifested his intention … to abide by the obligations" imposed. *Id.* at 564. Here, of course, the Liquidator has manifested his intention to abide by the agreements with the Objecting Creditors by ***entering into them himself -- and enabling priority creditors to benefit from them***.[5]

[5] Furthermore, last year, the Iowa Supreme Court refused to allow a liquidator to disavow a pre-liquidation agreement that the counter-party had "already performed." *Ommen v. Ringlee*, 941 N.W.3d 310 (Iowa 2020). Using verbatim language as the New Hampshire statute, the Iowa Liquidation Act allows liquidators to disavow pre-liquidation contracts entered into by an insurer. Iowa Code § 507C.21(1)(k). The Iowa Supreme Court wrote that the liquidator could not disavow a pre-liquidation agreement while "still retaining the ability to assert claims … pursuant to the same contract." *Ommen*, 941 N.W.3d at 318. Indeed, here, the Liquidator continues to utilize the agreements with AFIA Cedents to collect reinsurance recoveries for the benefit of the Home estate. Per the same logic, it cannot choose to disavow portions of the agreements that it does not like. A federal court applying Vermont's liquidation statute reached the same conclusion, once again in the context of a pre-liquidation agreement. *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 272 (D. Vt. 1993) ("[I]f a liquidator seeks to enforce an insolvent company's rights under a contract, she must also suffer that company's contractual liabilities.").

C. Liquidators Cannot Disavow Post-Liquidation Agreements

Bestowing on a liquidator the power to disavow contracts he entered into would create a strong disincentive for service providers, employees, landlords and other entities supporting the liquidator's efforts to enter into an agreement with a liquidator. The Court's oversight of such contract-breaking (Order at 5, 14) would not cure this lack of certainty. No law firm or accounting firm would want to do business for a liquidator. No landlord would feel comfortable leasing space to a liquidator. Employees would not want to sign employment agreements. Thus, it is not in the interest of creditors to grant a liquidator the power to disavow contracts into which he entered. Indeed, the New Hampshire Supreme Court approved the agreement with the AFIA Cedents with the understanding and expectation that the Liquidator would comply. Certainly, the Objecting Creditors had that expectation as well.

For these reasons, the Objecting Creditors respectfully request that the Court reconsider the portion of the Order describing the Liquidator's power to disavow his own contracts and address the Objecting Creditors' arguments that the Motion is at odds with the Liquidator's binding obligations under the agreements, including to administer claims such that the Objecting Creditors could submit them for reimbursement (including the amount with IBNR advised to the New Hampshire Supreme Court), ultimately for the benefit of the Home Estate.

II. The Issue in *Ambassador* Is the Same as Presented Here and Application of the Balancing Test Must Account for the Liquidator's Failure to Estimate IBNR

The second issue meriting reconsideration deals with the application of a balancing test in the Court's assessment of the Motion. The Court declined to apply the test employed by the Vermont Supreme Court in *In re Ambassador*, 114 A.3d 492 (Vt. 2015), erroneously finding that the motions before the Vermont court and this court were at different stages of the two liquidations. Order at 16.

In *Ambassador*, there was a March 1, 1988 deadline for filing claims and proofs of loss. *Id.* at 493. At issue before the Vermont Supreme Court was the liquidator's request, decades later, to set a date for the filing of "final and complete proofs of claim." *Id.* at 496. In the Home Liquidation, there was an initial claim filing deadline of June 13, 2004. Order at 2. The requested effect of the Liquidator's Motion here is to establish a deadline for the "final submission of amendments ... to proofs of claim ... ." Order Approving Claim Amendment Deadline at 1-2, ¶ 3. The Objecting Creditors submit that there is no practical difference between the Motion here and the motion at issue in *Ambassador*.

While the Order at pp. 14-16 asserts that there would be no difference in result even if the *Ambassador* test were applied (and finds that the Liquidator's request strikes a "reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims"), this finding is based on an incomplete presentation by the Liquidator and is thus in error. A reasonable balance must take into account the IBNR that would be forfeited by the Liquidator's requested relief. This includes the IBNR of Class II creditors[6] as well as the IBNR of the Objecting Creditors and other AFIA Cedents, whose claims are converted into reinsurance recoveries for the benefit of the Home estate. Inexplicably and unfairly, the Liquidator has never provided the Court and the Objecting Creditors with an estimate of IBNR to allow the Court to assess whether there is a "reasonable balance" or whether the *Ambassador* test is met. Without such an estimate, the Court lacked the evidentiary record to conclude that the Liquidator struck a "reasonable balance" between competing estate interests.

The Ambassador liquidator provided the Vermont Supreme Court with an IBNR estimate for the court's consideration in applying its balancing test. *In re Ambassador*, 114 A.3d at 494, ¶

[6] The settlement agreements the Liquidator enters into with claimants routinely provide consideration for any future claims, demonstrating that claimants that have not reached settlement agreements with the Liquidator do have some amount of IBNR that will be foregone by virtue of a premature claim amendment deadline.

7. That has not happened here. Without that information, the Court cannot assess the reasonable balance called for under New Hampshire law or apply the *Ambassador* test. Without that information, the Liquidator has deprived the Court of the ability to assess the reinsurance recoveries that would be sacrificed by virtue of a premature claim amendment deadline, including but not limited to those under the BAFCO agreements and reinsurance unrelated to the AFIA Cedents. *See* Objecting Creditors' Feb. 27, 2020 Sur-Reply at 8, n. 6. And without that information, the Court cannot assess the harm to Class II creditors from a premature claim amendment deadline that cuts off future reinsurance recoveries of the estate. Indeed, given the New Hampshire Supreme Court's edict that the agreement with AFIA cedents "benefits Class II claimants," any balancing exercise must account for that benefit, and that requires the IBNR information the Liquidator has not provided.

By not providing this, the Liquidator has left the Court with no ability to assess alternative outcomes, such as an extended deadline or the setting of a date for the Liquidator to return with more information.[7] Rather, the Court has been asked to rule on an incomplete record. Simply put, the Liquidator has not met its burden of proof as the moving party. Applying any balancing test under these circumstances is impossible, and thus the Court's conclusion that the Liquidator's balancing of interests was "reasonable" is an error of fact and law.

III. New York's Statute of Limitations for Abuse Claims Has Already Been Extended to August 2021

The third issue meriting reconsideration is the erroneous statement in the Order that the argument made by the Objecting Creditors (*see* p. 9 of Objecting Creditors' Feb. 27, 2020 Sur-

[7] Further, the fact that the liquidation is in its 17th year is not a sufficient factor, considering the numerous other liquidations in place longer prior to a final claim amendment deadline. *See* Objecting Creditors' Objection at 24. Assets recognized by the New Hampshire Supreme Court remain that will benefit Class II creditors and it is not unreasonable for the estate to continue for a period of time sufficient for the collection of those assets, or at least until the point when it can be determined that they are exceeded by the administrative costs of the estate.

Reply) and the New York Liquidation Bureau regarding the revival of the statute of limitations in New York is merely a "potential change." Order at p. 17. As detailed in the Objecting Creditors' Sur-Reply and in the October 27, 2020 submission by the New York Liquidation Bureau to the Court, New York has already extended its revival period to August 14, 2021. *See* Ex. B. Thus, as is the case with other states' revival laws described in the Objecting Creditors' sur-reply, the extended date in New York's statute is not a potential change, but rather one presently in effect. As currently ordered, the claim amendment deadline would take place prior to August 14, 2021 (as well as the expiration of other states' already revived statutes of limitations, such as California, which extends to January 1, 2023). Thus, the Objecting Creditors respectfully request that the portion of the Order dealing with the uncertainty of these statutory extensions be reconsidered.

IV. The Status of Johnson & Johnson's Settlement Agreement Is Unclear

The fourth issue meriting reconsideration relates to claimant Johnson & Johnson ("J&J"). As the Court is aware, J&J withdrew its objection to the Motion when it reached a settlement agreement in principle with the Liquidator. On January 28, 2021 (the same day as the Orders at issue here), J&J filed a motion with the Liquidator's agreement seeking to hold in abeyance any approval of the J&J settlement for 60 days while it awaits direction regarding a specific new coverage action relating to talc claims. Obviously, the Objecting Creditors lack information regarding whether the J&J settlement agreement is imperiled and what effect that may have, if any, on the Motion. The Court, however, may have issued the Orders here under the belief that the J&J settlement agreement was complete and fully effectuated. To the extent that the Orders were written with that mistaken understanding, the Objecting Creditors respectfully request that the Court reconsider its Orders.

CONCLUSION

Wherefore, for the reasons contained herein, the Objecting Creditors respectfully request that the Court reconsider its Orders regarding and approving the Liquidator's Motion for a Claim Amendment Deadline. Further, the Objecting Creditors request that the Court clarify, in its ruling on reconsideration, whether the Orders as reconsidered operate as a final decision for purposes of appeal to the New Hampshire Supreme Court. The Objecting Creditors request oral argument on this motion, and their companion motion for a stay of the Orders pending reconsideration and appeal, if necessary.

Respectfully submitted,

ZURICH INSURANCE PLC GERMAN BRANCH AND WUERTTEMBERGISCHE VERSICHERUNG,

By their Attorneys,

McLANE MIDDLETON, PROFESSIONAL ASSOCIATION

Dated: February 11, 2021

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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 Motion to Reconsider the Orders Granting the Liquidator's Motion for Approval of Claim Amendment Deadline and its attached exhibits was sent this 11th day of February 2021 by first class mail, postage prepaid to all persons on the attached service list and via email to those counsel with an asterisk.

Mark C Rouvalis

Mark C. Rouvalis

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

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

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Exhibit A

Transcript Excerpt from December 11, 2020 Hearing on Liquidator's Motion to Approve Claim Amendment Deadline – Page 42

and the parties agreed -- Wurttenbergische and Zurich agreed with the liquidator that that interest should be computed on a pooled share basis.

So those settlement agreements, which settled the disputes that had been arbitrated -- they are not related to the AFIA agreement, okay -- reached a resolution, and that resolution involved two general things.

One, Home agreed that it was responsible for the administration of those claims to (indiscernible), and this was negotiated during the liquidation. This agreement was approved by the Court, and we agreed that those administration costs should be Class 1 costs. And we have confirmed that on multiple occasions to Counsel for Zurich and Wurttenbergische, we do not back away from that.

Those administrative obligations are obligations of The Home, they are entitled to Class 1 status, and they need to be addressed within The Home liquidation proceeding and there, you know, there's a good form for that, they will be addressed; that is not a point for the claim amendment deadline.

The second issue, which is the reinsurance shares, the parties agreed that those liabilities should be addressed on a full-share basis, and that's how they have been addressed.

Now, there is a significant difference in the

Exhibit B

New York Liquidation Bureau
Notice of Non-Participation in Hearing and of Extension of Filing Deadline Under Child Victim Act to August 14, 2021

EXHIBIT B

PRIMMER PIPER EGGLESTON & CRAMER PC

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October 27, 2020

Catherine J. Ruffle, Clerk
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RE: In the Matter of the Liquidation of The Home Insurance Company
Docket No. 217-2003-EQ-00106
Our File No. Q09026-65033

Dear Ms. Ruffle:

Enclosed for filing with the court in the above-referenced matter please find The Ancillary's Notice of Intent with respect to the December 11, 2020 video conference hearing. Thank you.

Very truly yours,

/s/ Doreen F. Connor
Doreen F. Connor

DFC/Encl.

cc: John Kelly, Esq.
David Axinn, Esq.
Attached Service List

EXHIBIT B

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

NOTICE OF NON-PARTICIPATION AT THE DECEMBER 11, 2020 VIDEO CONFERENCE

NOW COMES the Special Deputy Superintendent of the New York Liquidation Bureau, and the agent of the New York Superintendent of Financial Services ("New York Superintendent") in its capacity as the ancillary receiver ("Ancillary Receiver") of The Home Insurance Company ("The Home") and respectfully advises the Court that:

1. The Ancillary Receiver will rest on its pleadings and will not participate in the December 11, 2020 video conference.

2. Although the Ancillary Receiver rests on its prior pleadings and is not requesting any additional relief, the Court should be aware that the New York Legislature extended the filing deadline under the Child Victim Act to August 14, 2021, which will be impacted by this Court's final bar order.

Respectfully Submitted

New York Superintendent of
Financial Services as Ancillary Receiver
of the Home Insurance Company
in Liquidation

By Its Attorneys,

Primmer Piper Eggleston & Cramer, PC

Dated: 10/27/2020

By: /s/ Doreen F. Connor
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was this day forwarded all counsel of record on the enclosed Service List.

/s/ Doreen F. Connor
Doreen F. Connor

EXHIBIT B

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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