

The State of New Hampshire

MERRIMACK COUNTY

SUPERIOR COURT

IN THE MATTER OF THE LIQUIDATION OF
THE HOME INSURANCE, CO.

Docket No.: 217-2003-EQ-00106

ORDER

John R. Elias, Insurance Commissioner of the State of New Hampshire, as Liquidator of the Home Insurance Company (the “Home”), has moved for the Court to establish a final deadline for the amendment or submission of claims in the Home’s liquidation proceedings (the “Claim Amendment Deadline”). The Court granted the Liquidator’s motion on January 28, 2021, over the objection of various parties, including several insurance agencies reinsured by the Home (the “AFIA Cedents”). A number of AFIA Cedents (the “Objecting Creditors”) now move for the Court to stay and to reconsider portions of its January 28, 2021 Orders granting the Liquidator’s motion. These are: the German branch of Zurich Ins., P.L.C., Württembergische Versicherung, A.G. (collectively, “Zurich and Württembergische”), Nationwide Mutual Ins. Co., Indemnity Marine Assurance Co., Nederlande Reassurantie Groep N.V., NRG Victory Reinsurance Ltd., NRG Fenchurch Ins. Co., Ltd., New Zealand Reinsurance Co., Tenecom Ltd., Underwriters at Lloyd’s of London, Winterthur Swiss Ins. Co., and World Auxiliary Corp., Ltd. The Liquidator¹ partially objects. For the following reasons, the Objecting Creditors’ motion for partial reconsideration of the Court’s January 28, 2021

¹ The current Liquidator, and the party bringing the objection, is Christopher R. Nicolopoulos. Mr. Elias has not served as Insurance Commissioner since December 2019.

Orders is DENIED in part, while their motion to stay is GRANTED in part.

A. Motion for Reconsideration

A motion for reconsideration “shall state, with particular clarity, points of law or fact that the [C]ourt has overlooked or misapprehended.” Super. Ct. Civ. R. 12(e). The Objecting Creditors contend the Court overlooked or misapprehended each of the following: (1) the Liquidator does not have the power to disavow post liquidation contracts, (2) the facts before the Vermont Supreme Court in In re Ambassador Insurance Co., 114 A.3d 492 (2015), are the “[s]ame as [p]resented [h]ere” and this Court’s application of the balancing test employed by the In re Ambassador court must account for the Liquidator’s “[f]ailure to [e]stimate” the value of incurred but not reported (“IBNR”) claims, (3) the statute of limitations for claims brought pursuant to New York’s Child Victims Act has been extended to August 2021, and (4) the status of Johnson & Johnson’s settlement is unclear and may bear upon the Court’s consideration of the instant motion. (Zurich and Württembergische’s Mot. Recon. at 1–9.) The Court addresses each argument in turn.

First, the Objecting Creditors successfully argue the Court misapprehended the Liquidator’s power to disavow contracts post-liquidation pursuant to RSA 402-C:25, XI. RSA 402-C:25, XI provides, in relevant part, that “[s]ubject to the [C]ourt’s control, [the Liquidator] may . . . affirm or disavow any contracts to which the insurer is a party.” In its January 28, 2021 Order addressing the AFIA Cedents’ objections to the Claim Amendment Deadline (the “Primary Order”), the Court interpreted this provision to grant the Liquidator broad authority to disavow any prior agreements the Liquidator may have reached with the AFIA Cedents once appointed to the liquidation. Upon

reconsideration, such a reading does not comport with the policy goals sought to be advanced by the statute, nor with the New Hampshire Supreme Court's endorsement of binding agreements between the AFIA Cedents and the Liquidator. See In re Liquidation of Home Ins. Co., 154 N.H. 472, 490 (2006) (upholding the AFIA agreements as "fair and reasonable"); 402-C:1, IV ("The purpose of this chapter is," in part, to promote "[i]mproved methods for rehabilitating insurers" and to "[e]nhance[] [the] efficiency and economy of liquidation."). Despite the ostensibly broad language of RSA 402-C:25, XI, courts in other jurisdictions have interpreted similar statutory provisions to apply only in the pre-liquidation context. See, e.g., State ex rel. Wagner v. Kay, 722 N.W.2d 348, 355 (2006) (The "liquidator is not automatically bound by the preappointment contractual obligations of the insurer.") (emphasis added); Benjamin v. Pipoly, 800 N.E.2d 50, 59 (2003) (Ohio Ct. App. 2003) ("Thus, we hold that when a liquidator is appointed by court order, as in the instant case, she is not automatically bound by the pre-appointment contractual obligations of the insurer.") (emphasis added); First Am. Ins. Co. v. Commonwealth Gen. Ins. Co., 954 S.W.2d 460, 469 (Mo. Ct. App. 1997) (The applicable state statute "grants [the liquidator] broad authority to disaffirm pre-liquidation agreements to which the insurer is a party . . .") (emphasis added).

Nevertheless, for the reasons cited in the Primary Order, the Court properly concludes the Claim Amendment Deadline strikes "a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims." See RSA 402-C:46, I. The agreements reached between the Liquidator and the Objecting Creditors, including those common to all AFIA Cedents

and those reached with individual parties, have no bearing on the result reached by the Court. Nothing in the texts of the agreements cited by the Objecting Creditors, nor by any of the AFIA Cedents in this litigation, addresses how long the Liquidator is obligated to accept the filing of proofs of claim, nor purports to set aside generally applicable limitations the Liquidator may ordinarily impose on the filing of such claims. In the absence of any contractual language addressing these matters, or of any other indications that the Liquidator ever manifested an intent to limit his authority to impose a Claim Filing Deadline, the Court cannot read into the parties' various agreements what the parties did not see fit to include. Poland v. Twomey, 156 N.H. 412, 414 (2007) ("A valid, enforceable contract requires . . . a meeting of the minds," which consists of a shared understanding of the "essential terms" of the agreement and a "manifest . . . intention" to be bound by such terms) (emphasis added).

Second, the Court neither overlooked nor misapprehended any issue of fact or law in its treatment of In re Ambassador, 114 A.3d 492. Super. Ct. Civ. R. 12(e). As the Court noted in its Primary Order, the facts before the Vermont Supreme Court in In re Ambassador are not the same as those presently before the Court. In re Ambassador dealt with a claim filing deadline, not a claim amendment deadline. Here, a claim filing deadline was imposed more than sixteen years ago, in June 2004. In addition, unlike the liquidator before the Vermont Supreme Court in In re Ambassador, the Liquidator here does not have sufficient means to pay all policyholder claimants in full. Crucially, the Liquidator is unable to issue final disbursements to policyholder claimants unless and until a claim amendment deadline is imposed. The Court can hardly agree with the Objecting Creditors that the facts before the Vermont Supreme

Court in In re Ambassador are, in practice, the “[s]ame as [those] [p]resented [h]ere.” (Zurich and Württembergische’s Mot. Recon. at 6.) Moreover, the Court committed no error by failing to require the Liquidator to quantify the value of IBNR claims prior to weighing the factors adopted by the In re Ambassador court. No party to this action is in a position to produce a reliable estimate of the value of IBNR claims and, for the reasons laid out in the Court’s Primary Order, there are sufficient facts before the Court for it to conclude the In re Ambassador factors, if applicable, do not compel the Court to require the Liquidator to keep the liquidation open at the expense of ensuring final distributions are disbursed to priority creditors.

Third, the Objecting Creditors successfully argue the Court misapprehended the latest extension of the statute of limitations applicable to New York’s Child Victims Act. See N.Y. C.P.L.R. § 214-g (2020). The statute of limitations pertaining to New York’s Child Victims Act was most recently extended to August 14, 2021, not 2020. Id. (An “action [hereunder] may be commenced not earlier than six months after, and not later than two years and six months after” February 14, 2019, “the effective date of this section.”) (emphasis added). The Court erroneously relied on a prior version of the statute, which instead read “not earlier than six months after, and not later than one year and six months after” the effective date of the statute. Id. (2019) (emphasis added).

Nevertheless, the Court is not persuaded that the interests of those Class II policy holders who may be affected by the statute of limitations’ extension outweigh the interests of other Class II policy holders in securing timely, final distributions on their pending claims. It has now been more than sixteen years since the expiration of the

Claim Filing Deadline, and the Liquidator has a statutory mandate to “[e]xercise and enforce all the rights, remedies and powers” of priority creditors, not individually but as a class. 402-C:25, XVIII, X. The Court committed no error by granting a Claim Amendment Deadline that prioritizes the interests of all Class II creditors over the interests of individual creditors who are or may be affected by limitations extensions to statutes that implicate potential claims. In the absence of the Claim Amendment Deadline, the Liquidator is unable to distribute substantial estate assets to Class II creditors for the foreseeable future, frustrating his statutory obligation to secure an “expeditious completion” of the liquidation that timely distributes to priority creditors as large a portion of their claims as possible. Id.; RSA 402-C:46, I.

Finally, the Court’s January 28, 2021 Orders contain no errors of fact or law with respect to any aspect of Johnson & Johnson’s settlement agreement with the Liquidator. As the Objecting Creditors note, Johnson & Johnson withdrew its objection to the Claim Amendment Deadline prior to the December 11, 2020 hearing on the merits. The status of the settlement agreement has no bearing on the Court’s January 28, 2021 Orders and the Court was under no obligation to consider any of Johnson & Johnson’s former objections once those objections were withdrawn. Accordingly, the Objecting Creditors have failed to identify, with “particular clarity,” any “points of law or fact that the [C]ourt has overlooked or misapprehended” sufficient to warrant a reversal of any of the Court’s January 28, 2021 rulings. Super. Ct. Civ. R. 12(e).

B. Motion to Stay

Contemporaneously with their motion for reconsideration, the Objecting Creditors have filed a motion to stay the Court’s January 28, 2021 Orders “during the pendency of

reconsideration and for a further period of time as necessary to allow for appeal,” whether direct “or interlocutory,” to “the New Hampshire Supreme Court.” (Zurich and Württembergische’s Mot. Stay ¶ 3.) They argue that the 150 day period afforded by the Court to submit amendments to existing claims with the Liquidator is only a “short period,” and allowing the “claim amendment time period to run while the Court considers issues on reconsideration” is unfairly prejudicial to the Objecting Creditors, as the issues raised by the motion to reconsider “bear directly on the Court’s approval of the claim amendment deadline itself.” (Id. ¶ 5.) In addition, they argue the Claim Amendment Deadline renders the Objecting Creditors’ appeal “vulnerable to a mootness argument” absent a stay. (Id. ¶ 6.)

The Liquidator does not object to a stay of the Claim Amendment Deadline “limited to the time until Zurich and Württembergische’s motion for reconsideration is resolved.” (Liq.’s Resp. Mot. Stay ¶ 1.) However, the Liquidator opposes the grant of a stay pending appeal, citing prejudice to Class II creditors, whose claims have preference over the Objecting Creditors’ Class V claims and who would otherwise be prevented from receiving “the full extent of available distributions in a timely fashion.” (Id. ¶¶ 1–5 (citing RSA 402-C:44, II).)

The Court retroactively grants a stay of its January 28, 2021 Orders ending 30 days from the issuance of this Order, so as to afford the Objecting Creditors an opportunity to pursue an interlocutory appeal with the New Hampshire Supreme Court. While the Court is mindful that allowing the clock to run on the Claim Amendment Deadline may prejudice the Objecting Creditors’ arguments on appeal, the Court is also mindful of the interests of Class II priority creditors in securing final distributions from the

Home liquidation. As the Objecting Creditors have only Class V priority status, their interests must yield to those of higher priority creditors that stand to benefit from an imposition of the Claim Amendment Deadline. See RSA 402-C:44.

The Objecting Creditors are, accordingly, granted an opportunity to confer with the Liquidator and submit to the Court an agreed-upon “interlocutory appeal statement” pursuant to Sup. Ct. Civ. R. 46(a). (“Whenever any question of law is to be transferred by interlocutory appeal from a ruling . . . counsel shall seasonably prepare and file with the trial court the interlocutory appeal statement or interlocutory transfer statement pursuant to Supreme Court Rule 8 or Supreme Court Rule 9 . . .”) The Court is mindful “that interlocutory appeals should be limited to exceptional cases” and will only sign an interlocutory appeal statement compliant with Supreme Court Rules. Guyette v. C & K Dev. Co., 122 N.H. 913, 918 (1982). If the parties do not come to an agreement on the scope or any other material aspect of the interlocutory appeal statement within 14 days of the clerk’s notice of decision on this order, counsel for the Objecting Creditors and for the Liquidator shall each submit competing statements for the Court’s consideration within 7 days of that deadline. If an interlocutory appeal is sought, the January 28, 2021 Orders will be stayed. In the event a final interlocutory appeal is accepted by the New Hampshire Supreme Court, the Objecting Creditors’ motion to stay is GRANTED, pending a resolution of the question raised on appeal. Otherwise, the Court’s January 28, 2021 Orders shall take full effect as of 30 days from the issuance of this Order or 30 days from the date of any decision by the New Hampshire Supreme Court denying an interlocutory appeal, whichever is later.

For the foregoing reasons, the Objecting Creditors’ motion for partial

reconsideration is DENIED, in part, and their motion to stay is GRANTED, in part.

SO ORDERED.

Date 4/26/21


John C. Kissinger, Jr.
Presiding Justice