

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 217-2003-EQ-00106

2021 JAN 24 P 1:47

**In the Matter of the Liquidation of
The Home Insurance Company**

**ZURICH INSURANCE PLC, GERMAN BRANCH'S REPLY IN SUPPORT OF ITS
MOTION TO RECONSIDER THE ORDERS GRANTING THE LIQUIDATOR'S
MOTION FOR APPROVAL OF CLAIM AMENDMENT DEADLINE
WITH REQUEST FOR A HEARING**

Pursuant to Rule 13A of the Rules of the Superior Court of the State of New Hampshire, Zurich Insurance plc, German Branch ("Zurich") respectfully submits the following Reply in Support of Its Motion to Reconsider 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 an initial matter, Zurich notes that the Liquidator's Objection to the Motion to Reconsider (the "Objection") seeks the denial of the Motion to Reconsider, even though the Liquidator freely admits that several material statements in the Order¹ are contrary to the law or the facts in the record. Of course, the presence of these undisputed errors justifies the reconsideration and re-issuance of the Orders and justifies the need to address all arguments made by Zurich and other AFIA Cedents that the Orders did not address as a result of a misunderstanding of key facts or principles.

I. Because the Liquidator Does Not Have the Power to Disavow Post-Liquidation Contracts, the Court Erred in Disregarding the Liquidator's Agreements with AFIA Cedents

The Order states 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

¹ Unless otherwise noted, all references to the "Order" are to the order regarding the Motion.

to “disavow any contracts to which the insurer is a party.” Order at 14 (citing RSA 402-C:25, XI). On page 1 of the Objection, the Liquidator agrees with Zurich and Wuerttembergische that he does not have “the authority to disavow post-liquidation contracts” and that agreements with Zurich and Wuerttembergische “are binding” on him. Thus, the Court must consider and address the AFIA Cedents’ arguments about those agreements.

The Liquidator baldly contends that those agreements “have no bearing” on his Motion, and thus, the Orders. Objection at 1. That is not the case. The January 22, 2004 agreement with all AFIA Cedents (Ex. 1 to Liquidator’s Resp. to AFIA Objections) implements the Scheme of Arrangement between The Home and the AFIA Cedents and imposes a binding contractual obligation on the Liquidator to pay the AFIA Cedents 50% of the Liquidator’s reinsurance recoveries (less specified deductions, such as offsets asserted by the reinsurers) for their claims, with the other 50% remaining for use to pay Class II claimants. It was this agreement that the New Hampshire Supreme Court specifically approved, writing that while collection proceedings “will be lengthy, complex, and difficult,” the agreement “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) (noting the \$231 million including IBNR then calculated as “significant”). The implementation of a premature claim amendment deadline would harm Class II creditors (as well as Zurich and other AFIA Cedents) by reducing the estate’s reinsurance recoveries, all of which is contrary to the interests protected by the Supreme Court’s order.

The Scheme of Arrangement established by this agreement expressly authorizes the Liquidator to enter into commutations with The Home’s reinsurers. Ex. E to Zurich’s Objection,

¶ 2.12, at CAD-HRG 459. Unbeknownst to Zurich until recently, however, the Liquidator ended these efforts to collect IBNR amounts that would benefit the Estate's priority creditors. Ex. A to Zurich's Objection at ¶¶ 12-13, at CAD-HRG 230. The result is a proposed premature claim amendment deadline that unfairly and unreasonably bestows a windfall on The Home's reinsurers, to the detriment of both Class II creditors and the AFIA Cedents, including Zurich. The Liquidator should live up to his contractual obligations, maximize reinsurance recoveries, and later propose a claim amendment deadline once that process is complete.

This failure by the Liquidator to commute with The Home's reinsurers coupled with the request for a premature claim amendment deadline, however, has frustrated the very purpose of the Scheme, which was to allow the Liquidator to collect claims – including IBNR – from The Home's reinsurers. The Scheme does not terminate until the liabilities of the AFIA Cedents are discharged in full (which would maximize reinsurance recoveries for The Home Estate, for the benefit of Class II creditors) or unless the Scheme Creditors and the Liquidator conclude based upon the facts that the Scheme is no longer in the interests of the Scheme Creditors, of which Zurich is one. Ex. E to Zurich's Objection at ¶ 7.1.1, at CAD-HRG 482.

In addition to the Liquidator's agreement with the AFIA Cedents, Zurich and Wuerttembergische have their individual, separate post-liquidation settlement agreements with the Liquidator. These are the agreements that obligate The Home Estate to adjust and respond to claims asserted by policyholders and cedents against Zurich and Wuerttembergische. *See, e.g.*, Ex. A-2 to Zurich's Objection at ¶ 6.3, at CAD-HRG 261. Specifically, The Home (that is, the Liquidator) is to "***do all things necessary*** to have such obligations admitted into Home's estate." *Id.* at ¶ 6.3.2 (emphasis added). Both by failing to provide updated reserves on claims so that they may be commuted with underlying cedents and policyholders of Zurich, and by advocating

the premature claim amendment deadline, the Liquidator has violated these obligations of The Home to Zurich. The Liquidator has failed to take the actions The Home is required to take to have Zurich's obligations admitted into Home's estate; in fact, with regard to Zurich's IBNR, he is actively trying to prevent that from happening.

For these reasons, Zurich respectfully requests that the Court reconsider the portion of the Order describing the Liquidator's power to disavow his own contracts and address the arguments that the Motion is at odds with the Liquidator's binding obligations under the agreements, including to administer claims such that Zurich and other AFIA Cedents may submit them for reimbursement and for the Liquidator to negotiate commutations with The Home's reinsurers of Zurich's claims against the Estate, all ultimately for the benefit of The Home Estate's Class II creditors.

II. The Issue in *Ambassador* Is the Same as Presented Here and the Liquidator Has Failed to Provide the Court with Information Necessary to Conduct a Balancing Test

The Liquidator agrees with Zurich that the deadline at issue in *In re Ambassador Ins. Co.*, 114 A.3d 492 (Vt. 2015) was procedurally the same as that presently before this Court. Thus, the Order should be corrected to remove the erroneous finding that the test employed therein by the Vermont Supreme Court should be ignored because it involved a different kind of deadline.

The Liquidator claims that *Ambassador* is irrelevant (Objection at 6), but once this Court examines the *Ambassador* test, it will find that the *Ambassador* court had information that The Home's Liquidator has declined to provide that is necessary for any balancing of interests. Namely, the Liquidator here has failed to provide the Court with an estimation of the IBNR that will be foregone by implementation of a premature claim amendment deadline. Furthermore, the Liquidator has failed to provide the Court with an estimation of the reinsurance recoveries that

will also be forfeited if his requested deadline is implemented. Without that information, application of two prongs of the *Ambassador* test (consideration of the insolvent company's remaining assets (*i.e.*, reinsurance recoverables) and the nature and amount of its remaining liabilities (*i.e.*, IBNR)) is simply impossible. In *Ambassador*, the liquidator there provided its "professional judgment" about the amount of IBNR so that the Court could take into account the remaining liabilities of the estate. *Id.* at 494, ¶ 7. Indeed, in 2004, The Home's Liquidator did the same thing, providing an affidavit to this Court (and, later, the New Hampshire Supreme Court), that The Home stood to recover \$231 million, ***including IBNR***, on AFIA claims. Ex. C to Zurich's Objection at CAD-HRG 395.

Despite the Liquidator's inexplicable failure to provide this Court with current information, there is undoubtedly IBNR that will be cut off if the premature claim amendment deadline is adopted, resulting in claims that will be fully borne by The Home's insureds and reinsureds and foregone reinsurance recoveries on those liabilities of The Home. The proposed Johnson & Johnson ("J&J") settlement demonstrates this, as it provides a release by J&J of the Liquidator of any future claims J&J may have under its policies with The Home. *See* Ex. A to Liquidator's Dec. 3, 2020 Motion for Approval of Settlement Agreement with Johnson & Johnson at p. 5, ¶ 3. That is standard language appearing throughout The Home's settlements, and it demonstrates that IBNR was part of the approved claim of J&J in The Home Estate. For those creditors such as Zurich that have not entered into such settlements with the Liquidator, their IBNR claims will be forfeited by a premature claim amendment deadline and policyholders or reinsureds that faithfully paid premiums to The Home will now bear the full costs of those claims.

Seventeen years after it chose to provide this Court and the New Hampshire Supreme Court with an estimate of IBNR of the AFIA Cedents, the Liquidator does not provide a plausible explanation for his failure to provide this Court now with IBNR information to assist the Court's decision-making process. He contends that the estimation of IBNR is "speculative and uncertain." Yet he used IBNR in 2004 and urged this Court and the New Hampshire Supreme Court to rely on that figure as the primary evidence supporting that petition. Moreover, calculating IBNR is something insurance companies do as a regular function of their business, including in preparing their financial filings with state regulators or settling with insureds. While IBNR is an estimation, it is underpinned by mathematics and actuarial science. The Liquidator is the only entity that can estimate the Estate's IBNR and should not be absolved of that responsibility by the approval of a premature claim amendment deadline.

Rather than provide the Court with this essential information, the Liquidator instead provides a highly selective calculation about AFIA-related reinsurance recoveries that ignores commutation values. Objection at 7. In so doing, the Liquidator disregards the entirety of the Estate's reinsurance recoveries, which at present exceed the Estate's operating costs (even without more AFIA Cedent commutations). *See* Liquidator's 78th Report at CAD-HRG 631. Indeed, the Liquidator's Objection completely ignores the argument made in the Motion to Reconsider that the Liquidator has deprived the Court of the ability to assess all of 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. Motion to Reconsider at 8.

Without an estimate of IBNR and the resulting estimate of the reinsurance recoveries that will be foregone, the Court is simply unable to apply either the *Ambassador* test or, indeed,

any balancing of interests that could inform a decision as to whether this is the time to implement a claim amendment deadline.

III. Statutes of Limitations for Abuse Claims Have Already Been Extended Beyond the Order’s Claim Amendment Deadline

With regard to New York’s statute of limitations for sexual abuse claims, the Liquidator does not deny that the date identified in the Order is in error. Objection at 8. Thus, the present date of the claim amendment deadline would precede the already-enacted revival period of the New York Child Victims Act and New York insureds of The Home would not be able to process all of their eligible claims in this liquidation. *See* New York Liquidation Bureau’s November 15, 2019 Objection and Ex. B to Motion to Reconsider. The same is true in California, where, as mentioned in Zurich’s Sur-Reply in support of its original objection and in the Motion to Reconsider, the already-enacted revival period lasts until January 1, 2023. Cal. Code of Civil Proc. § 340.1(q).

The Home’s insureds and reinsureds paid for coverage expecting that The Home would respond to claims brought against them. Obviously, the liquidation process means those insureds and reinsureds will not receive payment for the entirety of their claims, but they should at least have the opportunity to seek their proportionate reimbursement for all claims that they are able to file prior to the expiration of statutes of limitations. By seeking to impose a claim amendment deadline that is so premature that even statutes of limitations have not yet expired for claims that state legislatures have determined are deserving of compensation, the Liquidator is simply seeking to bring this Estate to a close too quickly. Thus, the Objecting Creditors respectfully request that the portion of the Order dealing with these statutory extensions be reconsidered in light of these facts.

IV. Johnson & Johnson’s Objection Was Only Withdrawn Based Upon Approval of a Settlement Agreement that It (and the Liquidator) Now Seek to Hold in Abeyance

Finally, there is no dispute that there is a pending motion, to which the Liquidator has assented, to hold approval of the J&J settlement in abeyance. The Liquidator’s Objection claims that “the possibility of some further action respecting a particular policyholder settlement does not affect the balance of interests underlying the Claim Amendment Deadline” and that J&J “withdrew its objection to the Liquidator’s motion without qualification.” Objection at 9.

First, only the Court knows if the mistaken belief that the J&J settlement was complete affected its decision. Second, it is important to note that the J&J settlement originally approved by this Court specifically provided that J&J would withdraw its objection to the claim amendment deadline “upon approval of this Settlement Agreement by the Court.” See Ex. A to Liquidator’s Motion for Approval of Settlement Agreement with Johnson & Johnson at pp. 9-10, ¶ 10. The Liquidator should not benefit from the apparent rush to settle with J&J in advance of the hearing on the claim amendment deadline. J&J’s withdrawal of its objection at that time was based on approval of a settlement agreement that it and the Liquidator now seek to hold in abeyance. The Court should reconsider the Orders in light of this new information.

CONCLUSION

Wherefore, for the reasons contained herein, Zurich respectfully requests that the Court reconsider its Orders regarding and approving the Liquidator’s Motion for a Claim Amendment Deadline. Further, Zurich requests 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. Zurich requests 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,

By its Attorneys,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: March 4, 2021

By: /s/ Mark C. Rouvalis

Mark C. Rouvalis (Bar No. 6565)

Steven J. Dutton (Bar No. 17101)

Viggo C. Fish (Bar No. 267579)

900 Elm Street, 10th Floor

Manchester, NH 03101

(603) 625-6464

mark.rouvalis@mclane.com

steven.dutton@mclane.com

viggo.fish@mclane.com

FREEBORN & PETERS LLP

Joseph T. McCullough IV* (IL Bar # 6189956)

jmccullough@freeborn.com

Peter B. Steffen* (IL Bar # 6275987)

psteffen@freeborn.com

Freeborn & Peters LLP

311 South Wacker Drive, Suite 3000

Chicago, IL 60606

(312) 360-6000

**Admitted Pro Hac Vice*

Certificate of Service

I hereby certify that a copy of the foregoing Zurich Insurance plc German Branch's Reply in Support of Its Motion to Reconsider the Orders Granting the Liquidator's Motion for Approval of Claim Amendment Deadline was sent this 4th day of March 2021 by first class mail, postage prepaid to all persons on the attached service list and by email to those with an asterisk by their names.

/s/ 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**

SERVICE LIST

J. Christopher Marshall
J.Christopher.Marshall@doj.nh.gov
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397

J. David Leslie
dleslie@rackemann.com
Eric A. Smith
esmith@rackemann.com
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110

Lisa Snow Wade, Esq.
Orr & Reno
One Eagle Square
P.O. Box 3550
Concord, New Hampshire 03302-3550

Gary S. Lee, Esq.
James J. DeCristofaro, Esq.
Kathleen E. Schaaf, Esq.
Morrison & Foerster
250 West 55th Street
New York, NY 10019-9601

David M. Spector, Esq.
Dennis G. Lagory, Esq.
Schiff Hardin LLP
6600 Sears Tower
Chicago, IL 60606

Richard Mancino, Esq.
Willkie Farr & Gallagher, LLP
787 Seventh Avenue
New York, New York 10019

Joseph G. Davis, Esq.
Willkie Farr & Gallagher LLP
1875 K. Street, N.W.
Washington, DC 20006

Albert P. Bedecarre, Esq.
Quinn Emanuel Urquhart Oliver & Hedges
LLP
50 California Street, 22nd Floor
San Francisco, California 94111

Jeffrey W. Moss, Esq.
Morgan Lewis & Bockius, LLP
One Federal Street
Boston, Massachusetts 02110

Robert M. Horkvich, Esq.
Robert Y. Chung, Esq.
Anderson Kill & Olick, P.C.
1251 Avenue of the Americas
New York, New York 10020

Andrew B. Livernois, Esq.
Ransmeier & Spellman, P.C.
One Capitol Street
P.O. Box 600
Concord, New Hampshire 03302-0600

Samantha D. Elliot, Esq.
Gallagher, Callahan & Gartrell, P.C.
214 North Main Street
Concord, NH 03301
David H. Simmons, Esq.
Mary Ann Etzler, Esq.
Daniel J. O'Malley, Esq.
deBeaubien, Knight, Simmons, Mantzaris &
Neal LLP
332 North Magnolia Avenue
P.O. Box 87
Orlando, Florida 32801

Martin P. Honigberg, Esq.
Sulloway & Hollis, P.L.L.C.
9 Capitol Street
P.O. Box 1256
Concord, New Hampshire 03302-1256

Michael S. Lewis, Esq.
Rath Young Pignatelli
One Capital Plaza
Concord, New Hampshire 03302-1500

John A. Hubbard
615 7th Avenue South
Great Falls, Montana 59405

Mark J. Andreini, Esq.
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190

Paul A. Zevnik, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Gregory T. LoCasale, Esq.
White and Williams LLP
One Liberty Place, Suite 1800
Philadelphia, Pennsylvania 19103-7395

Michael J. Tierney, Esq.
Wadleigh, Starr & Peters PLLC
95 Market Street
Manchester, New Hampshire 03101

Stephanie V. Corrao, Esq.
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595

Harry Cohen, Esq.
Crowell & Moring
590 Madison Avenue, 20th Floor
New York, New York 10022-2544

Harry L. Bowles
306 Big Hollow Lane
Houston, Texas 77042

Michael Y. Horton, Esq.
Morgan & Lewis & Bockius LLP
300 South Grand Avenue, 22nd Floor
Los Angeles, California 90071

Hillary Loynes Palazzolo, Esq.
Keith Dotseth, Esq.
Larson King
30 East Seventh Street, Suite 2800
St. Paul, Minnesota 55101

Joseph C. Tanski, Esq.
John S. Stadler, Esq.
Nixon Peabody LLP
100 Summer Street
Boston, Massachusetts 02110