

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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

Docket No. 217-2003-EQ-00106

**JOHNSON & JOHNSON'S OBJECTIONS TO LIQUIDATOR'S
MOTION FOR APPROVAL OF CLAIM AMENDMENT DEADLINE**

Jon R. Elias, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), failed to notify policyholder claimant Johnson & Johnson ("J&J") of its Motion for Approval of Claim Amendment Deadline (the "Motion"). Having only recently learned of the Motion, J&J now submits this objection for the Court's consideration. The proposed Order directing the Liquidator to reject "without consideration of their merits" amendments to claims after the proposed Claim Amendment Deadline, and reject "without consideration of their merits" "any claim . . . where a specific claim has not been asserted by a specific claimant against a specific person on or before the Claim Amendment Deadline" would unduly prejudice the claims of policyholders like J&J, who face developing and ongoing long-tail liabilities, without achieving any proportionate benefit to the orderly administration of the liquidation. See Proposed Order Approving Claim Amendment Deadline submitted with the Motion (the "Proposed Order") at ¶ 5. The Motion should therefore be denied.

I. The Liquidator Failed to Properly Notify J&J of Its Motion.

J&J was quite surprised to learn of the Liquidator's motion from a third party after the deadline to file objections had already passed. See Affidavit of Thomas W. Ladd in Support of Johnson & Johnson's Objections to Liquidator's Motion for Approval of Claim Amendment

Deadline (“Ladd Aff.”) at ¶¶ 9-13. J&J’s proofs of claim relating to policies sold by the Home Insurance Company and its former subsidiary City Insurance Company are dated June 10, 2019. *Id.* at ¶ 9. Those proofs of claim included contact information for J&J’s counsel. *Id.* On June 26, 2019, a representative of the Liquidator responded to counsel, “acknowledg[ing] receipt of the subject Proofs of Claim submitted on behalf of Johnson & Johnson,” and requesting more information about the claims. *Id.* at ¶ 10. J&J provided additional information on July 29, 2019.¹ *Id.* at ¶ 11.

Nearly one month later, the Court ordered the Liquidator to provide notice of the Motion to “all claimants who have open proofs of claim in the Home liquidation.” Proposed Order at ¶ 3. At that time, J&J had not only submitted proofs of claim, but was also engaged in ongoing dialogue with the Liquidator’s representative. However, it received no such notice. Ladd Aff. at ¶ 13. Weeks later, when the Liquidator informed the Court that it “finished mailing the completed notice to claimants with open proofs of claim,” J&J still had not received notice. Liquidator’s Certificate of Compliance (Sept. 18, 2018) at ¶ 2. Indeed the Liquidator never notified J&J of the Motion at all. Instead, J&J was informed of the Motion by a third party after the November 18, 2019 deadline to object had already passed. Ladd Aff. at ¶ 13.

In short, through no fault of its own, J&J was unable to object to the Motion before the deadline. It therefore respectfully requests the Court consider its objections submitted at this time.

¹ In this communication, J&J explained to the Liquidator that it could not have filed proofs of claim prior to the June 13, 2004 filing deadline, as the Talc Claims did not exist until many years later. Even then, because all of the Home and City insurance policies at issue are excess policies, and because J&J’s losses must be allocated across a decades-long coverage map, J&J could not have known until recently that its liabilities and costs related to the Talc Claims would reach a magnitude to implicate the policies. Ladd Aff. at ¶ 11.

II. J&J's Open Proofs of Claim.

During the period from 1973 through 1981, Home and its former subsidiary City (referred to collectively hereinafter as “Home”) sold umbrella/excess insurance coverage to J&J totaling nearly \$120 million in annual limits. Ladd Aff. at ¶ 2. A substantial amount of this coverage is first layer excess and low-level excess coverage, often attaching at \$3.5 million or \$4.1 million. *Id.* at ¶ 2. As another policyholder objector has explained, such coverage is not “high level excess” in the context of long-tail liabilities – such as the talc claims brought against J&J in recent years, which involves at minimum hundreds of millions of dollars of losses. MW Custom Papers LLC’s Objections to Liquidator’s Motion for Approval of Claim Amendment Deadline, Nov. 15, 2019 (“MWCP Objections”) at 2. Those talc claims form the basis of J&J’s proofs of claim.

J&J currently faces more than 15,000 underlying lawsuits alleging injury arising from or relating to the use of products containing talc, over the course of decades (the “Talc Claims”). *Id.* at ¶ 3. Underlying claimants allege principally that they suffer from ovarian cancer and mesothelioma premised on the purported failure by J&J to warn consumers of the risks associated with its talc products. *Id.* at ¶ 4. J&J denies the allegations in each of the underlying complaints. Its strategy is to defend the claims vigorously and, if necessary, appeal any adverse verdicts. *Id.* at ¶ 4.

The Talc Claims as a mass tort remain in the preliminary stages of litigation. New complaints are filed every week. *Id.* at ¶ 6. Only a small number have gone to trial, and a smaller number have settled. *Id.* Juries returned verdicts for J&J in some cases, and for the claimants in others. However, no jury verdict in a talc case against J&J has been upheld on appeal. *Id.*

Since submitting its proofs of claim, J&J has cooperated with the Liquidator in connection with its evaluation of the claims. Among other things, J&J has provided voluminous documentation related to the Talc Claims, particularly those that have approached trial. *Id.* at ¶¶ 11-12. J&J has also apprised the Liquidator of its activities with respect to the bankruptcy of one of its co-defendants. *Id.* at ¶ 12. In short, J&J has cooperated with the Liquidator to facilitate an orderly and thorough evaluation of J&J's claims as they develop.

III. Imposition of the Liquidator's Proposed Claim Amendment Deadline Does Not Strike "A Reasonable Balance Between the Expeditious Completion of the Liquidation and the Protection of Unliquidated and Undetermined Claims."

The Liquidator acknowledges it must assure "a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims." Motion for Approval of Claim Amendment Deadline ("Mot.") at 8. The Liquidator, however, underestimates the prejudice to claimants like J&J, and overestimates the degree to which imposition of the proposed Claim Amendment Deadline would cure the alleged administrative difficulties the Liquidator describes. This results in an incorrect balancing of the relevant interests, and the Court should reject it.

A. Imposition of the Liquidator's Proposed Claim Amendment Deadline Will Materially and Unduly Prejudice J&J's Claims.

J&J's claims for reimbursement of defense and indemnity costs arising from the Talc Claims against it are, in significant part, "unliquidated and undetermined claims" that must be protected and balanced against the Liquidator's interest in completing the liquidation. As noted above, the Talc Claims as a mass tort are still in the early stages. While some cases have proceeded through discovery and motion practice and gone to trial, others are in their infancy. New claims are filed continuously, and more are anticipated. But even those Talc Claims that

have not yet been made against J&J are not wholly contingent,² as the talcum powder exposure the plaintiffs will allege gives rise to J&J's liability took place many years ago.³ As another policyholder objector has explained, in such circumstances as-yet-unfiled mass tort claims are properly categorized, protected, and balanced as unliquidated and undetermined. MWCP Objections at 3-5.

The Liquidator's proposed Claim Amendment Deadline will materially prejudice J&J's claims. The Liquidator protests that with regard to non-workers compensation claims (like J&J's), (i) certain policyholders have underlying liabilities that "are being fully paid by solvent insurers"; (ii) Home often wrote only "high level excess coverage" that may not be implicated for "many years, if ever," and (iii) the policyholders "generally are not willing to voluntarily resolve their proofs of claim." Mot. at 5. These characterizations simply do not apply to J&J. *See also* MWCP Objections at 1-2 (similar).

J&J's cost of defending the Talc Claims has been substantial, continues to grow, and at this time is not being fully paid by solvent insurers. Ladd Aff. at ¶ 7. The Home policies sold to J&J are an important potential source of funding for J&J's defense and liability obligations with regard to the Talc Claims. As noted above, Home sold policies to J&J that attached as low as \$3.5 million, which is not "high excess" in the context of long-tail mass torts. While J&J continues to evaluate the proper allocation of its losses, it is likely that Home's policies are, or may soon be, implicated. *Id.* at ¶ 8. The Liquidator cannot fairly state that J&J has expressed no interest in resolving its proof of claim, as it has been actively engaged over the course of the past

² In any event, the Liquidator provides no support for its assertion that long-tail mass tort claims not yet asserted by a particular plaintiff are wholly "unknown" and "contingent," and thus may be disregarded in the balancing analysis. Mot. at 12.

³ As noted above, the Home policies in question cover occurrences taking place in the time period 1973 through 1981.

several months in responding to requests on behalf of the Liquidator concerning J&J's claim. *Id.* at ¶¶ 11-12. J&J stands willing to voluntarily resolve its proofs of claim, and has never done or said anything to suggest otherwise.

The proposed Claim Amendment Deadline would therefore prejudice J&J's claims by depriving J&J of insurance coverage it is not otherwise receiving from solvent insurers; inhibiting it from accessing excess policies that may already be implicated in the Talc Claims; and artificially truncating J&J's opportunity to negotiate with the Liquidator to voluntarily resolve its proofs of claim. In particular, J&J concurs with the concern expressed by another policyholder that the proposed Claim Amendment Deadline would provide the Liquidator unfair negotiating leverage. MWCP Objections at 7. Unsettled claimants would face pressure to resolve their claims quickly and potentially at a discount as the Claim Amendment Deadline approached, lest unliquidated and anticipated future claims lose all value. The Liquidator will lack the incentive to value such claims appropriately, and both J&J and the Liquidator would be forced to attempt to assign a value to unliquidated claims while many of those claims are only very recently filed, and the mass tort as a whole is not yet mature.

All of this prejudice to J&J's claims would inure unfairly to the benefit of Home's other policyholder claimants, whose long-tail liabilities emerged earlier than J&J's Talc Claims.

B. The Liquidator Overstates the Prejudice It Will Suffer in the Absence of the Proposed Claim Amendment Deadline, and the Degree to Which the Proposed Claim Amendment Deadline Would Cure the Alleged Prejudice.

Not only does the Liquidator wrongly minimize the harm the proposed Claim Amendment Deadline would cause claimants like J&J, it overestimates the prejudice the liquidation would suffer if the Claim Amendment Deadline were not imposed, or if it were imposed on a later date.

The Liquidator’s arguments rest substantially on the notion that delay alone prejudices the orderly administration of the liquidation, and requires imposition of the proposed Claim Amendment Deadline. Mot. at 9 (liquidation will “remain open indefinitely” without a Claim Amendment Deadline); *id.* at 13 (post-Deadline claims would prejudice liquidation because “they will delay the final determination of all claims and thus the distribution of assets”), *id.* at 14 (“potential claims” prejudice liquidation because they “would delay the determination of claims and distributions from the estate”). But “[t]he mere duration of the liquidation process in and of itself is not a basis for bringing it to a close, thereby frustrating the goal of protecting policyholders and other creditors, in the absence of specific factors warranting closure.” *In re Ambassador Ins. Co.*, 198 Vt. 341, 356 (2015) (rejecting 13-month Claim Amendment Deadline where insurer had been in liquidation for approximately 30 years). In the context of insurers who primarily insure long-tail liabilities, particularly at excess layers, an “expeditious” liquidation may properly take decades. *Id.* at 354 (“The policies in question were designed to have very long tails. This factor alone points to the likely reasonableness of a liquidation proceeding that lasts for decades.”).

The Liquidator also argues that claimants with open proofs of claim “are generally resistant to providing information or resolving the matters,” Mot. at 18, make it difficult for the Liquidator to obtain relevant information, Mot. at 16, and require the Court to impose a Claim Amendment Deadline in order incentivize cooperation and “[p]roved[e] claimants with reason to assert and prove up their claims with the Liquidator.” Mot. at 9. But, as explained above, none of this pertains to J&J. Imposing the proposed Claim Amendment Deadline would subvert J&J’s rights at least in part to rebuke other, allegedly misbehaved, claimants, and to favor claimants similarly situated to J&J, but whose long-tail liabilities emerged sooner. Mot. at 9 (imposing the

Claim Amendment Deadline would permit claimants with allowed Class II claims to “obtain[] the full possible distribution on their claims”). Such an inequitable distribution system should not be permitted. *See also* MWCP Objections at 6.

Finally, even if a Claim Amendment Deadline of some type is appropriate, the Liquidator has done little to establish that its proposed 150-Day window to amend claims is reasonable or adequate. It argues only that 150 days is appropriate because “Home stopped writing policies in 1995, and it has been in liquidation since 2003. Claims thus have had many years to develop and claimants have had sixteen years to assert them in the liquidation.” Mot. at 9. But as another court has acknowledged:

This is 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, such that it would be uneconomical to extend the liquidation to keep the door open for a small number of exceptional claims. As noted above, given the latency of the diseases covered by the policies in question, [the insurer’s] status as a fourth-layer excess provider . . . it seems very likely . . . that substantial obligations for covered risks remain unliquidated and unsatisfied. Likewise, the environmental risks covered by [the insurer] have similarly long tails. It is not as though policyholders have had since 1987 to establish their claims. Their claims are only ripening now. There is no evidence that the bulk of the delay in claimants’ submissions of qualifying proofs of claim is a result of foot-dragging or a lack of diligence; the long tail on these claims is intrinsic to the covered risks.

In Re Ambassador Ins. Co., 198 Vt. at 354-55. In that case, the Supreme Court of Vermont rejected a 13-month Claim Amendment Deadline in a liquidation that had been open for approximately 30 years. At a minimum, a longer and more reasonable Claim Amendment Deadline would better balance the interests of claimants like J&J against the expeditious completion of the liquidation.

C. Request for Oral Argument

J&J requests oral argument on the Liquidator's Motion for Approval of a Claim Amendment Deadline.

* * *

For all of the reasons set forth above, J&J objects to the Liquidator's Motion, and requests that the Court decline to impose a claim amendment deadline until such time as until J&J's claims can be fully assessed and calculated.

Dated: December 23, 2019

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Certificate of Service

I hereby certify that a copy of the foregoing Objection to Liquidator's Motion for Approval of Claim Amendment Deadline and Affidavit of Thomas W. Ladd in Opposition to Motion for Approval of Claim Amendment Deadline was served this 23rd of December, 2019 by First-Class Mail, postage prepaid to all persons on the attached service list.


David Himelfarb

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