THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0211

IN THE MATTER OF THE LIQUIDATION OF THE
HOME INSURANCE COMPANY

APPEAL OF ZURICH INSURANCE PLC, GERMAN BRANCH

Interlocutory Appeal Pursuant to Rule 8 from an
Order of the Merrimack County Superior Court

BRIEF OF APPELLEES BRIDGESTONE AMERICAS TIRE OPERATIONS, LLC, ELI LILLY AND COMPANY, VIACOMCBS INC. and the ARCHDIOCESE OF SAINT PAUL AND MINNEAPOLIS SETTLEMENT TRUST

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If the Court wishes to question Policyholder-Appellees at oral argument, Attorney Stockman will be present and prepared to respond.

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STATUTORY PROVISIONS

In addition to the statutory provisions identified by Appellant ("Zurich"), the policyholders joining this brief (the "Policyholder Appellees") set out the following additional statutory provisions that are relevant to the resolution of this appeal:

RSA 402-C:1, III – Insurers Rehabilitation and Liquidation – Title, Construction and Purpose.

III. Liberal Construction: This chapter shall be liberally construed to effect the purpose stated in paragraph IV.

RSA 402-C:25, XXII – Insurers Rehabilitation and Liquidation – Formal Proceedings – Powers of Liquidator.

XXII. The enumeration in this section of the powers and authority of the liquidator is not a limitation upon him, nor does it exclude his right to do such other acts not herein specifically enumerated or otherwise provided for as are necessary or expedient or the accomplishment of or in aid of the purpose of the liquidation.

RSA 402-C:44 – Insurers Rehabilitation and Liquidation – Formal Proceedings – Order of Distribution.

The order of distribution of claims from the insurer's estate shall be as stated in this section…. No subclasses shall be established within any class.

I. Administration Costs. The costs and expenses of administration, including but not limited to the following: the actual and necessary costs of preserving or recovering the assets of the insurer; compensation for all

services rendered in the liquidation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorney's fees.

II. Policy Related Claims. All claims by policyholders, including claims for unearned premiums in excess of $50, beneficiaries, and insureds arising from and within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company, and liability claims against insureds which claims are within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company and claims of the New Hampshire Insurance Guaranty Association, the New Hampshire Life and Health Insurance Guaranty Association and any similar organization in another state. . . .

V. Residual Classification. All other claims including claims of any state or local government, not falling within other classes under this section. Claims, including those of any non-federal governmental body, for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction or proceeding out of which the penalty or forfeiture arose with reasonable and actual costs occasioned thereby. The remainder of such claims shall be postponed to the class of claims under paragraph VIII.

….

VII. Interest on Claims Already Paid. Interest at the legal rate compounded annually on all claims in the classes under paragraphs I through VI from the date of the petition for liquidation or the date on which the claim becomes due, whichever is later, until the date on which the dividend is declared….

RSA 402-C:49 – Insurers Rehabilitation and Liquidation – Formal Proceedings – Reopening Liquidation.

After the liquidation proceeding has been terminated and the liquidator discharged, the commissioner or other interested party may at any time petition the court to reopen the proceedings for good cause, including the discovery of additional assets. If the court is satisfied that there is justification for reopening, it shall so order.

COUNTERSTATEMENT OF THE CASE

This appeal arises out of the Liquidator's effort to bring this protracted insurance liquidation to an end after nearly two decades. Given that this is the seventh appeal in this matter, the Court is undoubtedly well-acquainted with its general contours. *See In re Liquidation of Home Ins. Co.,* 154 N.H. 472 (2006) (*Home I*); *In re Liquidation of Home Ins. Co.,* 157 N.H. 543 (2006) (*Home II*); *In re Liquidation of Home Ins. Co.,* 158 N.H. 396(2006) (*Home III*); *In re Liquidation of Home Ins. Co.,* 158 N.H. 677 (2006) (*Home IV*); *In re Liquidation of Home Ins. Co.,* 166 N.H. 84 (2006) (*Home V*); *In re Liquidation of Home Ins. Co.,* No. 2016-0569, 2017 WL 5951591 (N.H. Oct. 27, 2017) (*Home VI*). Therefore, the policyholders joining this brief (the "Policyholder Appellees") discuss only those aspects of the liquidation relevant to the present appeal.

I. Presentation of Policyholder Claims in the Liquidation

This proceeding is the final unwinding of a company with a storied history. The Home Insurance Company ("Home") traces its origin back to 1853, and it actively wrote insurance and reinsurance throughout the United States and elsewhere in the English-speaking world until the 1990s. At that point, as claims mushroomed (and in the absence of an influx of premiums from the ongoing underwriting of new policies), it soon found itself in intractable financial difficulty. *See generally* App'x vol. I at 206-07.

In June 2003, after a brief and unsuccessful effort at statutory rehabilitation, Home was declared insolvent and placed into liquidation. *See Home I,* 157 N.H. at 475; *Home II,* 158 N.H. at 544. The liquidation order established a June 13, 2004 deadline for the submission of claims, *see* App'x vol. I at 171, but amendments were permitted, as were untimely claims under certain defined circumstances, *see* RSA 403-C:37, II.

Ultimately, nearly 21,000 individual proofs of claim were filed; as of September 9, 2021, all but 808 of these had been resolved. *See* Supp. App'x at 76. In other words, more than 96% of all proofs of claim have been resolved (whether by allowance, disallowance or court-approved compromise). Only 172 policyholders still have open proofs of claim. *See id.* at 76 n.5.

Policyholder Appellees all filed proofs of claim, and have allowed claims against the remaining assets in the liquidation estate aggregating more than $69 million:

- Bridgestone Americas Tire Operations, LLC has allowed claims totaling $2,257,995, under two policies issued to The Firestone Tire & Rubber Company, in connection with asbestos claims and other liabilities. *See id.* at 57-63.
- Eli Lilly and Company has a series of allowed claims in the aggregate amount of $17,157,152. *See id.* at 1-19.
- ViacomCBS Inc. has several allowed claims, totaling $20,519,535, under policies issued to Westinghouse Electric Company and others, for toxic tort bodily injury claims, workers compensation claims, and other liabilities. *See id.* at 64-70.
- The Archdiocese of Saint Paul and Minneapolis Settlement Trust is the assignee of a $14,200,000 allowed claim of the Archdiocese, and of a $1,500,000 allowed claim of certain parishes within the Archdiocese, for bodily injury liabilities related to alleged sexual abuse. The rights to payment on these allowed claims have been assigned to the Trust for the benefit of the sexual abuse survivors, pursuant to the Archdiocese's confirmed plan of reorganization, a 2016 Settlement Agreement

between the Liquidator and the Archdiocese approved by the United States Bankruptcy Court for the District of Minnesota on August 30, 2018, and a Settlement Agreement between the Liquidator and the certain parishes. *See id.* at 20-56.

The Policyholder Appellees are all "Class II Claimants" under RSA 402-C:44, II. Only the expenses of administering the liquidation estate have higher priority. *See* RSA 402-C:44, I.

Despite the high priority afforded to allowed policyholder claims – a reflection of the Insurers Rehabilitation and Liquidation Act's preference for protecting insureds, *see* RSA 402-C:1 – it has been evident for more than a decade that there will not be sufficient assets in Home's liquidation estate to satisfy all policyholder claims in full. *See Home I,* 154 N.H. at 477. Altogether, as of September 1, 2021, there are $2.9 billion in allowed Class II claims, but the Liquidator has only been able to collect roughly $1.77 billion, net of liquidation expenses and Class I claims, to satisfy those policyholder claims. *See* Supp. App'x at 72.

To date, the Liquidator has made interim distributions totaling 30% of allowed claims (amounting to roughly $672 million) and has satisfied certain guaranty association claims. *See id.* at 81-83. Approximately $785 million in assets remain to satisfy the remaining portion of the Class II claimants' allowed claims, *see id.* at 72, a shortfall of more than $1 billion.

II. The Liquidator's Agreement with the AFIA Cedents

Before the liquidation, Home participated in the London insurance market as part of a consortium known as the American Foreign Insurance Association ("AFIA"). As an AFIA member, Home wrote reinsurance covering several insurance companies' risks, including Zurich. (These

reassureds are known collectively as the "AFIA Cedents.") These reinsurance claims are all deemed to be "Class V" claims and (given their low priority) would not receive any distribution of Home assets. *See Home I,* 154 N.H. at 474, 477.

That ordinarily would have been the end of the story, but for the 1984 purchase of AFIA by the Insurance Company of North America ("INA") (to which Century Indemnity Company ("CIC") is now the successor). As part of that purchase, INA contractually assumed Home's liability under these reinsurance treaties. *Id.* at 474-75.

As a result, when Home went into liquidation, it had a valuable (if inchoate) asset in the form of prospective reimbursements from CIC for claims asserted against Home by the AFIA Cedents. Unfortunately, the AFIA Cedents had no incentive to undertake the effort of submitting claims in the liquidation, a precondition to triggering payments from CIC, given that they would not otherwise reap any benefit. *Id.* at 477, 486.

In an effort to encourage the filing of AFIA claims that would generate payments from CIC, the Liquidator entered into an agreement with the AFIA Cedents. In return for the AFIA Cedents' filing of claims, the Liquidator would pay them half of the resulting proceeds (net of offsets and setoffs assessed by CIC) as a "Class I" administrative claim. This was a substantial benefit for undertaking an essentially ministerial task: the AFIA Cedents' projected share of the payments from CIC at the time was $78 million. *Id.* at 477. The Superior Court and this Court upheld the arrangement, in the face of challenges from CIC, its affiliates, and an objecting policyholder. *See generally Home I.*

The AFIA Cedents were paid handsomely for their modest effort. AFIA Cedents' reinsurance claims from 2004 until 2019 totaled $133,997,778. App'x vol. II, at 316. Net of offsets and expenses, the Liquidator collected $87,829,406 from CIC, *id.* at 316 n.11, and so distributed nearly $44 million to the AFIA Cedents.

In recent years, however, the pace of reinsurance claims, and ensuing payments from CIC, have slowed to a trickle. For the five years from 2015 through 2019, AFIA reinsurance claims have averaged only about $3 million per year. *Id.* at 316. Net of setoffs, the liquidation estate has only collected about $1.8 million per year, *id.* at 317, and half of that is paid out to the AFIA Cedents as an administrative expense. In other words, the benefit to Home's Class II policyholder claimants – the benefit that justified the arrangement in the first place, *see Home I*, 154 N.H. at 485-90 – in recent years has been only about $900,000 per year. At that rate (without even considering the ultimate depletion of the underlying reinsurance limits as claims are paid), it would take more than 1,000 years for these payments to cover the current shortfall and pay policyholders 100 cents on the dollar.[1]

[1] Zurich argues that more time would enable it to reach agreements with its policyholders, and thus bring a "sudden influx of reinsurance recoveries," Zurich Br. at 31, but this speculation is inconsistent with recent history. The Liquidator's effort to set a claim amendment deadline – which should have prompted a concerted effort to wrap up open claims – has been pending for more than two years, and there is no evidence of any "sudden influx" in the intervening months. If anything, any "sudden influx" (if it would happen at all) appears unlikely to eventuate until there is a hard deadline to compel action.

III. The Claim Amendment Deadline

As noted above, this Liquidation has been pending since 2003, and the Liquidator has made substantial progress in resolving Class II policyholder claims. *See* App'x vol. I at 211-13; Supp. App'x at 76. Further, the Liquidator has concluded that most accessible assets have been recovered: as noted above, the pace of recoveries on the AFIA claims has slowed, App'x vol. II at 316-17, and the remaining assets principally consist of reinsurance coverage obtained by Home that will not become payable until it has resolved remaining policyholder claims, App'x vol. I at 213. The Liquidator thus believed that the benefits from keeping the liquidation open, and continuing efforts to marshal assets, no longer outweigh the ongoing expense of administering the liquidation estate. *Id.* at 213-14. That cost, for 2021, is projected to be $12.4 million, *see* Supp. App'x at 79 – that is, more than four times the average annual gross total of AFIA claims (without considering setoffs), and more than thirteen times the average benefit to policyholders from the Liquidator's arrangement with the AFIA Cedents.

Accordingly, the Liquidator asked the Superior Court to approve a claim amendment deadline (set at 150 days after Court approval). *See* App'x vol. 1 at 180-223. Zurich and certain of the other AFIA Cedents objected. *See, e.g., id.* at 224-68. While some policyholders initially objected, most resolved their claims with the Liquidator and withdrew their objections.

After a hearing, the Court granted the Liquidator's request. *See id.* at 5-30. The Court then denied Zurich's and other AFIA Cedents' ensuing motions for reconsideration. *Id.* at 31-40. The Court did, however, stay the effectiveness of its order pending this interlocutory appeal. *Id.* at 37-39.

SUMMARY OF ARGUMENT

The Insurers Rehabilitation and Liquidation Act gives the Liquidator a broad charter when it comes to wrapping up a liquidation: it requires only that the Liquidator strike "a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims." RSA 403-C:46, I. The law also gives the Liquidator and supervising court a correspondingly broad discretion in how it strikes that balance, and this Court can reverse only if that balancing were to be unsustainable, clearly unreasonable or untenable.

Here, the Liquidator and Superior Court properly exercised their discretion in instituting a claim amendment deadline. The overwhelming majority of claims have been resolved, and there is no good basis for holding open the liquidation based upon the diminishing potential for additional recoveries (recoveries that are further attenuated by the administrative payment given to the AFIA Cedents, who otherwise are lower-priority claimants). In fact, the only material effect of an order reversing the trial court would be to prejudice the interests of policyholders with allowed claims such as the Policyholder Appellees. These policyholder claims, which do not bear interest, become less valuable with each passing year of delay. Further, the ongoing expenses of the liquidation continue to erode the liquidation estate, consuming funds that cannot then be distributed to policyholder claimants. The fact that no policyholders are opposing a claim amendment deadline in this Court is a powerful testament to that on-the-ground reality.

In re Ambassador Insurance Co., 114 A.3d 492 (Vt. 2015), does not alter this analysis. The decision there was based on "unique circumstances," *id.* at 497, in that all policyholder claimants were paid in full, with interest, *see id.* at

494, and so could not be prejudiced by any prolongation of the proceedings, *see id.* at 501. Further, a premature end to the liquidation in *Ambassador* would effectively have prioritized lower-priority claimants, to the detriment of policyholders with unliquidated claims. *See id.* at 502-03. Here, by contrast, there are insufficient assets to pay all allowed policyholder claims, and the continued pendency of the liquidation process reduces the value of those policyholder claims. In fact, a faithful application of the reasoning of *In re Ambassador* supports the Liquidator's efforts to begin winding down this 18-year-old liquidation proceeding.

Nor is a claim amendment deadline in any way inconsistent with agreements that the Liquidator has consummated with Zurich or any of the other AFIA Cedents. Those agreements are silent on the issue, and there is no reason for this Court to insert such a term – a provision inconsistent with the broader goals of the statutory liquidation process – by judicial fiat.

Finally, because claims can be presented up to the deadline and resolved thereafter, and because the liquidation can be reopened if additional assets become available, this dispute is at bottom an abstract disagreement. This Court should not overturn a reasoned exercise of the Liquidator's and Superior Court's discretion in an attempt to avert an "injury" that remains at this point purely hypothetical.

For these reasons, the Policyholder Appellees ask the Court to affirm the Superior Court's order setting a claim amendment deadline.

ARGUMENT

I. Appellant's Brief Sidesteps the Broad Discretion Given to Both the Liquidator and to the Superior Court, and Thus Understates the Deferential Nature of This Court's Review.

Before turning to the substance of this appeal, it is important to frame the matter properly for the Court's decision, because Zurich largely ignores the controlling legal standards:

Under the Insurers Rehabilitation and Liquidation Act, RSA chapter 402-C, the liquidator is given broad discretionary and equitable powers to ensure an efficient, economical and equitable liquidation, in order to protect the interests of insureds, creditors and the public. *See* RSA 403-C:1, III; RSA 403-C:1, IV(c)-(d); RSA 403-C:25, XII; *Home I,* 143 N.H. at 479-80; *Gonya v. Comm'r,* 153 N.H. 521, 524 (2006). *See also In Re Exec. Life Ins. Co.,* 32 Cal. Rptr. 2d 453, 459 (Cal. App. 1993); *Ito v. Investors Equity Life Holding Co.,* 346 P.3d 118, 130-31 (Hawaii 2015); *Angoff v. Holland-Am. Ins. Co. Trust,* 937 S.W.2d 213, 217 (Mo. App. 1996); *In re Rehab. of Frontier Ins. Co.,* 870 N.Y.S.2d 144, 146 (N.Y. App. Div. 2008); *Taylor v. Ernst & Young, L.L.P.,* 958 N.E.2d 1203, 1208 (Ohio 2011); *In re Ambassador Ins. Co.,* 114 A.3d 492, 497-98 (Vt. 2015); 1 STEVEN PLITT *ET AL.,* COUCH ON INS. § 5:37 (2021) ("the commissioner is afforded very broad judgment and discretion in the performance of his duties"); 44 C.J.S. *Insurance* § 249 (2021).

This includes the authority and the discretion – indeed, the obligation, at the appropriate time – to set deadlines for the filing of claims and for the wind-up of the liquidation estate, to prevent the piecemeal and protracted proceeding of claims, and so that policyholders can have their claims paid with reasonable dispatch. *See, e.g., MSEJ, LLC v. Transit Cas. Co.,* 280 S.W.3d 621, 624 (Mo. 2009); *Lorain Cty. Bd. of Comm'rs v. U.S. Fire Ins. Co.,* 610 N.E.2d

1061, 1064 (Ohio App. 1992); *Foster v. Mut. Fire, Marine & Inland Ins. Co.,* 614 A.2d 1086, 1098 (Pa. 1992); *State ex rel. Sizemore v. United Physicians Risk Retention Group,* 56 S.W.3d 557, 564 (Tenn. App. 2001); *In re Ambassador Ins. Co.,* 114 A.3d at 497 n.9; 1 STEVEN PLITT *ET AL.,* COUCH ON INS. § 5:35 (2021); 44 C.J.S. *Insurance* § 258 (2021). *Cf. Angoff,* 937 S.W.3d at 218 ("The receivership court has the discretion to expedite closure of the estate.").

As a result, the Liquidator's and Superior Court's decisions should be upheld unless there was an unsustainable exercise of this broad discretion. *See, e.g., In Re Exec. Life,* 32 Cal. Rptr. 2d at 460; *Ito,* 346 P.3d at 131; *Angoff,* 937 S.W.2d at 218; *In re Rehab. of Frontier Ins. Co.,* 945 N.Y.S.2d 866, 876 (N.Y. Sup. Ct. 2012); *Taylor v. Ernst & Young, L.L.P.,* 958 N.E.2d at 1208; *In re Ambassador Ins. Co.,* 114 A.3d at 498.

Under this standard, this Court will affirm so long as the record reveals an "objective basis" for the exercise of discretion. To be reversible, the decision must be clearly untenable or clearly unreasonable. This Court does not determine whether it would have found differently in the first instance; rather, it only determines whether a reasonable person could have reached the same decision as the trial court on the basis of the evidence before it. *See, e.g., Balzotti Global Group, LLC v. Shepherds Hill Proponents, LLC,* 173 N.H. 314, 321 (2020); *Benoit v. Cerasero,* 169 N.H. 10, 19-20 (2016).

Zurich pays lip service to this deferential standard of review, *see, e.g.,* Zurich Br. at 6, 17, 19, but sidesteps it in its analysis, instead contending that the Liquidator and Superior Court committed errors of law by misconstruing the controlling statutes. As shown below, this is not the case: the record makes clear that the Superior Court's decision was consistent with applicable law, justified on the facts, wholly reasonable, and should be affirmed.

II. The Liquidator and Superior Court Properly Exercised Their Discretion in Setting a Claim Amendment Deadline.

The conduct of insurance liquidations is a matter of statute, and the relevant provisions of the Insurers Rehabilitation and Liquidation Act speak in broad terms, consistent with the overall breadth of the discretion afforded to the Liquidator and supervising court. The statutory framework:

- directs the liquidator to "assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims," RSA 402-C:46, I; and
- allows the liquidator to apply to terminate the liquidation "[w]hen all assets justifying the expense of collection and distribution have been collected and distributed," RSA 402-C:48, I.

The Liquidator's application to the Court, and the Court's order approving a claim amendment deadline, appropriately strike the balance envisioned by RSA 402-C:46, I and 48, I.

The benefit that flows from bringing this liquidation to an expeditious end far outweighs the harm that might result from cutting off a limited universe of unliquidated or unknown claims. In fact, keeping this liquidation open indefinitely, so that Zurich and the AFIA Cedents have the opportunity to present otherwise-fruitless reinsurance claims, will cause real and quantifiable prejudice to policyholders, whose protection "in particular" is "the critical goal of the liquidation process," *In re Ambassador,* 114 A.3d at 498.

- As noted above, the AFIA Cedents' continued filing of reinsurance claims has, in recent years, contributed less than $1

million in net assets per year to the liquidation estate. *See supra* at 14. By contrast, the continuing expense of administering the liquidation is more than ten times greater. *See supra* at 15. As a result, allowing the liquidation to remain open solely to permit the AFIA Cedents to obtain Class I administrative payments – money that they otherwise would be unable to receive in the ordinary course of the liquidation as Class V claimants – depletes the assets available to pay Class II policyholder claims, to the prejudice of Policyholder Appellees and all remaining policyholders.[2]

- Compounding that prejudice is the fact that the continued pendency of the liquidation prevents a final distribution of assets to the Class II policyholder claimants, including Policyholder Appellees, thereby eroding the value of the allowed claims. After all, policyholders' allowed claims will not accrue interest.[3] At present, $785 million in assets are being held for distribution. *See supra* at 12. Applying even a minimal one percent discount rate, the remaining value of policyholders' allowed claims therefore erodes, as a practical matter, by nearly

[2] Zurich suggests that inbound reinsurance recoveries could offset these administrative costs, *see* Zurich Br. at 27, but the Liquidator has concluded that remaining reinsurance recoveries are largely contingent on the resolution of policyholder claims that are already pending, *see* App'x vol. I at 213, a determination that this Court should be reluctant to second-guess. As a result, a prolonged extension of the liquidation will not materially increase the amount of reinsurance assets to be collected and distributed to policyholders.

[3] Interest payments on allowed claims are given Class VII priority, *see* RSA 403-C:44, VII, and so will certainly never be made.

> $8 million in one year alone.[4] Zurich, in other words, is asking this Court to penalize Class II policyholder claimants to the tune of millions of dollars per year, so that lower-priority Class V reinsurance claimants can recover what appears to be no more than a few hundred thousand dollars.

Under these circumstances, it was not an abuse of discretion to impose a claim amendment deadline. In fact, given the facts at hand, the Liquidator and Superior Court would have unsustainably exercised their discretion had they **refused** to impose a claim amendment deadline.

Against this record, Zurich argues principally that the Liquidator and Superior Court cannot take this discretionary step until they tote and tally all the potential claims that might be cut off. *See, e.g.,* Zurich Br. at 29-31. RSA 402-C:46, I, however, does not compel such precision as a prerequisite to striking a "reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims." And RSA 402-C:48, I, by its terms, does not require a mathematical calculation before the Liquidator and Superior Court can reasonably conclude that the collection of remaining estate assets is no longer justified.

To be sure, a claim amendment deadline would eliminate Zurich's and the AFIA Cedents' access to Class I administrative distributions (and could possibly limit recoveries by some of the 172 policyholders who still have open claims, to the extent these claims involve unliquidated liabilities and cannot be

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[4] If the time value of money is calculated using the statutory interest rate on judgments pursuant to RSA 336:1, II, 2.09 percent, the annual policyholder loss exceeds $16 million. *See* N.H. Judicial Branch, "Civil Interest Rates," *available at* https://www.courts.nh.gov/our-courts/superior-court/civil/civil-interest-rates.

resolved by agreement). The law is clear, however, that some "'individual interests may need to be compromised in order to avoid greater harm to the broad spectrum of policyholders.'" *See PrimeHealth Corp. v. Ins. Comm'r,* 758 A.2d 539, 549 (Md. App. 2000) (quoting *Vickodil v. Pa. Ins. Dep't,* 559 A.2d 1010, 1013 (Pa. Commw. 1989); 44 C.J.S. *Insurance* § 251 (2021); *see also In re Ambassador,* 114 A.3d at 498.[5]

More broadly, Zurich's protestations in favor of policyholders, *see, e.g.,* Zurich Br. at 20, should be seen as nothing more than crocodile tears. No Class II policyholder claimants have appeared in this Court to oppose the Liquidator's or Superior Court's efforts to wind down this 18-year-old liquidation. This is not surprising, given that the claims of almost all Class II policyholder claimants have already been resolved, by allowance, disallowance or compromise. Perhaps even more telling is the fact that none of the 172 policyholders who still have open proofs of claim are arguing for additional time, to permit the maturation of presently unliquidated claims or for the presentation of presently unknown claims.[6] Under these circumstances, this

[5] For example, the claim amendment deadline established in the Midland Insurance Company liquidation potentially impacted up to $605 million in incurred-but-not-reported claims, but the court allowed the deadline to facilitate the distribution of $1.9 billion in allowed claims. *See In re Liquidation of Midland Ins. Co.,* No. 41294/1986, 2011 WL 2652564 at *6 (N.Y. Sup. Ct. June 27, 2011).

[6] Only three individual worker's compensation claimants, and one liability insurance policyholder, ultimately opposed the Liquidator's application below. *See* App'x vol. I at 10-14. None have entered appearances in this Court. Other than the undersigned, the only other appearance in this Court on behalf of a policyholder was entered by counsel for Johnson & Johnson, and we have been informed that Johnson & Johnson does not oppose the claim amendment deadline.

Court should be hesitant to overturn the considered judgment of the Liquidator and the Superior Court judge who has been overseeing the liquidation.[7]

III. The Vermont Supreme Court's Decision in *In re Ambassador Insurance* Does Not Counsel a Different Result.

The bulk of Zurich's argument is devoted to discussing the Vermont Supreme Court's decision in *In re Ambassador Insurance Co.,* 114 A.3d 492 (2015). That decision, however, rested on an idiosyncratic factual posture that is not present here, and so *Ambassador* does not justify the relief that Zurich seeks, and does not undermine the Liquidator's and Superior Court's sound exercise of discretion in this matter.

A. Because Policyholders in *Ambassador* Were Paid in Full, With Interest, The Decision Is Not Instructive Here.

At the outset, as the Court in *Ambassador* expressly recognized, the situation that it was facing was "unique." 114 A.3d at 497. Because of a $205 million judgment obtained against Ambassador's auditor, the liquidator in *Ambassador* paid all court-approved policyholder claims **in full, with interest**, and still had ample assets to pay in full any policyholder claims that were reasonably projected to eventuate. *See id.* at 494. As the court explained:

> The primary issue on appeal is not whether the trial court had the legal authority to set a final claim date.

[7] Even if this Court were to question the wisdom of the claim amendment deadline at issue – a conclusion that Policyholder Appellees believe would be impossible to reach on this record – that does not justify this Court's substitution of its own discretion. "We do not decide whether we would have ruled differently than the trial court, but rather, whether a reasonable person could have reached the same decision as the trial court based upon the same evidence." *Balzotti Global,* 173 N.H. at 319.

> Nor is it whether the liquidation estate should remain open forever, with no deadline for presenting liquidated claims. Rather, the question is whether, **given the unique circumstances of this case,** the trial court erred in setting December 31, 2013 as a final date for submission of proofs of liquidated claims.

Id. at 497 (emphasis added). Put otherwise, *Ambassador* by its very terms limits its own precedential value. Throughout the *Ambassador* opinion there are recognitions that its outcome was driven by the fact that the liquidation estate retained sufficient funds to ensure that all policyholders were made whole. For example, the court observed that "courts and liquidators should be loath to cut off valid claims **in the face of ample funds to pay those claims** without good reason." *Id.* at 498 (emphasis added). As the court explained:

> As noted above, Ambassador has ample resources to meet its known obligations to [policyholder] claimants ($26 million), to pay the $20 million in claims asserted by [a policyholder assignee], if they are established, to pay claimants with known but not yet liquidated [policyholder] claims (estimated in Ambassador's reserves to be around $18 million), to sustain its administrative costs for at least five years, and even to pay the bulk of known obligations to priority-five claimants. Given this circumstance, we cannot conclude that, as required by the liquidation order, "all assets that can be economically collected and distributed have been collected and distributed." In particular, the liquidator has not yet distributed "all assets that can be economically collected and distributed." Ambassador has sufficient funds to pay additional known and not yet liquidated, and even yet-unknown [policyholder] claims.

Id. at 500-01.

Importantly, the *Ambassador* court also grounded its holding on the fact that, because of the full payment of allowed policyholder claims, policyholder claimants would not be prejudiced by the continuation of the liquidation process:

> [I]t is not the case that the interests of other [policyholder] claimants here would be substantially compromised by continuation of the litigation. In this case, no [policyholder] claimants are currently prejudiced by allowing additional time for those with known but unliquidated claims to perfect their claims, or for those with yet-unknown claims protected by policyholder-protection claims to make actual claims.

Id. at 501 (citation omitted).[8] The opposite situation, of course, is presented here. *See supra* at 20-22.

Zurich entirely ignores this highly salient distinction. Nor does Zurich mention that in *Ambassador* the policyholder claimants were – or were going to be – paid in full. This is not surprising: the uniqueness of *Ambassador,* with its full protection for policyholders, renders it weak precedential support for overturning a decision already committed to the sound discretion of the Liquidator and the lower court, in the context of a much less policyholder-friendly financial situation.

There are also other aspects of the *Ambassador* decision that limit its applicability here. For example, *Ambassador* "was not a case in which we can reasonably conclude that the lion's share of the insolvent insurer's obligations is substantially known and established by now." *Id.* at 501. Here, by contrast,

[8] The court cited, and distinguished, *In re Liquidation of Integrity Ins. Co.,* 935 A.2d 1184, 1187 (N.J. 2007), where "keeping liquidation open until substantially all contingent claims became absolute would delay the full and final dividend to claimants and policyholders."

more than 96% of the Class II policyholder claims have been finally resolved. *See supra* at 11.

Further, because the liquidator in *Ambassador* planned, after the deadline, to distribute assets to claimants in lower priority classes than policyholders:

> any payment to lower priority claimants before Ambassador satisfies its obligations to higher priority claimants would be a windfall to those lower-priority claimants…. The notion that a priority-five claimant should be entitled to full payment while a [policyholder] claimant… should be left without its contracted-for protection as a policyholder because of the long-tail nature of the risks for which it purchased coverage is squarely at odds with the distribution priorities reflected in the liquidation order and is unsupported by any authority.

114 A.3d at 502-03. Here, on the other hand, there are insufficient assets even to make policyholder claimants whole, and thus no risk that a premature termination of the liquidation would benefit lower-priority claimants to the detriment of policyholders.

Indeed, the opposite is present here: keeping the liquidation open harms policyholders, and benefits only lower priority reassureds. Simply put, Zurich and the other AFIA Cedents were allowed to "jump the queue" and receive half of their otherwise-unrecoverable reinsurance coverage, as an "administrative expense," solely because the remaining recovery from CIC would inure to the benefit of Class II policyholder claimants, *see Home I,* 154 N.H. at 490. But that arrangement no longer benefits the liquidation estate in a meaningful way, as shown above, *see supra* at 14, and so there is little reason to allow the reinsurance "tail" to continue to "wag the dog" in this fashion.

In sum, *Ambassador* does not provide any significant assistance to this Court, particularly in the context of this Court's deferential review.

B. If *Ambassador Insurance* Is Read to Establish a Set of Mandatory Criteria, It Is Inconsistent with New Hampshire Law.

Ignoring the *sui generis* nature of the ruling in *Ambassador,* Zurich argues that its multi-factor test should be mandatory as a matter of New Hampshire law. *See, e.g.,* Zurich Br. at 26. But the governing statutes say no such thing – they speak much more broadly, asking only that a "reasonable balance" be struck "between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims," RSA 403-C:46, I, which asks the liquidator and court to consider, among other things, whether "the expense of collection and distribution" is "justif[ied]," RSA 402-C:48, I. As discussed above, such a broad mandate is consistent with the overall goals of the statutory liquidation scheme, which include not only the "[e]quitable apportionment of any unavoidable loss," but also, importantly, the "efficiency and economy of liquidation." RSA 402-C:1, IV(c)-(d). (Zurich repeatedly emphasizes the former goal, but ignores the latter.)

Zurich's effort to rewrite New Hampshire statutes, to add by judicial gloss a specific set of criteria that the legislature did not contemplate, is inconsistent with this Court's approach to statutory construction. Rather, this Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Appeal of Algonquin Gas Transm., LLC,* 170 N.H. 763, 770 (2018) (citation omitted); *Home II,* 157 N.H. at 554. Indeed, where the Legislature wished to impose mandatory constraints on the liquidator and reviewing court, it did so. *See id.* (noting that the liquidator was

required to allow setoffs under RSA 403-C:34, I unless one of the exceptions in 403-C:34, II applied). Having not done so here, it would be inappropriate to write *Ambassador*'s four-part test into RSA 403-C:46, I or RSA 403-C:48, I. *See Algonquin,* 170 N.H. at 774 (declining to "judicially engraft" terms into a statute where the Legislature has failed to do so).

Put otherwise, while the considerations set out in *Ambassador* may, when appropriate, guide courts' exercise of discretion, they are neither an exclusive nor a mandatory enumeration of relevant considerations. *Ambassador* itself made that clear. *See* 114 A.3d at 500 (stating that its four factors are ones that "courts should consider, among other factors," and not a checklist that the court was obligated to address explicitly as a prerequisite to establishing a valid claim amendment deadline). As a result, any failure on the part of the Superior Court to check each of these four boxes in reaching its decision is of no moment.[9]

C. The Analysis in *Ambassador Insurance* Supports the Liquidator's and Superior Court's Decisions.

Even if this Court were to adopt *Ambassador*'s four-part test, however, it does Zurich no good. If anything, a careful consideration and balancing of the relevant factors identified in *Ambassador* support the Liquidator's and Superior Court's exercise of discretion in this situation.

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[9] In any event, the Superior Court in fact **did** consider the factors identified in *Ambassador* and concluded that they supported a claim amendment deadline. *See* App'x vol. I at 20. As a result, what Zurich is really complaining about is not an error of law on the part of the trial court, but rather is a disagreement about how the trial court resolved the relevant factual considerations and balanced the equities. Those are not matters that this Court will revisit, so long as "a reasonable person could have reached the same decision," *Balzotti Global,* 173 N.H. at 319.

First, and most importantly, "delay in termination of the liquidation proceedings" necessarily "results in a delay of full payment to priority claim holders," *Ambassador,* 114 A.3d at 500, and justifies a prompt claim amendment deadline. Unlike *Ambassador,* where policyholders had already been paid, Class II policyholder claimants here have only received 30 cents on the dollar, and continued delay compounds the resulting policyholder prejudice, as the effective value of policyholder's fixed-dollar allowed claims is eroded by the passage of time and as ongoing expenses deplete the liquidation estate. *See supra* at 20-22. The possibility of interim distributions, which Zurich cites as a method of alleviating prejudice, *see* Zurich Br. at 32, offers at best only partial relief. After all, the Liquidator still must retain sufficient assets to fund the ongoing liquidation and to ensure that remaining policyholder claims can participate *pari passu* with those Class II claimants whose claims are already resolved. And any partial benefit from an interim distribution is rendered even more fractional for another reason: while it offers some partial relief from the inexorable effect of delay on the value of a future payment, it does not prevent the liquidation estate from being eroded by ongoing expenses, which works to the detriment of all policyholders.

Second, the ongoing "administration costs of the estate," *Ambassador,* 114 A.3d at 500, also justify a wind-down of the liquidation process. While the costs of estate administration may be modest in comparison to the overall remaining asset base of the liquidation estate, as Zurich argues, *see* Zurich Br. at 31, they substantially outweigh any likely benefit from keeping the liquidation open (particularly when these administration costs, in effect, are taken directly out of the pockets of policyholders with allowed claims).

Third, consideration of "the nature and amount" of Home's "remaining liabilities," *Ambassador,* 114 A.3d at 500, supports the establishment of a claim amendment deadline. At the risk of repetition, the Liquidator has resolved the overwhelming majority of claims, with only a relatively small number remaining. *See supra* at 11. The pendency of some stragglers, while it might justify patience when there are sufficient assets to pay everyone (as in *Ambassador*), does not require the Court to prolong the liquidation where, as here, it will reduce (rather than increase) the amount to be distributed to policyholders.

Fourth, for the same reason, consideration of "the company's remaining assets," *Ambassador,* 114 A.3d at 500, also supports efforts to bring this litigation to its natural end. After all, there clearly are insufficient funds to make policyholder claimants whole, and Home (unlike Ambassador) is insolvent.

In brief, even under *Ambassador*'s four-prong test, the Superior Court's decision here was a sound exercise of discretion.

IV. A Claim Amendment Deadline Does Not Violate Any of the Liquidator's Agreements with the AFIA Cedents.

Zurich's fallback argument – that a claim amendment deadline violates the contractual framework governing the Liquidator's dealings with the AFIA Cedents – fares no better. Zurich argues that a series of documents – the agreement establishing the AFIA Cedents' entitlement to share in recoveries, the English "scheme of arrangement" implementing that agreement, and a separate settlement agreement – each preclude the Liquidator from seeking to impose a claim amendment deadline.

Zurich's arguments are unavailing. Nothing in these documents precludes a claim amendment deadline. *See* App'x vol. 1 at 296-346 (Zurich settlement agreement); App'x vol. 2 at 58-144 (AFIA scheme of arrangement); *id.* at 332-44 (AFIA agreement). It is telling that Zurich never identifies any provisions in the AFIA agreement or scheme of arrangement that purportedly preclude a claim amendment deadline. In the absence of any such contract provisions, this Court should not "write into the contract a term that the parties did not include," *Home V,* 166 N.H. at 92, particularly where (as here) the party seeking such an exercise in judicial draftsmanship is a sophisticated participant in international financial markets (as Zurich unquestionably is).[10]

The only attempt Zurich makes to ground its "breach of contract" argument in the actual text of a contract is its citation of the following term (in an agreement settling an arbitration over certain pre-liquidation reinsurance claims):

> Agrippina agrees that Home's obligations pursuant to 6.6.1 and 6.6.2[11] shall, immediately upon being

[10] In fact, the AFIA agreement and scheme of arrangement expressly contemplate that the Liquidator may take steps that would cut off the AFIA Cedents' ongoing right to collect a portion of their reinsurance claims as administrative expenses. Both documents allow the Liquidator to enter into commutations that would liquidate CIC's obligation to reinsure claims presented by the AFIA Cedents, and thus cut off the AFIA Cedents' ongoing entitlement to their Class I payments, so long as the Liquidator satisfied certain conditions. *See* App'x vol I at 113-14; App'x vol. 2 at 336.

[11] Section 6.6.1 obligated Home to advance the cost of certain coverage obligations for reimbursement, and to reimburse its reassured if it recovered the costs from the underlying policyholder. Section 6.6.2 obligated Home to reimburse its reassured for the cost of certain coverage obligations. *See* App'x vol. 1 at 296.

> established, be treated as falling within Agrippina's Proof of Claim and Home agrees to do all things necessary to have such obligations admitted into Home's estate for the purposes set forth in 6.7 [i.e., as Class I administrative expenses].

App'x vol. 1 at 295. A claim amendment deadline, Zurich argues, breaches this provision and causes Zurich to "lose the bargained-for reinsurance coverage." Zurich Br. at 38. Zurich reads far too much into this provision: there is nothing in this language, or anywhere else in the settlement, that can be read to require the Liquidator to keep the liquidation open in perpetuity, so that Zurich can continue to reap an "administrative claim" windfall (particularly when it would interfere with the orderly liquidation and prejudice higher-priority policyholder claimants). The language simply defines what the Liquidator has committed to do while the liquidation remains pending. Again, this Court should not include a provision that the parties themselves neglected to include, particularly when such a provision is inconsistent with the overall goals of the Insurers Rehabilitation and Liquidation Act.[12]

V. RSA 403-C:49 Vitiates Any Claimed Prejudice and Further Justifies Affirming the Superior Court's Ruling.

Zurich cannot claim that the Superior Court's order is unfairly prejudicial for yet another reason: the Insurers Rehabilitation and Liquidation Act specifically permits a closed liquidation to be reopened – on motion of

[12] Indeed, any such implied term would likely be unenforceable as a matter of public policy, in that it would hinder the "efficiency and economy of liquidation," RSA 402-C:1, IV(c). Such a provision would also be inconsistent with RSA 402-C:48, I, which allows a liquidation to be terminated "[w]hen all assets justifying the expense of collection and distribution have been collected and distributed."

any "interested party" – "for good cause, including the discovery of additional assets." RSA 403-C:49. Accordingly, if Zurich or the other AFIA Cedents are faced with the prospect of significant additional claims, claims that could generate substantial additional payments for the benefit of Home's policyholder creditors, Zurich and its allies may seek to reopen the liquidation and seek to reinstitute the incentive provided by their arrangement with the Liquidator. While Policyholder Appellees obviously cannot speak for the New Hampshire Insurance Department or the Superior Court, it seems likely that the prospect of additional assets to distribute to Class II policyholder claimants – if significant enough to merit the expense of collection and distribution, *cf.* RSA 403-C:48, I -- would amply justify such a reopening. For now, given the recent history of modest reinsurance claims, *see supra* at 14, there is no reason to believe that this is the case. If such a situation eventuates, however, the statutory scheme provides an avenue for relief.

Indeed, any surmise that Zurich and the other AFIA Cedents will actually be injured, in a manner that cannot be remedied in the liquidation (either as it is currently constituted or as it may be reopened in the future), is just that: a hypothetical disagreement that does not merit this Court's intervention, particularly when balanced against the direct and tangible prejudice that policyholders with allowed claims will suffer if this liquidation is prolonged indefinitely.

CONCLUSION

To recapitulate, the imposition of a claim amendment deadline was well within the discretion of the Liquidator and Superior Court. There is no reason to prolong this liquidation solely to allow Zurich and the other AFIA Cedents to obtain relief to which they otherwise would not be entitled under the Insurers Rehabilitation and Liquidation Act, when any trifling benefit to Home's policyholders is substantially outweighed by the cost of delay (a cost measured both in the time value of money and in the ongoing expense of liquidation). Simply put, this Liquidation has, after 18 years, run its course, and there is no reason to prolong policyholders' wait for final claim payments. Therefore, this Court should AFFIRM the trial court's order setting a claim amendment deadline, remanding the matter for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT

Policyholder Appellees expect that counsel for the Liquidator will primarily argue in support of affirmance, and so do not request oral argument on their own behalf. Should the Court have any questions for the Policyholder Appellees, however, Attorney Stockman will be present and will be prepared to address any matters that the Court may wish to take up.

Respectfully Submitted,

October 26, 2021

/s/ Paul K. Stockman

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CERTIFICATE OF COMPLIANCE

This Brief complies with the word limitations set out in Supreme Court Rule 16(11), in that it contains 7,232 words (excluding pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters).

October 26, 2021 /s/ Paul K. Stockman
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief shall be served on all counsel of record through the New Hampshire Supreme Court's electronic filing system.

October 26, 2021 /s/ Paul K. Stockman
Paul K. Stockman