

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**

**Nationwide's Objection to the Liquidator's
Motion for Approval of Claim Amendment Deadline**

I. Introduction

Nationwide Mutual Insurance Company ("Nationwide") is a claimant in the Liquidation. By order dated August 19, 2019 this Court set November 18, 2019 as the deadline to object to the 150-day claim amendment deadline proposed by the Liquidator. Nationwide submits that the proposed amendment deadline is less about the amendment of claims and more about cutting-off, in its entirety, any liability for all undetermined and unliquidated claims. As such, Nationwide objects to the proposed amendment deadline because: (1) it does not balance the competing interests under the liquidation statute; (2) it does not promote settlement or closure and instead unfairly extinguishes legitimate claims; and (3) the record does not include sufficient admissible evidence to allow this Court to approve a deadline with such harsh consequences.

II. Objections

A. The Proposed Claim Amendment Deadline Does Not Meet the Statutory Requirements Because It Fails to Strike A Reasonable Balance.

1. An amendment deadline does nothing to protect unliquidated and undetermined claims.

New Hampshire Rev. Stat. § 402-C:46 requires the Liquidator to strike “a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims.” The statute further provides that the power of the Liquidator is subject to the court’s approval and control. *See* N.H. Rev. Stat. § 402-C:25. The proposed claim amendment deadline fails to strike this balance and instead seeks to cut-off an entire group of claims – which are otherwise fully conceded as very real liabilities -- simply because those claims involve long-tail exposures that are slow developing. The Liquidator’s motion concedes “[u]nidentified and potential claims will be barred.” (Motion, pg. 1). The Liquidator characterizes these long-tail exposure claims as “contingent and unknown” to avoid any balancing of interests as required by the statute. The Liquidator is incorrect since these claims are precisely the type of “unliquidated and undetermined” claims the statute requires the Liquidator to protect. There is nothing in the statutory provisions referenced by the Liquidator with respect to the filing of claims to suggest otherwise. *See* N.H. Rev. Stat. § 402-C:37.

The Liquidator contends a claim amendment deadline is “a means to bring the claim determination process . . . to a close.” (Motion, pg. 3). But it is not the only means

nor is it a reasonable and fair means to achieve closure. In addition, as noted by the Liquidator itself, in a separate liquidation proceeding of a Home reinsurance subsidiary the court set a claim amendment deadline and the liquidation proceeding was still open for another five years. (Aff. ¶ 3, fn. 1). Here, rather than achieving closure by arbitrary cutting off claims, Nationwide respectfully submits the Liquidator should estimate, value and pay the remaining claims which total only 1090 out of an original 20,785. (Aff. ¶¶ 5, 7).

The Liquidator implies that without an amendment deadline "claims may straggle in, potentially for decades." (Aff. ¶ 23). This assertion is belied by the fact this court long ago set a claim deadline and there is a finite universe of 1090 open claims at issue in this liquidation. The estimated value of "unidentified and unliquidated" claims is an item the Liquidator and its actuarial consultant have, in fact, calculated (at least in the distant past). These types of calculations and the resulting estimates for incurred but not reported (IBNR) claims are common-place in the insurance industry and have been used in other liquidations. *See e.g., Angoff v. Holland-America Ins. Co. Trust*, 937 S.W.2d 213 (Mo. App. 1996). Rather than completely cutting off claims involving IBNR, which is not permitted by statute, the Liquidator should make the required calculations and estimates in order to resolve and pay those claims. The Liquidator cannot simply bar such claims for the sake of expediency and thereby unfairly benefit those claimants with previously approved claims.

2. An amendment deadline does not promote a fair and expeditious liquidation.

The statute contemplates “reasonably expeditious liquidations” but, of course, “reasonably expeditious” is not subject to precise definition and depends greatly on the nature of the estate and the claims and assets at issue. (Motion, pg. 12). The Liquidator asserts a deadline is “necessary to bring this proceeding to a close for the benefit of policy-level claimants” (Motion, pg. 13) but this assertion does not acknowledge this deadline works to the detriment of “policy-level claimants” by precluding those with long-tail claims from ever receiving any proceeds from the estate.

An expeditious liquidation is a laudable goal, but the statute also contemplates fair and reasonable treatment of claimholders particularly when those claimholders are in the same class. *See* N.H. Rev. Stat. §§ 402-C:1, 402-C:44. The statute exists to protect these very parties and is designed to maximize their ability to obtain some benefit from the insurance protection they long ago purchased. *See* N.H. Rev. Stat. § 402-C:1 IV(d) (“The purpose of this Chapter is the protection of the interests of insureds . . . through . . . [e]quitable apportionment of any unavoidable loss.”) In short, speed cannot come at the expense of fairness and equity. This is particularly true when speed is a very fluid and relative concept in the context of the Home’s original promise of insuring long-tail liabilities.

This liquidation has been pending since 2003 and substantial progress has been made and will undoubtedly continue to be made. In fact, the Liquidator acknowledges

that there is nothing preventing additional interim payments. (Motion, pg. 2). While sixteen years may seem like a long period of time, it is imperative not to lose sight of the fact the occurrence-based insurance policies at the heart of this liquidation were sold to policyholders with the promise the protection would be available in perpetuity. In short, the proposed amendment deadline creates a prohibited subclass of policy-level claims in contravention of the statute and should be rejected by this Court. *See* N.H. Rev. Stat. § 402-C:44 (“No subclasses shall be established within any class”).

B. The Proposed Claim Amendment Deadline Does Little to Promote Settlements or Closure.

A supposed rationale for a claim amendment deadline is that it will “motivate claimants that have been slow or reluctant to resolve or amend their open proof of claims” and thereby “benefit the broad group of policyholders and claimants with allowed claims.” (Aff. ¶¶ 16, 17). This characterization ignores the nature of the outstanding long-tail claims. An amendment deadline will not force claimants to address the undefined claims and collect the necessary data to present these claims because such data does not exist. The Liquidator seems to imply that the claimants are just sitting on their potential claims and not undertaking the necessary effort to define claims that could be defined. This is incorrect because of the slow developing nature of long-tail. An amendment deadline does nothing to change this reality.

Instead, Nationwide submits the Liquidator should estimate the value of the remaining open claims including the long-tail undefined and unliquidated claims. This

valuation along with the continued reduction of assets in the estate via interim payments and otherwise promotes settlement and provides claimants with undetermined and unliquidated claims an avenue for recovery. A claimant that refuses to consider settlement or accept payment under these circumstances does so at its own peril with full knowledge that the liquidation will, at some point, end. Conversely, a claim amendment deadline does nothing to promote settlement it simply extinguishes an entire group of claims. Expediency does not justify unfairness.

C. The Record Does Not Include Sufficient Evidence To Support Approval of A Deadline That Cuts-Off Legitimate Claims.

The Motion includes no real evidence that the establishment of a 150-day claim amendment deadline will materially aid in closure of the estate. Notably, the record does not contain any facts underlying any of the overarching averments regarding the “reasonable balancing” that is required to take place. *See e.g., Dover Mills P'ship v. Commercial Union Ins. Companies*, 144 N.H. 336, 339–40, 740 A.2d 1064, 1067 (1999) (affidavit based on conjecture, surmise and assumptions is not sufficient to support judgment in favor of movant). Instead, there are only conclusions and assertions that the proposed claim amendment deadline is “fair and reasonable.” (Aff. ¶ 17).

The motion suggests that a deadline will result in some unquantified administrative savings and prevent the “inevitable loss of experienced claims . . . staff, to retirement or otherwise.” It also attempts to justify cutting-off an entire group of claims by asserting “such unknown and contingent claims will prejudice the orderly administration of the

liquidation" without offering any predicate facts as support. (Motion, pg. 21). Again, these types of speculative, conclusory assertions fall far short of the type of admissible evidence this Court should insist upon in order to exercise its role in supervising and approving this liquidation. *Id.* ("The affidavit provided by the defendant is based in large part on conjecture, including the claims that 'the memory of any witness[] dims' during a long delay . . . These allegations merely assume the truth of the predicate facts necessary to prove the defendant's hypothesis that it was prejudiced . . . it must at the very least provide the court with facts showing prejudice and not merely surmise that it may be prejudiced.")

While it is true that "at some point in the life of the estate, the balance tips in favor of completing the liquidation" (Motion, pg. 20) there are no facts or evidence to support the conclusion that such a "tipping point" has occurred here or that a claim amendment deadline would do anything to aid in the closure of this liquidation aside from unfairly cutting-off open claims. Far more is required before this Court should ever entertain the notion of depriving any entire group of "policy-level" claimants of any avenue of recovery.¹

¹ Nationwide respectfully submits that, at minimum, formal briefing and an evidentiary hearing are needed to determine whether this liquidation has, in fact, reached the "tipping point" and, if so, whether there are other less drastic means available to achieve closure. In addition, preliminary factual discovery depositions of the key individuals involved in the Liquidation would seem in order, if the Liquidator continues to profess that there is factual support for its argument that we have reached the point where a claim amendment deadline is required.

III. Conclusion

For the reasons set forth above, Nationwide objects to the Liquidator's motion for a claim amendment deadline. The proposed deadline is fails to reasonably balance the involved interests as required by statute. In short, the proposed deadline does nothing to protect the unliquidated and undetermined claims and should be rejected by this Court.

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