

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**

**LIQUIDATOR'S MOTION FOR APPROVAL
OF CLAIM AMENDMENT DEADLINE**

John R. Elias, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby moves that the Court enter an order establishing a final deadline for the amendment or submission of claims in the Home liquidation proceeding (the "Claim Amendment Deadline") at the date 150 days after the Court's order. The Claim Amendment Deadline will apply to all claims except administration costs and federal government claims. It will promote the final determination of claims against Home and advance the closure of this proceeding by requiring that claimants specifically identify and describe claims so that the Liquidator can determine them. Unidentified and potential claims will be barred. A proposed form of order is submitted herewith. The Liquidator has filed a separate motion for order of notice. As reasons for this motion, the Liquidator states as follows:

Introduction

In the Order of Liquidation entered June 13, 2003, the Court declared Home insolvent and appointed the Insurance Commissioner as Liquidator to liquidate the company pursuant to the Insurers Rehabilitation and Liquidation Act, RSA 402-C (the "Act"). The Order of Liquidation established the deadline for filing of claims as June 13, 2004 (the "Claim Filing Deadline"). Order of Liquidation ¶ (bb). The Court also issued an Order Approving Notice on June 11, 2003 approving notice of the Order of Liquidation and the Claim Filing Deadline.

The Liquidator's principal goals in this liquidation are to determine claims and collect assets for the ultimate purpose of distributing Home's assets to its creditors, in particular the creditors with claims under policies of insurance issued by Home that are granted Class II priority by the Act. As of May 31, 2019, the Liquidator has determined and the Court has allowed Class II claims totaling approximately \$2.705 billion, and the Liquidator has made interim distributions totaling 30% on allowed Class II claims.

The Liquidator has concluded that to move this proceeding to closure and protect the interests of creditors with allowed Class II claims (those who will receive distributions) it is now necessary to establish a deadline by which claimants must finally amend their claims in order to provide the Liquidator with the specificity required for determination of claims. While it may be possible to make additional interim distributions, the final distribution of assets can only be made after all Class II claims have been determined. The Liquidator has made substantial progress in determining Class II claims, but it will be difficult to make significant additional progress without a final deadline for claimants to amend claims or submit any new claims and barring claims that are not identified and presented.

This motion accordingly requests the establishment of the Claim Amendment Deadline. This will not change the original Claim Filing Deadline of June 13, 2004. The Liquidator gave the statutorily required notice of the liquidation and the Claim Filing Deadline to potential claimants in 2003, and that broad notice is conclusive. See RSA 402-C:26, III ("If notice is given in accordance with this section, the distribution of the assets of the insurer under this chapter shall be conclusive with respect to all claimants, whether or not they received notice."); Order Approving Notice ¶ 10 ("Notice provided in accordance with this Order shall be deemed to satisfy the requirements of RSA 402-C:26."). The Claim Amendment Deadline is a means to

bring the claim determination process, in particular the remaining open proofs of claim, to a close so that a final distribution may be made. While the deadline applies to any new proofs of claim so that all claims will be subject to the same limits, it is not a general call for claims, which was already made in 2003.

Background Regarding Home and the Liquidation

Home is a New Hampshire-domiciled insurance company incorporated in 1973, although its predecessor corporations were established as long ago as 1853. Home had a number of insurer subsidiaries, most of which were merged into Home as part of its reorganization in 1995.¹ Home and its subsidiaries wrote insurance and reinsurance in almost all states and territories of the United States, as well as in Canada, Bermuda, Hong Kong, and the United Kingdom, where Home's unincorporated branch operation wrote business as a member of the American Foreign Insurance Association. Home and its subsidiaries generally stopped writing personal lines business in the early 1990's, and they stopped writing all business, including commercial lines (subject to certain personal lines mandatory renewal requirements in a few states), in 1995. Affidavit of Peter A. Bengelsdorf, Special Deputy Liquidator, in Support of Motion for Approval of Claim Amendment Deadline ("Bengelsdorf Aff.") ¶ 3.

Claims. A total of 20,785 proofs of claim have been filed as of May 31, 2019. As described in the Liquidator's reports, the Liquidator has been reviewing and determining claims throughout the liquidation. The Liquidator has filed numerous reports of claims and recommendations and motions for approval of policyholder settlements with the Court since 2004. As of May 31, 2019, the Court has approved claim recommendations, including

¹ A reinsurer subsidiary, US International Reinsurance Company ("USI Re"), was the subject of a separate liquidation proceeding in this Court, Docket No. 03-E-0112. After a claim amendment deadline of December 31, 2008, the USI Re liquidation proceeding was concluded on December 3, 2013.

settlements, resolving a total of 19,695 proofs of claim with a total allowed amount of approximately \$3.08 billion for all priority classes. Bengelsdorf Aff. ¶ 5.

This motion focuses on the policy-related claims assigned Class II priority by RSA 402-C:44, II, although the Claim Amendment Deadline is to apply to all claims except administration costs and federal claims. The Liquidator concluded early in the liquidation that there would not be sufficient assets to make any distribution to priority classes below Class II. See In the Matter of Liquidation of Home Ins. Co., 154 N.H. 472, 477 (2006). The total amount of Home's Class II liabilities can be determined only by resolving all Class II claims, and the final distribution percentage to Class II creditors cannot be calculated and the distribution made until all claims have been determined. See Gonya v. Comm'r, N.H. Ins. Dept., 153 N.H. 521, 535 (2006) (“[N]o reasonable prediction of recovery can be made until the Commissioner knows the final cost of the administration of the liquidation as well as the size of every claim filed in the liquidation.”).² Bengelsdorf Aff. ¶ 6.

The remaining 1,090 open proofs of claim include 887 proofs of claim that involve Class II policy-related claims.³ As of May 31, 2019, the Liquidator has recommended and the Court has approved Class II determinations or settlements resolving 17,370 proofs of claim with

² The Liquidator engaged the actuarial consulting firm Milliman, Inc., to provide an estimate of Home's ultimate unpaid Class II obligations in connection with the first two interim distributions, leading to an undiscounted actuarial central estimate of \$4.034 billion as of December 31, 2014. Executive Summary of Milliman's Roll-Forward Analysis of Unpaid Loss and ALAE as of June 13, 2003 and December 31, 2014, Summary by Class at 2 (attached as Exhibit F to the Liquidator's Fifty-Seventh Report (June 24, 2015)). This actuarial central estimate “should be interpreted as an estimate of the expected value over [a] range of reasonably possible outcomes.” Executive Summary at 4. See id. at 8 (“the average of a wide range of possible outcomes”). Milliman noted that “[t]he uncertainty in our estimates is greater than it otherwise would be due to the liquidation of Home and the resulting involvement of state GAs and insureds, including their agents, in the process of handling and determining claims. Because Home is in liquidation, its historical loss experience as well as the experience since Home entered liquidation is less predictive of future claim activity, both with respect to the timing of claim reporting and payment, and with respect to the size of the payments that will ultimately be made.” Id. at 8. Because of such factors, the uncertainties in reserve estimates, and the shrinking number of open claims (which will be determined through the liquidation process), the Liquidator has not engaged Milliman to perform another analysis.

³ This does not include proofs of claim where the determination provided that the claimant could submit further claims.

a total allowed amount of approximately \$2.705 billion. These resolved Class II proofs of claim represent 95% of the 18,257 Class II proofs of claim. The 887 remaining open Class II proofs of claim generally involve policyholder or guaranty association claims. Bengelsdorf Aff. ¶ 7.

As of May 31, 2019, there are 237 policyholders/insureds with open Class II proofs of claim (representing a total of 828 Class II proofs of claim).⁴ Of these remaining policyholder accounts, 131 involve non-workers compensation claims and 106 involve only workers compensation claims. In most instances, the 131 non-workers compensation accounts involve long-tail claims such as asbestos, lead, talcum powder, environmental or other mass tort claims that depend upon complex underlying facts or lawsuits and emerge over time, if at all. Such claims may not implicate Home coverage – which is often high level excess coverage – for many years, if ever. In certain instances, the underlying claims are being fully paid by solvent insurers. These insureds whose proofs of claim remain open generally are not willing to voluntarily resolve their proofs of claim. Bengelsdorf Aff. ¶ 8.

There are also 59 open Class II proofs of claim filed by insurance guaranty associations for claims against Home insureds or Home that are being handled as “covered claims” by the associations in accordance with their respective statutes. See, e.g., RSA 404-B (the New Hampshire Insurance Guaranty Association Act). Subject to statutory limitations, insurance guaranty associations handle and, where appropriate, pay claims under Home policies and in turn have a claim against the Home estate. E.g., RSA 404-B:11. The guaranty associations are currently handling approximately 2,063 open claims under Home policies. Guaranty association

⁴ This tally counts all entities within the coverage of a policy, including the named insured and its successors, as one policyholder/insured if they filed a consolidated proof of claim or proofs of claim. Where the insured, additional named insureds, and/or their successors filed separate proofs of claim, the entities are counted separately.

payments under Home policies are accorded Class II priority – the same priority to which the claimants would have been entitled absent the guaranty association. Id.⁵ Bengelsdorf Aff. ¶ 9.

As of May 31, 2019, there are also approximately 304 proofs of claim that have been issued determinations as to Class V priority only, deferring determination as to amount, since there will not be assets sufficient to make any distribution to claims below Class II priority. Bengelsdorf Aff. ¶ 10.

Assets and distributions. The Liquidator has been collecting assets, in particular reinsurance. As a result of these efforts, the Liquidator has approximately \$808.4 million in cash and invested assets under his control as of May 31, 2019. Additional assets have already been collected and distributed as early access distributions to guaranty associations or as interim distributions as described below. Bengelsdorf Aff. ¶ 11.

With Court approval, the Liquidator has made eleven Class II early access distributions to insurance guaranty associations pursuant to RSA 402-C:29, III totaling total \$256.1 million as of May 31, 2019. In addition, certain states have taken control of special deposits that with interest now total approximately \$55.7 million which the Liquidator is setting off against claims of guaranty associations in those states. Bengelsdorf Aff. ¶ 12.

With Court approval, the Liquidator made three interim distributions totaling 30% on allowed Class II claims: an initial interim distribution of 15% in 2014, a second distribution of 10% in 2016, and a third distribution of 5% in 2019.⁶ In accordance with the approval orders,

⁵ Guaranty associations' claims include defense expenses incurred under Home policies. The Liquidator initially assigned such claims to Class II priority, while guaranty associations contended they were entitled to Class I priority. Pursuant to a Settlement Agreement approved by the Court on July 15, 2013, 90% of guaranty association defense expense claims are assigned to Class II and 10% to Class I.

⁶ The orders approving the three interim distributions each provided that the distribution was subject to receipt of a waiver of federal priority claims from the United States. The Liquidator obtained waivers from the United States Department of Justice ("US DOJ") for the first two distributions and entered the Release Agreement with the US DOJ approved by the Court on March 26, 2019, to address the third distribution and future distributions.

newly allowed Class II claims receive the 30% interim distribution percentage following the next July 1 or December 31. As of May 31, 2019, a total of \$620.1 million in interim distributions has been paid to non-guaranty association Class II creditors. Bengelsdorf Aff. ¶ 13.

Adding the \$808.4 million in estate assets, the \$256.1 million of early access distributions to guaranty associations, the \$620.1 million in interim distributions to non-guaranty association claimants, and the \$55.7 million in deposits, a total of approximately \$1.74 billion in assets is either available for distribution or has been distributed to Class II claimants. The collection of Home's assets is mostly complete except for reinsurance recoveries on claims that have not yet been determined. Bengelsdorf Aff. ¶ 14.

The liquidation. As of May 31, 2019, the liquidation staff is 39 in number (including part-time employees), plus information technology and other consultants. The size of the staff has been significantly reduced over the course of the liquidation, as in 2004 staff totaled 95. The annual cost of the liquidation has also dropped over time, from \$26.9 million in 2004 to a budget of \$13.5 million for 2019. Bengelsdorf Aff. ¶ 15.

The Statutory Framework

The Act assigns claims to ten successive priority classes and provides that all claims in each class must be paid in full (or assets reserved) before claims in lower priority classes receive any distribution. RSA 402-C:44. Costs of administering the liquidation are given first priority in RSA 402-C:44, I. They are followed by the policy-related claims of insureds, third party claimants against insureds, and guaranty associations which all are assigned Class II priority by RSA 402-C:44, II. See Liquidation of Home, 154 N.H. at 475-76, 488.

Claims are to be asserted through the proof of claim process. See RSA 402-C:37. Proofs of claim must be filed with the Liquidator "on or before the last day for filing specified in the

notice required under RSA 402-C:26.” RSA 402-C:37, I.⁷ The Liquidator is also required to accept “excused” late filed proof of claim: “For good cause shown, the liquidator shall recommend and the court shall permit a claimant making a late filing to share in dividends, whether past or future, as if he were not late, to the extent that any such payment will not prejudice the orderly administration of the liquidation.” RSA 402-C:37, II. The Act defines “good cause” to include (i) that the existence of the claim was “not known” to the claimant and he files within 30 days after learning of it, and (ii) that “a claim was contingent and became absolute” and was filed within 30 days after it became absolute. RSA 402-C:37, II(a) and (e).⁸

However, the Liquidator may not accept claims that “prejudice the orderly administration of the liquidation.” RSA 402-C:37. This reflects legislative recognition that at some point acceptance of claims will harm the estate, to the detriment of those with allowed claims, by preventing the determination of a distribution percentage and making of distributions.

The Act recognizes that competing interests need to be balanced by providing that the Liquidator, under the direction of the Court, shall pay dividends in a manner that will assure “a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims.” RSA 402-C:46, I. The Act provides that “[w]hen all assets justifying the expense of collection and distribution have been collected and distributed under this chapter, the liquidator shall apply to the court for discharge.” RSA 402-C:48, I.

⁷ Claims must be submitted on the proof of claim form (or by amendment to a previously filed proof of claim form). See RSA 402-C:37, I; RSA 402-C:38, I(b). If a claimant attempts to submit a claim without using the form, the Liquidator notifies the claimant of the requirement to use the proof of claim form and measures timeliness based on the date the form is received.

⁸ The Liquidator may also accept late filings that are not excused. See RSA 402-C:37, III (Liquidator “may consider” other late filings and “permit” them to “receive dividends, other than the first dividend, which are subsequently declared on any claims of the same or lower priority if the payment does not prejudice the orderly administration of the liquidation.”).

ARGUMENT

The Court should approve a Claim Amendment Deadline – a deadline by which claimants must amend or file all claims. Such a deadline is a practical necessity to bring finality to an insurer liquidation proceeding. The estate’s assets cannot be finally distributed until the Liquidator knows the size of every claim filed in the liquidation in the priority classes that will receive a distribution. See Gonya, 153 N.H. at 535. A deadline will move the liquidation toward closure by providing claimants with reason to assert and prove up their claims with the Liquidator, which will allow the Liquidator to determine the claims. Those determinations will allow the Liquidator to collect any applicable reinsurance and to calculate the final distribution percentage based on the assets in the estate. Without a claim amendment deadline, the Home liquidation will remain open indefinitely, and the Liquidator will be unable to distribute estate assets as he will need to retain a conservative reserve to pay the costs of administering the estate and to handle and make distributions on whatever Class II claims come in or develop over the years. Without a deadline, claimants with allowed Class II claims will not receive the full possible distribution on their claims for years.

The proposed Claim Amendment Deadline of 150 days after the Court’s order is reasonable and appropriate. 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. The Claim Amendment Deadline will allow claimants a reasonable final opportunity to amend and assert claims. While the Claim Amendment Deadline will cut off potential future claims, that is consistent with the Act and reflects the reality that keeping the liquidation open after all these years disadvantages the claimants with allowed Class II claims by preventing them from obtaining the full possible

distribution on their claims. The Claim Amendment Deadline should be established so that the universe of claims against the Home estate can be determined, a final *pro rata* Class II distribution made, and the Home estate closed.

I. THE COURT MAY PROPERLY ESTABLISH A CLAIM AMENDMENT DEADLINE.

The New Hampshire Act is part of an integrated national scheme of generally similar insurer liquidation statutes enacted in the various States. It is generally recognized under such statutes that the insurer liquidation process requires a final deadline after which no further claims can be submitted in order to bring the proceeding to closure. See, e.g., Warrentech Consumer Prods. Servs., Inc. v. Reliance Ins. Co., 96 A.3d 346, 358 (Pa. 2014) (“[B]arring claims against insolvent insurers after a certain date, while it may work hardships on certain parties, is necessary to permit the Liquidator to manage effectively existing liabilities for the ultimate benefit of all claimants of insolvent insurers.”).

[P]rovisions for a claims filing deadline indicate legislative intent to provide a cutoff date after which a receiver is no longer obligated to accept claims. The filing deadline protects policyholders who timely filed claims because the allowance of late filed claims would unnecessarily prolong distribution of an insolvent insurer’s assets and dilute funds from which to satisfy timely filed claims.

Chandler v. Jose A. Gutierrez, P.C., 906 S.W.2d 195, 200 (Tex. App. 1995). The proposed Claim Amendment Deadline will serve these purposes, and it should be approved.⁹

⁹ For examples of final filing deadlines in insurer liquidations under other States’ statutes, see MSEJ, LLC v. Transit Cas. Co., 280 S.W.3d 621, 622-23 (Mo. 2009) (Transit liquidation set a “final, once-and-for-all time limit on the filing of claims” in Administrative Order 49, which established a deadline for the filing of “existing evidence of [the claimants’] current unresolved claims” after which “no new claims or evidence of claims shall be accepted.”); Comm’r of Ins. v. Integrity Ins. Co./W.R. Grace & Co., 2012 WL 75097 at *3 (N.J. Super. Ct. App. Div. Jan. 11, 2012) (Integrity liquidation: Amended Liquidation Closing Plan provided for all claims and supporting documentation to be filed with the liquidator by a deadline of September 30, 2009 and that only claims that had become absolute by June 30, 2009 could be considered); Garamendi v. Mission Ins. Co., 2005 WL 1060443 at *1, *10 (Cal. Ct. App. 2005) (Mission liquidation: “Final Dividend Claims Bar Date” required that “[a]ny contingent, unliquidated and/or undetermined claims not so amended by the Final Dividend Claims Bar Date shall conclusively be deemed forever waived.”); In re Reliance Ins. Co. in Liquidation, No. 1 REL 2001, Memorandum and Order re: Claims Bar Date (Dec. 22, 2015) (Reliance liquidation: establishing claims bar date by which all claims must be

A. A Claim Amendment Deadline Is Proper Under the Act.

As the Vermont Supreme Court held under a statute like the Act, “a court supervising the liquidation of an insolvent insurer has the authority to set a reasonable deadline for filing final proofs of claim as long as that deadline is not in conflict with any statutory requirements.” In re Ambassador Ins. Co., 114 A.3d 492, 497 n. 9 (Vt. 2015). The Act is properly construed to authorize the Claim Amendment Deadline as it provides for a deadline for filing of claims, permits certain late-filed claims to participate, and cuts-off unknown or contingent claims which prejudice the orderly administration of the liquidation.

The Act mandates a deadline in its “Deadline for Filing” provision, RSA 402-C:37, I. That section requires that “[p]roof of all claims must be filed with the liquidator . . . on or before the last date for filing specified in the notice required under RSA 402-C:26.” RSA 402-C:37, I. The Act then permits the filing of claims after the filing deadline in certain circumstances, but only so long as they do not “prejudice the orderly administration of the liquidation.” See RSA 402-C:37, II, III. The phrase “does not prejudice the orderly administration of the liquidation” reflects a legislative intent that at some point claims must end. Late filed claims that “prejudice the orderly administration of the liquidation” may not participate. RSA 402-C:37, II, III, :39, III.

This scheme of a deadline, late-filed claims, and cut-off is confirmed by the provisions that exclude unknown claims and contingent claims that may linger at the end of a liquidation. The Act provides that unknown claims may participate in dividends only where the “existence of a claim was not known to the claimant and . . . he filed within 30 days after he learned of it.”

filed or forever barred from any distribution); In re Liquidation of Midland Ins. Co., 32 Misc.3d 1211(A), 930 N.Y.S.2d 175, 2011 N.Y. slip op. 51261(U) at *5-*7 (N.Y. Sup. Ct. June 27, 2011) (Midland liquidation: establishing deadline for amendments of timely filed proofs of claim and for submission of evidence in support of allowance of a claim); In re Liquidation of Am. Mut. Liab. Ins. Co., No. 89-23, Order Approving Claim Amendment Deadline (Supreme Judicial Court for Suffolk County, MA, June 14, 2006) (American Mutual liquidation: claim amendment deadline for claimants with contingent or unliquidated claims to perfect their claims by showing that the claims are absolute and the amount has been fixed or can be proved).

RSA 402-C:37, II(a). It provides for contingent claims only where: (1) the contingent claim becomes absolute, see RSA 402-C:39, III (“A claim may be allowed even if contingent, if it is filed in accordance with RSA 402-C:37, II,” which in turn provides that “good cause” for late filing includes that “a claim was contingent and became absolute, and was filed within 30 days after it became absolute,” RSA 402-C:37, II(e)), or (2) the claim is a third party claim contingent on obtaining a judgment against the insured, RSA 402-C:39, I (“The claim of a third party which is contingent only on his first obtaining a judgment against the insured shall be considered and allowed as if there were no such contingency.”). See also RSA 402-C:40, II and III.

These sections permit allowance of unliquidated, and even certain contingent, known claims but do not encompass claims that are not actually known (*i.e.*, embodied in a cause of action asserted by a particular plaintiff). Such potential or “incurred but not reported” (“IBNR”) claims are wholly contingent.

The Act expressly provides for the Liquidator and the Court to balance the interests of claimants with allowed claims against the interests of claimants with “unliquidated and undetermined” – not unknown – claims in considering when to bring the liquidation to closure. The Act provides that the Liquidator, subject to the direction of the court, “shall pay dividends in a manner that will assure . . . a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims.” RSA 402-C:46, I (emphasis added). It contemplates reasonably expeditious liquidations. See RSA 402-C:40, III (“Delay in final payment under this section shall not be a reason for unreasonable delay of final distribution and discharge of the liquidator.”); RSA 402-C:48, I “When all assets justifying the expense of collection and distribution have been collected and distributed . . . the liquidator shall apply to the court for discharge.”).

The Court long ago established June 13, 2004 as the deadline for the filing of claims in the Home liquidation. The Liquidator now seeks to provide a firm deadline for the filing of amended claims and any additional late filed claims. This final Claim Amendment Deadline is reasonable and necessary to bring this proceeding to a close for the benefit of policy-level claimants. It is accordingly authorized as an exercise of the Liquidator’s authority, “[s]ubject to the court’s control,” to “do such acts not herein specifically enumerated or otherwise provided for as are necessary or expedient for the accomplishment of or in aid of the purpose of liquidation.” RSA 402-C:25, XXII. See Liquidation of Home Ins. Co., 154 N.H. at 480.

B. The Proposed Claim Amendment Deadline Implements The Act.

The Claims Amendment Deadline as proposed by the Liquidator is set forth in the proposed Order Approving Claim Amendment Deadline submitted herewith. The Claim Amendment Deadline will implement the Act and facilitate closure of the estate by requiring the filing of claims and barring unfiled claims and potential claims from participating in distributions because they prejudice the orderly administration of the estate. See Proposed Order ¶ 5. It will bar Post-Claim Amendment Claims and Potential Claims:

1. A “Post-Claim Amendment Deadline Claim” is any amendment (including supplement or any other enlargement) to any previously filed proof of claim or any new proof of claim that is filed after the Claim Amendment Deadline. Proposed Order ¶ 5(a). This category encompasses all claims first filed in the liquidation after the Claim Amendment Deadline. Because they will delay the final determination of all claims and thus the distribution of assets, Post-Claim Amendment Deadline Claims prejudice the orderly administration of the liquidation. In light of the need for finality and the years that have passed since the 2004 Claim Filing Deadline, Post-Claim Amendment Deadline Claims should not be considered, regardless of whether good cause – including but not limited to any reason constituting “good cause” under

RSA 402-C:37, II – exists for filing after the Claim Amendment Deadline, and regardless of whether a right to reopen, refile, or supplement a claim was previously reserved.

Because a number of the remaining open proofs of claim seek coverage for unidentified claims under a Home policy or reinsurance contract, the proposed order requires claimants with such proofs of claim to amend their proofs of claim to identify and provide the particulars of all claims for which coverage is sought. Proposed Order ¶ 6. See RSA 402-C:38, I(a)(1) (requiring the “particulars” of a claim in a proof of claim). Claims that have not been so identified (as a specific claim by a specific claimant against a Home insured or reinsured) on or before the Claim Amendment Deadline will be barred because, if later identified to the Liquidator, they will be Post-Claim Amendment Deadline claims. The proposed order also requires that the amendment to the proof of claim include available supporting information. Proposed Order ¶ 7.

2. A “Potential Claim” is any claim intended to be covered by a proof of claim or by an amendment where a specific claim has not been asserted by a specific claimant against a specific person on or before the Claim Amendment Deadline. Proposed Order ¶ 5(b). These are sometimes referred to as “incurred but not reported” claims. This category encompasses all claims that are not known or identified before the Claim Amendment Deadline. Some proofs of claim seek to assert claims that may emerge in the future or to reserve the right to assert claims that emerge in the future. As described above, such potential but presently unknown claims are not provided for in the Act. The delay that would result from continuing to wait for specific, identifiable claims to emerge would delay the determination of claims and distributions from the estate. Such “claims” prejudice the orderly administration of the liquidation and will not be considered, effective as of the Claim Amendment Deadline.

By way of example only, the following are types of Potential Claims that will be barred effective as of the Claim Amendment Deadline even if they are attempted to be included in a proof of claim or amendment filed before the Claim Amendment Deadline:

- a. any claims not asserted by a specifically identified claimant until after the Claim Amendment Deadline;
- b. any claims by a specifically identified claimant that are not asserted until after the Claim Amendment Deadline;
- c. any claims asserted in a legal proceeding commenced before the Claim Amendment Deadline on behalf of claimants who have not been specifically identified in the legal proceeding before the Claim Amendment Deadline, including but not limited to “Doe” or unknown parties and future class members or plaintiffs;
- d. any claims asserted in a legal proceeding commenced before the Claim Amendment Deadline by a claimant added as a party to the proceeding after the Claim Amendment Deadline;
- e. any claims asserted in a legal proceeding filed after the Claim Amendment Deadline, even if the legal proceeding relates to a legal proceeding filed before the Claims Amendment Deadline;
- f. projections of claims that may be asserted after the Claim Amendment Deadline; and
- g. assertions that a Home policy or reinsurance contract provides coverage for claims that may be asserted after the Claim Amendment Deadline.

The definition of Potential Claims focuses on the identification of claims asserted by a known, identifiable person before the Claim Amendment Deadline. For instance, assume that an insured company subject to suits by persons allegedly injured by its products filed a proof of claim before the Claim Amendment Deadline for existing and projected future claims. To the extent that claims are asserted against the company by known plaintiffs and identified in the proof of claim (or in an amendment) before the Claim Amendment Deadline, they may be addressed. However, projected claims not asserted by specific plaintiffs and identified in an amendment before the Claim Amendment Deadline are barred Potential Claims.

II. THE PROPOSED CLAIM AMENDMENT DEADLINE OF 150 DAYS AFTER THE ORDER IS APPROPRIATE.

A “reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims” now requires a final Claim Amendment Deadline. Such a deadline will motivate claimants that have been slow or reluctant to resolve or amend their open proofs of claim claims to do so, and it will thus expedite the final determination of claims necessary to collect reinsurance and to make a final distribution of Home’s assets. While it cuts off potential claims, that is necessary to achieve the final resolution of claims required to make a final distribution. See Bengelsdorf Aff. ¶ 16.

The proposed Claim Amendment Deadline of 150 days from the Court’s order granting the motion is fair and reasonable in light of the progress of the liquidation. Given the time that has passed, the claims that have been determined, and the increasing difficulty of obtaining information from those with asserted but unsubstantiated claims, the Liquidator has concluded that the balance of interests weighs in favor of establishing a final deadline by which claims must be amended and filed. This will benefit the broad group of policyholders and claimants with allowed claims by enabling the Liquidator to determine the remaining claims, collect any reinsurance on those claims, calculate and make the final distribution, and close the proceeding. The Liquidator’s conclusion reflects the factors described below. See Bengelsdorf Aff. ¶ 17.

First, there has been a lengthy period of time for claims against Home to emerge. Home has been in liquidation for sixteen years (since 2003), and it was in run-off for eight years before that (since 1995). Home stopped writing insurance – that is, issuing insurance policies – in 1995. Home did not have material coverage in force after 1996.¹⁰ Claims under Home policies thus

¹⁰ When it was placed in liquidation, Home had approximately 1000 in-force policies and bonds, including 900 perpetual first party property policies, 5 legal liability policies with ongoing tail coverage, and 100 bonds. These

have had at least twenty-three years to develop, and claimants have had sixteen years to assert them in the liquidation. The Liquidator provided broad notice of Home's liquidation and the June 13, 2004 claim filing deadline in 2003 as required by RSA 402-C:26 and the Court's Order Approving Notice.¹¹ Bengelsdorf Aff. ¶ 18.

The sixteen years of liquidation for Home is comparable to the periods before final claim deadlines in other major property-casualty insurer liquidations, especially in light of Home's eight prior years of run-off. See MSEJ, 280 S.W.3d at 622 (13 years from December 31, 1987 initial claim filing deadline to March 15, 2001 absolute deadline in Transit liquidation); Integrity Ins. Co./W.R. Grace & Co., 2012 WL 75097 at *1, *3 (21 years from initial March 25, 1988 deadline to September 30, 2009 deadline in Integrity liquidation); Garamendi, 2005 WL 1060443 at *1 (8 years from September 12, 1987 initial deadline to August 18, 1995 deadline in Mission liquidation); Reliance Ins. Co. in Liquidation, No. 1 REL 2001 (Memorandum and Order re: Claims Bar Date (Dec. 22, 2015)) (12 years from initial December 31, 2003 filing deadline to March 31, 2016 claims bar date); Liquidation of Midland, 2011 N.Y. slip op. 51261(U) at *1, *11 (25 years from initial April 3, 1987 deadline to January 31, 2013 final deadline in Midland liquidation); Liquidation of Am. Mut. Liab., No. 89-23, Order Approving Claim Amendment Deadline (June 14, 2006) (15 years from original March 9, 1990 claim filing deadline to October 31, 2006 amendment deadline in American Mutual liquidation).

Second, the Liquidator has determined the vast majority of proofs of claim. As of May 31, 2019, the Liquidator had issued and the Court had approved determinations resolving

policyholders and bondholders were sent notices of cancellation as well as notices of the liquidation and Claim Filing Deadline in 2003.

¹¹ In accordance with the Order Approving Notice, the Liquidator mailed notice of the liquidation and proof of claim forms including the June 13, 2004 Claim Filing Deadline to approximately 334,000 potential claimants (including insureds) and published notice of the liquidation and Claim Filing Deadline in 94 newspapers and a trade publication in the period July-September 2003. See Liquidator's First Report ¶¶ 5, 9 (July 3, 2003); Liquidator's Second Report ¶ 4 (August 11, 2003); Liquidator's Third Report ¶ 4 (September 12, 2003).

19,695 (almost 95%) of the 20,785 proofs of claim, including 17,370 (95%) of the 18,257 Class II proofs of claim. The Liquidator has also issued and the Court has approved determinations to guaranty associations involving thousands of claims under their proofs of claim. The approved Class II determinations for claimants, insureds and guaranty associations total approximately \$2.705 billion as of May 31, 2019. (This represents approximately 67% of Milliman's earlier actuarial central estimate of Class II liabilities, which was part of a wide range of possible outcomes. See n. 2, above.) Given the passage of time and the number of claims determined, the Liquidator has concluded that the liquidation is at a point where the answer to the value of the remaining claims must be arrived at through the claim determination process. See Bengelsdorf Aff. ¶ 19.

Third, the insureds with remaining open proofs of claim are generally resistant to providing information or resolving the matters as the claims increasingly involve future expectations. The 828 open non-guaranty association Class II proofs of claim as of May 31, 2019 involve a total of 237 policyholder accounts, of which 131 involve non-workers compensation claims and 106 involve only workers compensation. Many of the non-workers compensation accounts involve "long tail" exposures, such as asbestos or environmental exposures, that the insureds contend will result in covered liabilities that will emerge many years and, in some instances, decades into the future. Absent some requirement to update and substantiate their claims, these insureds are likely to prefer to keep them open and await future developments. Bengelsdorf Aff. ¶ 20.

Fourth, the Liquidator has collected a substantial part of the assets of the estate. As of May 31, 2019, the Liquidator controlled \$808.4 million in cash and invested assets. Adding the \$620.1 million of interim distributions paid to non-guaranty association claimants, the

\$256.1 million in early access distributions to guaranty associations, and the \$55.7 million of special deposits held by states, the Liquidator has collected a total of \$1.74 billion in assets available for Class II claims. While the Liquidator is still collecting assets, the remaining additional assets (other than potential investment income) principally consist of potential reinsurance recoveries that will not be realized unless underlying claims against Home are filed and proved. Bengelsdorf Aff. ¶ 21.

Fifth, keeping the liquidation open requires the payment of the ongoing costs of administering the estate. The liquidation presently has 39 liquidation staff (plus consultants), leases space in New Hampshire (through 2019) and New York, and an annual budget of \$13.5 million. The staff, in particular the claims staff, is appropriately experienced and sized to handle the open claims – many of which are complex and require both claims experience and knowledge of Home’s policies – and to address claims filed in connection with the Claim Amendment Deadline. However, if the estate were to remain open for the filing of claims without a deadline, the inevitable loss of experienced claims and reinsurance staff, to retirement or otherwise, who are necessary to handle the remaining complex claims and to collect any applicable reinsurance, will hinder the liquidation process while adding to the expense of administering the proceeding due to the necessity of hiring new staff or engaging more expensive consultants. The Claim Amendment Deadline will permit more efficient and economical handling of claims and collection of reinsurance by the present experienced staff. See Bengelsdorf Aff. ¶ 22.

In these circumstances, the Liquidator has concluded that a final deadline is necessary to move the liquidation to closure. Settlements, which are the principal way of resolving complex claims, are becoming more difficult as claims increasingly reflect expectations of future claims.

Collection of remaining reinsurance depends upon proof of underlying claims. Absent a final deadline, claims may straggle in, potentially for decades, which will require the maintenance of a liquidation operation and deferral of a final Class II distribution. See Bengelsdorf Aff. ¶ 23.

Such potential claims do not warrant keeping the liquidation open indefinitely. The “reasonable balance” required by RSA 402-C:46, I, is between the expeditious completion of the liquidation and protection of “unliquidated and undetermined” claims, not contingent and unknown claims. At some point in the life of the estate, the balance tips in favor of completing the liquidation by setting a final deadline for submission of claims so that claims may be finally determined and claimants with allowed Class II claims may receive a final distribution. After careful consideration, the Liquidator has concluded that, sixteen years into the liquidation and twenty-four years after Home stopped writing policies, the balance now clearly weighs in favor of establishing the Claim Amendment Deadline. See Bengelsdorf Aff. ¶ 24.

III. THE CLAIM AMENDMENT DEADLINE WILL NOT APPLY TO THE UNITED STATES.

The U.S. Department of Justice has asserted that state claim filing deadlines do not apply to the United States Government in light of the Federal Priority Statute, 31 U.S.C. § 3713. See Ruthardt v. United States, 303 F.3d 375, 384-386 (1st Cir. 2002). The Liquidator has resolved all known federal claims, and in the Settlement Agreement approved on March 26, 2019, the Federal Claimants stated that they do not intend to file any more proofs of claim in the Home liquidation. Settlement Agreement, tenth whereas clause. Further, in the Release Agreement approved on March 26, 2019, the United States released the Liquidator and Home from any and all liability and obligations under 31 U.S.C. § 3713 in connection with Home’s liquidation, subject to certain exceptions. Release Agreement ¶ III.4-5. The Liquidator does not anticipate more federal claims. However, given the Federal Priority Statute and the exceptions in the

Release Agreement, the Claim Amendment Deadline should not apply to the United States. See Bengelsdorf Aff. ¶ 25.

IV. THE PROPOSED ORDER IS APPROPRIATE.

The proposed form of Order Approving Claim Amendment Deadline submitted with this motion provides for a Claim Amendment Deadline consistent with the foregoing discussion of the Act and the circumstances of the Home liquidation:

The Proposed Order establishes the date 150 days after the order (or, if that is not a business day, the next business day) as the Claim Amendment Deadline. Proposed Order ¶ 3. Amendments to proofs of claim and any new proofs of claim must be received by the Liquidator or mailed to the Liquidator by U.S. mail on or before the Claim Amendment Deadline. *Id.*

To bring finality to the claim determination process and permit closure of the liquidation, the Proposed Order bars amendments or proofs of claim filed after the Claim Amendment Deadline (the “Post-Claim Amendment Deadline Claims” discussed above) because such late claims will prejudice the orderly administration of the liquidation. Proposed Order ¶ 5(a). Amendments and proofs of claim received after the Claim Amendment Deadline shall not be considered. *Id.* ¶ 3. Claimants with proofs of claim seeking coverage under a Home policy or reinsurance contract for unknown or potential claims must amend their proofs of claim to identify the claims. *Id.*, ¶ 6.

The Proposed Order bars unknown claims, where a specific claim has not been asserted by a specific claimant against a specific person on or before the Claim Amendment Deadline, sometimes referred to as “incurred but not reported” or “IBNR” claims (the “Potential Claims” discussed above), because such unknown or contingent claims will prejudice the orderly administration of the liquidation. Proposed Order ¶ 5(b).

To expedite review of claims, the Proposed Order requires that amendments to proofs of claim include available supporting information. Proposed Order ¶ 7. It also reiterates the Liquidator's statutory authority to request additional information, see RSA 402-C:38, II, and provides that failure to timely provide requested supplementary information may be a ground to deny a claim, subject to review under the Claims Procedures Order. Id.

Claimants who were issued notice of determination as to Class V priority only (deferring determination as to amount because there are insufficient assets to make any distribution to claims below Class II) must amend their proofs of claim and include an explanation of why their proofs of claim should be determined as to amount. Absent such an amendment, the previous notices of determination are final and the Liquidator need not act further. Proposed Order ¶ 8.

The Proposed Order makes clear that the Claim Amendment Deadline does not affect earlier claim determinations, does not permit refileing or rearguing of previous determinations, and does not apply to administration costs or to the United States. Proposed Order ¶¶ 9-11.

The Proposed Order makes clear that the June 13, 2004 Claim Filing Deadline continues to apply. Proposed Order ¶ 4. It further provides that, subject to the provisions of the Proposed Order (e.g., the barring of Post-Claim Amendment Deadline Claims and Potential Claims under ¶ 5), the claim determination process will continue under the January 19, 2005 Claims Procedures Order. Id. The Liquidator will continue to determine and settle claims subject to Court approval with disputes being resolved by the Referee and the Court.

Finally, the Proposed Order requires the Liquidator to provide mail notice of the Claim Amendment Deadline in the form attached to the order within 30 days of the order. Proposed Order ¶ 12. The notice will also be posted on the Home Liquidation Clerk website. Id. ¶ 13. This will provide claimants with about 120 days before the deadline to submit any amendments.

WHEREFORE, the Liquidator requests that the Court:

- A. Grant this Motion for Approval of Claim Amendment Deadline;
- B. Enter an order in the form submitted herewith approving the proposed Claim Amendment Deadline for the final amendment of proofs of claim and submission of any new proofs of claim in the Home liquidation, barring Post-Claim Amendment Deadline claims and Potential Claims as of the deadline, and directing the Liquidator to give notice of the Claim Amendment Deadline; and
- C. Grant such other and further relief as justice may require.

Respectfully submitted,

JOHN R. ELIAS, INSURANCE COMMISSIONER
OF THE STATE OF NEW HAMPSHIRE,
SOLELY AS LIQUIDATOR OF THE HOME
INSURANCE COMPANY,

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Dated: July 31, 2019

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Motion for Approval of Claim Amendment Deadline, the Affidavit of Peter A. Bengelsdorf, and the proposed approval order, was sent this 31st day of July, 2019 by first class mail, postage prepaid to all persons on the attached service list.



Eric A. Smith

NH Bar ID No. 16952

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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