

**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 OBJECTION TO ZURICH'S AND WÜRTTEMBERGISCHE'S  
MOTION TO RECONSIDER THE ORDERS GRANTING THE LIQUIDATOR'S  
MOTION FOR APPROVAL OF CLAIM AMENDMENT DEADLINE**

Christopher R. Nicolopoulos, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby objects to the motion of Zurich Insurance plc, German Branch and Württembergische Versicherung AG ("Zurich and Württembergische") to reconsider the Order [Granting Liquidator's Motion for Approval of Claim Amendment Deadline] ("Order") and the Order Approving Claim Amendment Deadline, both dated January 28, 2021 and issued under Clerk's Notices dated February 1, 2021 (the "Orders").

**I. The Zurich and Württembergische Settlement Agreements and the AFIA Scheme Do Not Support Reconsideration.**

The Liquidator has not contended and does not contend that he has the authority to disavow post-liquidation contracts such as the settlement agreements with Zurich and Württembergische. The Court approved those settlements by orders entered February 17, 2005 and March 21, 2006. Those agreements are binding.

However, the Court should conclude that those agreements have no bearing on the Liquidator's motion for approval of the Claim Amendment Deadline, and Zurich's and Württembergische's contract arguments have no merit, and revise the Order accordingly. Contrary to the broad assertions at pages 2-3 of the motion to reconsider, the settlement

agreements do not somehow require that the liquidation be held open for the submission of claims in perpetuity. The settlement agreements (and the Scheme) acknowledge that generally applicable New Hampshire liquidation requirements govern the claims. As the Liquidator noted in his December 30, 2019 and April 30, 2020 filings, they do not address questions of how long claims may be submitted or the liquidation may last. These are matters of public interest to be determined by the Court under the New Hampshire Insurers Rehabilitation and Liquidation Act, RSA 402-C (“Act”) [CAD HRG 138, 717-718, 733-734<sup>1</sup>].

As an initial matter, Zurich and Württembergische persist in conflating the AFIA Scheme with their individual settlement agreements. However, as explained in the Liquidator’s December 30, 2019 filing, the AFIA Agreement [CAD HRG 740] – implemented by the Scheme [CAD HRG 404] – provided an incentive for AFIA cedents generally to submit Class V reinsurance claims by providing for the cedents to be paid a part of reinsurance recoveries on the claims as an administration cost [see CAD HRG 714-717]. By contrast, the Zurich and Württembergische settlements resolved pre-liquidation disputes with the two particular cedents that were the subject of arbitrations [see CAD HRG 717-718]. The two resulting settlements are separate and distinct from the AFIA Scheme.

The Zurich and Württembergische settlement agreements resolved arbitrations regarding a reinsurance contract known as “Treaty R”. See Zurich and Württembergische Settlements, Whereas Clauses (D), (G) [CAD HRG 257, 258, 343]. The Liquidator’s motions for approval of the settlement agreements (to which Zurich and Württembergische did not object) also make this clear. See Liquidator’s Motion for Approval of Settlement Agreement with Wüstenrot &

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<sup>1</sup> These page references are to the binders of filings submitted in connection with the December 11, 2020 videoconference hearing.

Württembergische AG ¶¶ 3, 6 (March 1, 2006); Liquidator’s Motion for Approval of Settlement Agreement with Agrippina ¶¶ 3, 6-7 (January 25, 2005).<sup>2</sup>

As Zurich and Württembergische acknowledge (Motion to Reconsider at 2), the settlement agreements address Home’s obligations with respect to underlying claims by policyholders against Zurich and Württembergische. See Zurich Settlement, definition of “Policy Liability” [CAD HRG 259]; Württembergische Settlement, definition of “Policy Liability” [CAD HRG 347]. Home had agreed to administer as well as reinsure these underlying claims in “Treaty R”, and the settlement agreements provide specificity both as to the basis for Home’s potential liability (fixed pool share) as reinsurer of such policy claims and as to how Home will administer the underlying claims going forward (that administration being the Class I obligation referred to at argument). See Zurich Settlement ¶¶ 6.3.3, 6.3.1, 6.7 [CAD HRG 261, 262]; Württembergische Settlement ¶¶ 9, 13, 13.9 [CAD HRG 350, 352, 359].

In the settlements, the Liquidator agreed that when underlying policy claims are accepted as obligations of Zurich or Württembergische, then the fixed pool share would also be deemed to be part of Zurich’s or Württembergische’s proof of claim in the New Hampshire liquidation. See Zurich Settlement ¶ 6.3.3 (claims for which Agrippina’s liability has been established “shall automatically be deemed to form part of Agrippina’s Proof of Claim submitted in Home’s estate and shall immediately be capable of determination and admission in and to such estate”) [CAD HRG 261]; Württembergische Settlement ¶ 15.2.2 (periodic quarterly accounts of adjusted and established claims “shall automatically be deemed to form part of Württembergische’s Proof of

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<sup>2</sup> The Court may properly take judicial notice of the motions for approval of the settlements and other filings and orders in this proceeding, see Wellington v. Wellington, 88 N.H. 482 (1937), and rely on them. See In the Matter of Liquidation of Home Ins. Co., 2017 WL 5951591, \*3 (N.H. Oct. 27, 2017) (relying on statements in the Liquidator’s unopposed motion for approval of a settlement with the Western Asbestos Settlement Trust). The separate AFIA Agreement was approved on September 22, 2005, and the approval was affirmed in 2006. In the Matter of Liquidation of Home Ins. Co., 154 N.H. 472, 488 (2006) (“Home I”).

Claim submitted in Home’s estate and shall immediately be capable of determination and admission in and to such estate.”) [CAD HRG 356]. These provisions, however, do not purport to set aside generally applicable limitations governing proofs of claim. They are merely an administratively efficient way of submitting particular underlying claims by including them in proofs of claim as they are accepted and paid by Zurich and Württembergische.<sup>3</sup> Those proofs of claim are subject to the limits established in the New Hampshire liquidation proceeding. The settlements do not say anything different.

Zurich’s and Württembergische’s arguments are unmoored from the actual contract language. The settlement agreements do not contain any provision that purports to displace the rules for admission of claims in the Home liquidation established by the Act and the Court supervising the liquidation. It would be perverse to interpret the parties’ silence on these issues as indicating an intent to override otherwise applicable New Hampshire law. Cf. In the Matter of Liquidation of Home Ins. Co., 166 N.H. 84, 92 (2014) (“Home V”) (“To interpret the parties’ silence on the issue of interest as evidencing an intent that there be none would require us to write into the contract a term that the parties did not include.”). That is particularly the case where Zurich and Württembergische are Class V claimants who will not receive any distribution, and they seek to override a Claim Amendment deadline established to protect preferred Class II creditors by advancing distributions to them.

The Scheme similarly leaves the determination of claims against Home to the New Hampshire liquidation process. The Scheme depends upon the claim determinations made in the

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<sup>3</sup> The language quoted at page 3 of the motion to reconsider does not concern policy liabilities that, when admitted in the Home estate, could generate reinsurance recoveries from CIC. It is found in Zurich Settlement ¶ 6.3.2 and Württembergische Settlement ¶ 15.1 and concerns the Class I administration costs, which are not subject to the Claim Amendment Deadline. In any event, the phrase “do all things necessary to have such obligations admitted into Home’s estate” does not override generally applicable liquidation requirements. “All things necessary” is necessarily limited by the requirements of the Act as applied by the Court supervising the liquidation.

Home liquidation (which trigger the CIC reinsurance obligations); it does not control them. The purpose of the Scheme is merely to serve as the vehicle for distribution to Scheme Creditors of the subject CIC reinsurance collections as transferred to the Scheme by the Liquidator. See Scheme Clause 1.4 (“The purpose of the Scheme is to distribute the Scheme Assets to the Scheme Creditors . . . .”) [CAD HRG 454]. The Scheme expressly recognizes that claims must be determined under the procedures established in the New Hampshire liquidation, including the 2004 claim filing deadline and the Claims Procedures Order.<sup>4</sup> See Scheme Clause 2.8 (a claim only becomes established for purposes of the Scheme “when a proof . . . has been first lodged in the New Hampshire Liquidation in accordance with the terms of the Claims Procedures Order and there has been finally and conclusively established in accordance with the Claims Procedures Order . . . a present obligation of the Company to pay an ascertained sum of money . . . .”) [CAD HRG 457]; Scheme Explanatory Statement, Sections E.4, F.1-2 (“Pursuant to the terms of the Scheme, a Scheme Creditor is required to have submitted a proof of claim . . . in the New Hampshire Liquidation by 13 June 2004. Proofs of claim received after this filing deadline may be accepted by the New Hampshire Liquidator in certain circumstances. If, however, such a proof of claim is excluded by the New Hampshire Liquidator, it would then be ineligible for participation in the Scheme.”) [CAD HRG 427, 432-433]. Indeed, the Scheme’s definition of “liability” expressly excludes claims that are not admissible in the New Hampshire liquidation. See Scheme Clause 1.1 (“such expression does not include any liability which is barred by

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<sup>4</sup> The Claims Procedures Order is “the order establishing procedures regarding claims filed with the Company, entered by the New Hampshire Court on 19 December 2003 (as the same may be amended, varied, supplemented or replaced from time to time).” Scheme Clause 1.1 [CAD HRG 447]. That order applies generally to claims made against Home pursuant to the Act, and its purpose is to achieve uniformity and provide procedures for the presentation, processing, determination, and classification of claims against Home. Home V, 166 N.H. at 86-87.

statute or otherwise unenforceable or which would be inadmissible in the New Hampshire Liquidation of the Company”) [CAD HRG 450].

The Scheme thus acknowledges that claims must be determined in the New Hampshire liquidation subject to any applicable liquidation requirements. A requirement that the Liquidator accept AFIA claims in perpetuity would be contrary to the principle that the New Hampshire liquidation governs claims against Home. Not surprisingly, the Scheme contains no such provision.

In sum, the Zurich and Württembergische settlement agreements and the Scheme contemplate the submission of claims subject to generally applicable limitations established in the liquidation. They do not preclude establishing a Claim Amendment Deadline. Neither the settlements nor the Scheme provide that the Liquidator must accept claims and the New Hampshire liquidation remain open forever. Such an extraordinary result would be contrary to the purpose of the Act to provide for the “efficien[t]” and reasonably “expeditious” completion of the liquidation (see RSA 402-C:1, IV(c), RSA 402-C:46, I) and to the interests of the Class II policyholders and claimants that the Act is intended to prefer and protect. See RSA 402-C:44; Home I, 154 N.H. at 488.

## **II. The Ambassador Decision Is Not Relevant To The Balancing Of Interests.**

Zurich and Württembergische note that In re Ambassador Ins. Co., 114 A.3d 492 (2015), involved a request to establish a final claim date similar to the Claim Amendment Deadline here. That is correct, but beside the point. As the Court recognized in its Order, “Home is unable to pay all policyholder claimants in full, and it will be unable to issue final disbursements to policyholder claimants until a claim amendment deadline is approved.” Order at 16. By contrast, in Ambassador, the estate “had already paid all allowed policyholder claims ‘in full, with

interest,’ and had an additional \$92 million remaining to address future and lower priority claims.” Order at 15 (quoting Ambassador, 114 A.3d at 493-494). The Ambassador estate thus could be held open indefinitely without prejudice to the policyholder creditors, while holding the Home estate open harms the Class II creditors by preventing them from getting paid the full potential distribution.

The Ambassador decision offers no useful guidance here because its balancing of interests did not involve consideration of prejudice to policyholder creditors. As the Court held, the interest of Class II creditors in obtaining final distributions weighs heavily in favor of a Claim Amendment Deadline here. See Order at 7, 15-16. The Liquidator addressed that balance and other aspects of Ambassador in his December 30, 2019 filing [CAD HRG 721-723].

Zurich and Württembergische again contend that their IBNR should be given significant weight in the balancing of interests. However, the Liquidator has previously noted in his April 30, 2020 and December 30, 2019 filings that IBNR is speculative and uncertain, Scheme Creditors – although invited to do so on two occasions by the Scheme Administrators [SEAL CAD HRG 294, 312] – have not provided the information necessary to make any assessment, and the actual annual benefit from AFIA-related reinsurance recoveries to Class II creditors (about \$900,000 per year over the last five years) is a small fraction (less than 10%) of the annual cost of the liquidation [CAD HRG 140-143, 723-726]. Zurich and Württembergische repeatedly refer to the \$231 million number, but the Liquidator has explained why that 2002 estimate (used to illustrate operation of the AFIA Agreement in 2004) does not deserve weight now [CAD HRG 142-143, 725-26]. That illustration number has been supplanted by the lower actual Class V claims submitted by AFIA cedents over the past 16 years. Class II IBNR is speculative for similar reasons, and cannot be estimated with any useful reliability as the

Liquidator explained in his original motion [CAD HRG 4, n. 2]. Claims need to be proven through the claim determination process, and that can only be reasonably accomplished by establishing a Claim Amendment Deadline to require identification and valuation of claims.

The Court properly concluded that the Claim Amendment Deadline strikes a “reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims.” Order at 14 (quoting RSA 402-C:46, I).

### **III. The Remaining Arguments Do Not Warrant Reconsideration.**

Zurich and Württembergische finally make arguments respecting the New York Liquidation Bureau (“NYLB”) and Johnson & Johnson (“J&J”). However, Zurich and Württembergische lack standing to advance arguments based on the interests of others. See Libertarian Party of New Hampshire v. Secretary of State, 158 N.H. 194, 196 (2008); Gill v. Gerrato, 156 N.H. 595, 599 (2007). In any event, these matters do not change the balance of interests supporting the Claim Amendment Deadline.

Zurich and Württembergische point out that the New York Legislature extended the time for filing of “revived” sexual abuse claims from August 14, 2020 to August 14, 2021. See N.Y. Laws 2020, c. 130, § 1. However, the possibility that sexual abuse claims implicating Home policies might be submitted during the extended period is too speculative to warrant delaying a Claim Amendment Deadline and prolonging the Home liquidation. As the Court has noted, such legislative action is always possible, and delaying distributions to Class II creditors across the country on this basis more than 16 years after the initial filing deadline began (and more than 24 years after Home’s last policies expired) is unwarranted. Order at 17. A particular New York statute does not change the balance of interests supporting the Claim Amendment Deadline.

Zurich and Württembergische finally note that Johnson & Johnson (“J&J”) has filed a motion to hold approval of its settlement with the Liquidator in abeyance in light of discussions



Certificate of Service

I hereby certify that copies of the foregoing Liquidator's Objection to Zurich's and Württembergische's Motion to Reconsider were sent this 19th day of February, 2021, by first class mail, postage prepaid to all persons on the attached service list, and by email to counsel for Zurich and Württembergische and other objectors participating at the hearing.

/s/ Eric A. Smith

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