THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In the Matter of the Liquidation of
The Home Insurance Company

Docket No. 2004-0319

OBJECTION TO MOTION TO DISMISS

Appellants Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, "the ACE Companies") by their attorneys, Orr & Reno, P.A., object to the Motion to Dismiss the appeal from the Order of the Merrimack County Superior Court (McGuire, J.) dated April 29, 2004 ('the Order"), which approved the Motion for Approval of Agreement and Compromise With AFIA Cedents filed by Roger A. Sevigny, as Liquidator of the Home Insurance Company ("the Liquidator"). In support of their Objection, the ACE Companies state as follows:

1. After assenting to the ACE Companies' Petition to Intervene in the proceedings before the Superior Court and after conceding before the Superior Court that the ACE Companies had legal standing, the Liquidator now seeks to dismiss this appeal for lack of standing.[1]

2. For the reasons set forth in the Memorandum in Opposition to ACE Companies' Motion to Dismiss and Exhibits A through E attached to this Objection, ACE Companies has a direct interest in this Court's de novo review of the Superior Court's

[1] See Assented-To Petition to Intervene attached as Exhibit B and the transcript of the April 9, 2004 hearing at 26, attached as Exhibit D. The Liquidator similarly conceded Benjamin Moore's standing in the

construction of RSA 402:C sufficient to confer standing upon the ACE Companies. See, e.g. 4 R. Wiebusch, New Hampshire Practice and Procedure, §6.23, (2d. Ed. 1997); 5 R. Wiebusch, New Hampshire Practice and Procedure §61.03 at n. 19.

WHEREFORE, the ACE Companies respectfully request this Court:

A. Deny the Liquidator's Motion to Dismiss;

B. Grant the ACE Companies' Motion to Expedite Consideration of Appeal to Suspend Rules; and

C. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

ACE Companies

By Their Attorneys

ORR & RENO, P.A.
One Eagle Square
P.O. Box 3550
Concord, NH 03302-3550
(603) 224-2381

Dated: June 11, 2004

By: Marty Van Oot for
Ronald L. Snow

April 23rd hearing. Transcript of April 23, 2004 hearing at 5 (attached to the Liquidator's Motion to Dismiss).

CERTIFICATE OF SERVICE

The undersigned certifies that I served a copy of the foregoing on the following counsel via First Class mail on June 11, 2004.

Peter C. L. Roth
Senior Assistant Attorney General
Environmental Protection Bureau
New Hampshire Department of Justice
Attorney General's Office
33 Capitol Street
Concord, NH 03301-6397

Suzanne M. Gorman, Esq.
Civil Bureau
New Hampshire Department of Justice
Attorney General's Office
33 Capitol Street
Concord, NH 03301-6397

Paula Rogers
Case Administrator
Office of the Liquidation Clerk
The Home Insurance Company
286 Commercial Street
Manchester, NH 03101

J. David Leslie, Esq.
Eric. A. Smith, Esq.
Rackermann, Sawyer & Brewster
One Financial Center
Boston, MA 02111

Sherilyn R. Young, Esq.
Rath, Young & Pignatelli, P.A.
One Capital Plaza
Box 1500
Concord, NH 03302-1500

Andrew W. Serell, Esq.
Rath, Young & Pignatelli, P.A.
One Capital Plaza
Box 1500
Concord, NH 03302-1500

Andre Bouffard, Esq.
Downs, Rachlin, Martin, PLLC
199 Main Street
Box 190
Burlington, VT 05402

Eric D. Jones, Esq.
Downs, Rachlin, Martin PLLC
199 Main Street
Box 190
Burlington, VT 05402

Michael Ram, Esq.
Levy, Ram & Olson, LLP
639 Front Street, 4th Floor
San Francisco, CA 94111-1913

Michael Sandler, Esq.
Sandler, Ahearn & McGonaughty, PLLC
1200 Fifth Avenue, Suite 1900
Seattle, WA 98101-3135

Richard V. Wiebusch, Esq.
Hale and Dorr, LLP
60 State Street
Boston, MA 02109

Thomas Wamser, Esq.
ACE USA Legal Dept.
1601 Chestnut Street, T1 15A
Philadelphia, PA 19103

Martin P. Honigberg, Esq.
Sulloway & Hollis, PLLC
9 Capitol Street – Box 1256
Concord, NH 03302-1256

Gregory W. Swope, Esq.
Swope & Nicolosi, PLLC
58 Pleasant Street
Concord, NH 03301

Pieter Van Tol, Esq.
Lovells
900 Third Avenue – 16th Floor
New York, NY 10022

Gary Lee, Esq.
Lovells – 16th Floor
900 Third Avenue
New York, NY 10022

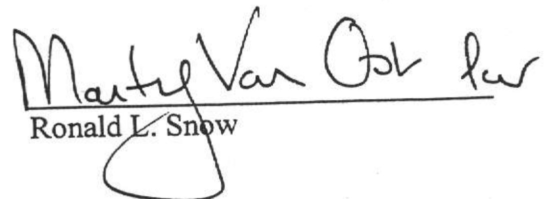
Salvatore Tollis, Esq.
Lovells – 16th Floor
900 Third Avenue
New York, NY 10022

Gail M. Goering, Esq.
Lovells
One IBM Plaza
330 N. Wabash Avenue
Suite 1900
Chicago, IL 60611

Eric Haab, Esq.
Lovells
One IBM Plaza
330 N. Wabash Avenue
Suite 1900
Chicago, IL 60611

Adam Goodman, Esq.
Lovells
One IBM Plaza
330 N. Wabash Avenue
Suite 1900
Chicago, Illinois 60611

Connie Rakowsky, Esq.
Orr & Reno, PA
One Eagle Square
P.O. Box 3550
Concord, NH 03302-3550



Ronald L. Snow

365818

TABLE OF CONTENTS TO EXHIBITS TO ACE COMPANIES' OBJECTION TO MOTION TO DISMISS

		Page
Exhibit A:	Memorandum of the Ace Companies in Support of Their Objections and Response to the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents	6
Exhibit B:	Addendum to Order of April 29, 2004	31
Exhibit C:	Assented-to Petition to Intervene	33
Exhibit D:	Order of Merrimack County Superior Court dated April 29, 2004	44
Exhibit E:	Transcript of Status Conference held on April 9, 2004	49
Exhibit F:	May 25, 2004 letter from Gareth Hughes and related letters	78

5-A

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

MEMORANDUM OF THE ACE COMPANIES IN SUPPORT OF THEIR OBJECTIONS AND RESPONSE TO THE LIQUIDATOR'S MOTION FOR APPROVAL OF AGREEMENT AND COMPROMISE WITH AFIA CEDENTS

Respondents Century Indemnity Company ("Century"), ACE Property and Casualty Insurance Company ("ACE P&C"), Pacific Employers Insurance Company ("PEIC"), and ACE American Reinsurance Company ("AARe") (individually, an "ACE Company," collectively, the "ACE Companies") hereby submit this memorandum in support of their objections and response to the Liquidator's Motion for Approval of Agreement and Compromise With AFIA Cedents (the "Motion").[1]

INTRODUCTION

The Motion, under the guise of a "compromise," seeks this Court's approval of an agreement (the "Agreement") with certain AFIA Cedents that squarely violates the New Hampshire Insurers Rehabilitation and Liquidation Act, N.H. Rev. Stat. Ann. § 402-C:1 *et seq.* (the "Act"). The Liquidator of the Home Insurance Company (respectively, the "Liquidator" and "Home") seeks to justify the proposed Agreement by claiming that it "will facilitate the

---

1 In addition to the facts set forth below, the ACE Companies incorporate by reference herein the facts set forth in the affidavits of Michael Durkin, the head of the run-off operations of the ACE Group in Europe, sworn to on March 19, 2004, attached hereto as Exhibit A and the affidavit of Richard Daniel Hacker Q.C., the ACE Companies' expert on English law, sworn to on March 12, 2004, attached hereto as Exhibit B (hereinafter referred to respectively as "Durkin Affidavit" and "Hacker Affidavit").

collection of a multimillion dollar asset of the Home estate and that it has been entered into in an effort to avoid "costly, uncertain and protracted multi-jurisdictional litigation." (Motion ¶ 1.) There is no realistic threat of "multi-jurisdictional litigation," let alone litigation that is "costly, uncertain and protracted."

As discussed below, there are compelling reasons why the Court cannot sanction the alleged "compromise" the Liquidator requests:

- The proposed Agreement directly contravenes the order of distribution statute, § 402-C:44, in multiple ways;
- The Liquidator has no authority to reach a "compromise" that violates § 402-C:44;
- There is no basis for the Liquidator's claim that such a "compromise" is necessary and appropriate to avoid costly and protracted international litigation;
- The Liquidator cannot circumvent the statutory scheme by offering unlawful "incentives" to one subclass of creditors;
- Such "incentives" cannot be passed off as an "administrative expense" of the estate;
- The proposed Agreement is contrary to New Hampshire law and well-established principles governing cross-border insolvencies and ancillary proceedings, which require that (a) all assets must be returned to the domiciliary liquidation for distribution; and (b) the ancillary proceeding must defer to the domiciliary liquidation; and
- The Motion violates due process because it has been made without adequate notice to affected parties and, if the Court does not summarily reject the Motion, discovery will be required before there can be a meaningful hearing on the merits.

In such circumstances, the Liquidator's Motion must be denied.

7

FACTUAL AND PROCEDURAL BACKGROUND

I. The ACE Companies' Interests as Creditors of Home

Century, ACE P&C, PEIC, and AARe are members of the ACE Group. All of the ACE Companies are incorporated in Pennsylvania with their principal place of business in Philadelphia. The ACE Companies are creditors of Home. (Durkin Affidavit ¶ 4.)

Before Home was placed into rehabilitation, Home was a reinsurer of the ACE Companies pursuant to various separate and independent reinsurance agreements. As creditors, the ACE Companies stand to suffer financial damage as a result of Home's inability to fulfill its contractual obligations due to its insolvency. In total, the ACE Companies possess claims against Home (for paid losses, reserves, and incurred but not reported losses) of at least $13,458,546.[2] The ACE Companies will be filing proofs of claim against Home for no less than that amount on or before the current bar date for such claims in June 2004. The ACE Companies understand that their claims will be treated as Class V claims pursuant to § 402-C:44. (Durkin Affidavit ¶ 5.)

II. Century's Interest as a Reinsurer of Home's AFIA Obligations

A. Background of AFIA

The Liquidator's Motion concerns obligations assumed by Home as part of its participation in an insurance "pool" previously known as the American Foreign Insurance Association and later as AFIA. AFIA was an unincorporated entity formed in 1918 through which its members -- U.S. insurance companies -- carried on business outside of the U.S.

---

2 Broken down by individual company, those claims are as follows:

Century	$ 11,912,063
ACE P&C	$ 1,288,003
PEIC	$ 25,480
AARe	$ 233,000

8

(Durkin Affidavit ¶ 6.) The structure of the pool was that various AFIA member companies obtained licenses or authorizations to operate branches in foreign countries and carry on the business of insurance through such branches in their own names. (*Id.*) Regardless of which company issued a policy or contract of reinsurance in any given instance, through a series of reinsurance agreements, every risk ultimately was shared by each member of AFIA in a fixed percentage equal to its number of "units of participation" in AFIA. (*Id.*) The AFIA members also arranged for common reinsurance that protected all members in excess of certain claim levels. (*Id.*)

In connection with its participation in AFIA, Home opened a branch office in London, England through which it issued policies of insurance and reinsurance. (Durkin Affidavit ¶ 7.) Home's London office was not a separate English company or subsidiary; the results of the London office's activities were included in Home's accounts that would have been inspected by the New Hampshire insurance regulators as part of their regular examination and oversight of Home. (*Id.*)

It is important to note that Home issued reinsurance agreements to "AFIA Cedents" (as defined in the Motion) that were not located solely in the U.K. (Durkin Affidavit ¶ 14.) To the contrary, numerous companies that come within the Liquidator's definition of "AFIA Cedents" were domiciled in the U.S., Canada, Bermuda, and indeed throughout the world. (*Id.*) A listing of the domiciles of various AFIA Cedents is attached as Exhibit B to the accompanying Durkin Affidavit.

B. Century's Assumption of AFIA Liabilities

The merger between Insurance Company of North America ("INA") and Connecticut General Insurance Company that created the CIGNA Corporation in 1982 set in motion a series

---

Other companies within the ACE Group also have sizeable creditor claims against Home that will be pursued in the

9

of transactions that resulted in the sale of the rights and interests in the AFIA business to CIGNA in 1984.[3] (Durkin Affidavit ¶ 8.) As part of the transfer of the AFIA business to CIGNA, Home (and other AFIA companies) entered into an Insurance and Reinsurance Assumption Agreement (the "Assumption Agreement") with INA (a CIGNA company) dated January 31, 1984, pursuant to which INA reinsured 100% of Home's liabilities under the insurance and reinsurance contracts Home had issued.[4] (*Id.* ¶ 9.) A true and correct copy of the Assumption Agreement is attached as Exhibit A to the Durkin Affidavit.

Century became the successor to INA with respect to the Assumption Agreement by virtue of a corporate restructuring under Pennsylvania law. (Durkin Affidavit ¶ 10.) Century thereafter was acquired by the ACE Group when ACE purchased the CIGNA Property and Casualty Companies in 1999. (*Id.*) Thus, Century is now Home's counterparty with respect to the Assumption Agreement. (*Id.*)

The Assumption Agreement contains the following terms that are relevant to the matters raised in the Motion:

- Century assumed all obligations of Home (¶ 2);
- Century assumed the obligation to administer the business, including the investigation and settlement of claims, and was given full power of attorney to act on Home's behalf for that purpose (¶ 3);
- in the event of Home's insolvency, Century's reinsurance obligations are payable to Home or its liquidator; in turn, Century has the right to receive notice of any claim, and investigate and interpose defenses to such claims in the liquidation proceedings (¶ 6); and

---

liquidation proceeding. (Durkin Affidavit ¶ 5.)

3 That merger resulted in the situation in which CIGNA owned one member of AFIA (Aetna Insurance Company) while also competing with AFIA through CIGNA's existing affiliates. This situation was contrary to the governing principles of AFIA, and led to negotiations that resulted in CIGNA's purchase of all AFIA interests. No new business was written through AFIA after it was acquired by CIGNA (with the exception of business written by a CIGNA affiliate until approximately 1987 in accordance with the sale documents). (Durkin Affidavit ¶ 8.)

4 With regard to Home's direct insurance obligations, there was a statutory transfer in the U.K. whereby CIGNA companies were substituted for Home and the other AFIA companies. Such a transfer (or novation) did not take place with regard to the assumed treaty reinsurance operations of Home. (Durkin Affidavit ¶ 9 n.3.)

- the Assumption Agreement is governed by New York law (¶ 10), with disputes to be resolved in arbitration to take place in New York (¶ 7).

The last point is particularly relevant given that the Liquidator's Motion refers to the "repatriation" of "U.K. Assets" of Home. (Motion ¶¶ 1, 7, 11.) Although the Liquidator does not define those U.K. assets, the only assets alluded to in the Motion are reinsurance recoveries against Century pursuant to the Assumption Agreement. (*Id.* ¶ 13.) Given that those recoveries would be from a Pennsylvania company pursuant to a contract governed by New York law with New York arbitration provisions, Century is at a loss to understand why the Liquidator seeks to characterize Century's obligations under the Assumption Agreement as "U.K. Assets" of Home.

III. Events Leading Up to the Liquidator's Misconceived Motion

Since 1984, Century (and its predecessor and affiliates) have complied fully with the financial and administrative obligations under the Assumption Agreement to handle and adjust claims by Home's AFIA cedents. (Durkin Affidavit ¶ 11.) In so doing, Century handled such claims without any day to day involvement of Home. (*Id.*) Century continued to fulfill its obligations under the Assumption Agreement throughout the period in which Home was in rehabilitation. (*Id.* ¶ 12.) After the Court's Order of Liquidation on June 13, 2003, in close cooperation with Home's Liquidator, Century has continued to investigate and administer the claims of Home's AFIA cedents pursuant to the Assumption Agreement, but Century has not made any binding determinations. (*Id.*) The Liquidator has taken the position that Century's obligation to investigate and adjust the claims by cedents of Home's U.K. branch continues despite the insolvency of Home. (*Id.*)

On February 11, 2004, the ACE Companies were served with a copy of the Motion, in which the Liquidator seeks this Court's approval of a self-described "compromise" to be implemented by an English "scheme of arrangement" ancillary to these proceedings. (*See, e.g.*,

Motion at 1.) At its core, approval of the Motion requires the Court to bless the payment to a group of Class V creditors (the AFIA Cedents) of approximately 50% of certain reinsurance recoveries made by the Liquidator against Century (*Id.* ¶¶ 13-15), while paying other Class V creditors such as the ACE Companies nothing. This special preference given to a particular subclass of Class V creditors squarely violates § 402-C:44 and is contrary to all established precedent. The Motion thus could inflate claims against Century beyond what they might otherwise have been in an orderly liquidation of Home that lawfully complied with the Act.

Notwithstanding Century's post-liquidation involvement with adjustment and administration of claims by Home's AFIA Cedents, the Liquidator did not inform, involve or consult with Century or any other ACE Company when he was negotiating the proposed Agreement with certain AFIA Cedents. (Durkin Affidavit ¶ 13.) Indeed, the ACE Companies knew nothing of the proposed Agreement until it had already been executed.[5] (*Id.*)

Beyond their lack of knowledge of the Liquidator's negotiations with certain AFIA Cedents about the proposed Agreement (notwithstanding Century's rights under the Assumption Agreement), the ACE Companies were disturbed to learn that the Agreement restricts the AFIA Cedents from communicating with Century regarding settlements of claims that Century has the right to investigate and adjust. Century believes that the Liquidator's conduct in negotiating such provisions directly breaches Home's duty of utmost good faith to Century under the Assumption Agreement.[6] In light of the above, and for the reasons described more fully below, the ACE Companies object to the Liquidator's Motion.

---

[5] Although the ACE Companies received notice of the Motion, as discussed below, the Liquidator has failed to notify hundreds of parties affected by the Motion (including many AFIA Cedents). Indeed, it appears that only a handful of the many AFIA Cedents were consulted about the Agreement or served with the Motion. (Motion, Ex. A.)

[6] Whether the Liquidator's conduct and its Motion have violated Home's duties to Century under the Assumption Agreement is not before the Court. Century reserves the right to address separately issues such as

ARGUMENT

I. The Proposed Agreement Violates the New Hampshire Insurers Rehabilitation and Liquidation Act

A. The Liquidator's Proposal Violates the Plain Language of the Order of Distribution Statute

Section 402-C:44 of the New Hampshire Insurance Code establishes multiple classes of claims. The portions relevant to the present dispute are as follows:

> Order of Distribution. The order of distribution of claims from the insurer's estate shall be as stated in this section . . . . [E]very claim in each class shall be paid in full or adequate funds retained for the payment before the members of the next class receive any payment. No subclasses shall be established within any class.
>
> I. Administrative Costs. -- The costs and expenses of administration, including but not limited to the following: the actual and necessary costs of preserving or recovering the assets of the insurer; compensation for all services rendered in the litigation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorney's fees.
>
> II. Policy Related Claims. -- All claims by policyholders . . . beneficiaries, and insureds arising from and within the coverage of . . . insurance policies and insurance contracts issued by the company . . . .
>
> . . . .
>
> V. Residual Classification. -- All other claims . . . not falling within other classes under this section.

N.H. REV. STAT. ANN. § 402-C:44 (emphasis added). Consistent with this statutory framework, the Court's Order of Liquidation issued on June 13, 2003 (the "Order") explicitly directed the Liquidator to make payments on all claims against the Home estate -- including the claims of residents in foreign counties -- in accordance with § 402-C:44. (Order ¶ w.)

Century's obligations for claims, and its rights and duties under the Assumption Agreement generally. Because the Assumption Agreement is governed by an arbitration clause, arbitration is the necessary and appropriate forum for those issues. Century also reserves its right to seek reimbursement of expenses under the Assumption Agreement, including those incurred in relation to this Motion.

The Liquidator's proposal violates § 402-C:44 and the Order in two ways. First, it creates impermissible subclasses by splitting Class V in two, with one group consisting of the AFIA Cedents and the other group consisting of other Class V creditors (including the ACE Companies). Second, the 50% "incentive" that the Liquidator proposes to pay to the AFIA Cedent subclass violates the statutory order of distribution by allowing the AFIA Cedent subclass to leap ahead of Classes II, III and IV to receive millions of dollars that otherwise would go to creditors in those classes.

Section 402-C:44 is comprehensive and clear. For this reason, the ACE Companies respectfully suggest that the Liquidator should not have made, and this Court cannot approve, a proposal inconsistent with the plain language of the statute. *See State v. Rix*, 150 N.H. 131, 834 A.2d 273, 275 (N.H. 2003); *Appeal of Northeast Rehab. Hosp.*, 149 N.H. 83, 85-86, 816 A.2d 970, 972 (N.H. 2003); *Marcotte v. Timberlane/Hampstead Sch. Dist.*, 143 N.H. 331, 337, 733 A.2d 394, 399-400 (N.H. 1999). The Liquidator's Motion therefore should be denied.

B. The Liquidator's Proposal Also Violates Corresponding Portions of the Act Relating to Multi-Jurisdiction Liquidations

Nothing in the Act suggests that its core priority scheme can be circumvented because an ancillary foreign proceeding has been commenced or because some claimants may reside in foreign countries. To the contrary, the Act states that "[i]n a liquidation proceeding begun in [New Hampshire] against an insurer domiciled in [New Hampshire], claimants residing in foreign countries or in states not reciprocal states must file claims in [New Hampshire] . . . ." N.H. REV. STAT. ANN. § 402-C:57(I). Moreover, where New Hampshire has commenced a liquidation for a New Hampshire-domiciled company, any receiver in another state or foreign country must transfer to the New Hampshire liquidator "any assets within his control other than special deposits, diminished only by the expenses of the ancillary receivership." *Id.* § 402-C:61. Indeed, if the ancillary receiver fails to do so, "the claims filed in the ancillary receivership, other

than special deposit claims or secured claims, shall be placed in the class of claims under § 402-C:44, VIII," *i.e.*, in the lowest priority class. *Id.*

In contrast to the Act and the Order,[7] the Liquidator's proposal actually seeks to withhold assets from Home's New Hampshire estate in order to provide a preference to the AFIA Cedents. New Hampshire law does not permit an ancillary receivership to be established for such an unlawful purpose. The Liquidator's request to do so therefore should be summarily rejected.

II. The Liquidator's Efforts to Justify His Violation of the Act Are Without Merit

In the Motion, the Liquidator alleges without any detail or evidentiary support that the proposed Agreement is necessary to compromise "disputes" over the proceeds of the Assumption Agreement. (Motion ¶ 7.) The primary purported concern is that, absent the "compromise," the AFIA Cedents might attempt to use an English insolvency proceeding to "wall off" the proceeds of the Assumption Agreement (which the Liquidator asserts may be "U.K. Assets") for distribution exclusively to the AFIA Cedents (and not to Home's other creditors). (*Id.*)

Even assuming that such "disputes" existed, the Liquidator has no authority to "compromise" them in a manner that violates the Act. In addition, as discussed below, the alleged "disputes" are illusory and a mere pretext for seeking the Court's approval for an unlawful proposal.

A. The Liquidator Has No Authority to Violate the Act on the Basis of an Alleged "Compromise"

The mandatory application of § 402-C:44 cannot be understated. In contrast to a rehabilitation, which has as its purpose the preservation, wherever possible, of an insurance

---

7 The Order is consistent with these provisions in that it directs the Liquidator to work with any joint provisional liquidator or comparable person appointed by a foreign tribunal "with respect to all or any portion of the estate of The Home located outside the United States (the 'foreign estates') for the purpose of preserving, recovering and <u>incorporating into the domiciliary estate</u> all assets of The Home located outside the United States." (Order ¶ v) (emphasis added). Thus, the Order contemplates that <u>all</u> foreign assets (without diminution) will be returned to this Court for proper distribution to creditors under the Act.

company threatened with insolvency, a liquidation is corporate death, the sole purpose of which is to marshal the insurer's assets and distribute them among the company's creditors. For this reason, the Act sets forth uniform, logical procedures by which a company shall be efficiently and effectively liquidated.[8] One of the linchpins of these procedures is the order of distribution of claims.

The Liquidator appears not to dispute the fact that his proposal would violate the order of distribution scheme set forth in § 402-C:44. He nonetheless apparently believes that the proposal may be lawfully approved if it is "fair and reasonable and in the best interests of the liquidation and the policyholders and other creditors of The Home." (Motion ¶ 21.) The Act, however, allows the Liquidator no such discretion.

Although no New Hampshire court has considered whether one group of creditors may be allowed to circumvent the statutory priority scheme, similar issues have been addressed by other courts supervising U.S. insurer insolvency proceedings. For example, in *In re Liquidation of Security Casualty Co.*, 537 N.E.2d 775 (Ill. 1989), the Illinois Supreme Court considered whether defrauded shareholders of an insurance company in liquidation should be able to impose a constructive trust on the proceeds of a stock offering that were in the possession of the insolvent insurer. The constructive trust effectively would have satisfied the shareholders' claims outside of the priority statute.[9] The court determined that "the liquidation provisions of the Insurance Code provide the exclusive scheme for determining priorities in distribution" of an

---

[8] For example, liquidation begins with the entry of a liquidation order, which "fixes" the rights and liabilities of the insurer and its creditors; only claims arising on or before the "fixing date" are eligible for payment. N.H. REV. STAT. ANN. § 402-C:21. Creditors holding eligible claims then must file proofs before a "bar date;" absent court intervention, claims filed after this date may not be paid. *Id.* §§ 402-C:37-:38. Once filed, claims are valued, then paid according to the priorities set forth in § 402-C:44.

[9] Like New Hampshire, Illinois has a comprehensive statutory scheme for the liquidation of insolvent insurance companies, including a provision regarding the priority of distribution of assets that mirrors New Hampshire's in all material respects. *See, e.g.*, 215 ILCS 5-205.

insolvent insurer's assets. *Id.* at 782. It therefore ruled that "equitable relief, such as a constructive trust, is precluded [and that the trial court] could not avoid the effect of the statutory scheme by imposing a constructive trust on [the insurer's] assets."[10] *Id.*

Similarly, in *Illinois ex rel. Boozell v. Coronet Insurance Co. (In re Liquidation of Coronet Insurance. Co.)*, 698 N.E.2d 598 (Ill. App. 1998), the Illinois Appellate Court found that the trial court had erred in holding that an attorney's claim under a retaining lien should be considered a Class I administrative expense of the estate. The appellate court noted that the trial court was "vested with only as much authority as is provided by the Insurance Code; equitable remedies in contradiction to those plainly set forth within the Insurance Code are therefore precluded." *Id.* at 603; *accord Northwestern Nat'l Ins. Co. v. Kezer (In re Aspen Indem. Corp.)*, 812 P.2d 688, 690 (Colo. App. 1990) (holding that state insurance priority of distribution statute is "both specific and comprehensive" and "leaves no room for the judiciary to add to the type of claims to be preferred or to establish a method of preference not created by the statute").

Indeed, so absolute are statutory distribution priorities that plans to rehabilitate a financially troubled insurer have been rejected where they violate those priorities, even though rehabilitators generally have greater discretion than liquidators to manage an insolvent insurer's affairs.[11] *See, e.g., Illinois ex rel. Shapo v. Alpine Ins. Co. (In re Conservation of Alpine Ins. Co.)*, 741 N.E.2d 663, 667-68 (Ill. App. 2000) (rejecting proposed rehabilitation plan that differentiated among members of the same priority class); *Commercial Nat'l Bank v. Superior*

---

[10] The legislative history of the National Association of Insurance Commissioners Insurers Rehabilitation and Liquidation Model Act (which contains a similar order of distribution section) reveals that the various state insurance commissioners agreed with the court in *Security Casualty* that "to allow a lower class creditor to receive a preference over a higher class creditor based on equitable remedies is inconsistent with the priority scheme." *See* Legislative History of NAIC Insurers Rehabilitation and Liquidation Model Act, § 47 (Priority of Distribution) at 555-94.

[11] *See, e.g., Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 572 A.2d. 798, 804 (Pa. Commw. Ct. 1990) (holding that "the Insurance Commissioner, as Rehabilitator, is given broader discretion to structure a rehabilitation plan than is given to her as statutory liquidator").

Ct., (*In re Rehabilitation of Executive Life Ins. Co.*) 14 Cal. App. 4th 393, 408-11 (Cal. App. 1993) (same). New Hampshire's order of distribution statute is equally comprehensive and thus equally exclusive. N.H. REV. STAT. ANN. § 402-C:44. The Liquidator's proposed Agreement vitiates § 402-C:44 and therefore must be rejected.

B. There is No Credible "Threat" or "Dispute" Purportedly Justifying the Alleged "Compromise"

Even if a wholesale violation of the statutory priority scheme could be justified on the basis of a necessary "compromise" (which, as demonstrated above, it cannot), no good faith compromise exists here. There is no evidence of any credible threat that the AFIA Cedents could (or would seek to) "wall off" the alleged "U.K. Assets" in an English insolvency proceeding, or that such an attempt would result in the "complex, protracted and costly litigation" that the Liquidator alleges. In fact, the purported "threat" (to the extent it has actually been made by any AFIA Cedent) is an empty one.

As set forth in the Affidavit of Richard Hacker, Q.C., there is no legitimate risk that creditors that did business with Home via its U.K. Branch would be able to "wall off" (or "ring fence," as the concept is described under English law) Home's alleged "U.K. Assets" for their exclusive benefit. Such efforts in the past have been repeatedly and uniformly rejected by the English courts, and would be summarily dismissed with an award of costs to the Liquidator if attempted in this instance. This is because English law applies the principle of "universality," whereby any company liquidated in England is "wound up" for the benefit of all of the company's creditors, not just for the benefit of those creditors that are resident in, or that did business with, the company in England. (Hacker Affidavit ¶ 30.) Indeed, if the company being liquidated is domiciled outside England (as is Home), an English court would treat the English liquidation as being ancillary to the liquidation in the domiciliary jurisdiction. (*Id.*) While

theoretically any creditor (and not just English creditors) could file a claim against Home in an English ancillary proceeding, and Home's English liquidator would marshal any English assets of Home (to the extent any exist), all such claims and assets ultimately would be distributed through the domiciliary liquidation in New Hampshire. (*Id.*) This mirrors what § 402-C:61 of the Act requires in Home's New Hampshire liquidation (as the Liquidator concedes at ¶ 6 of the Motion).

Notably, an English court would not engage in an inquiry as to which assets were "local" assets and which were not -- it is the essence of the universality principle that all assets are to be assembled for the benefit of all creditors. (Hacker Affidavit ¶ 31.) Even if such an inquiry would be entertained, however, recoveries pursuant to the Assumption Agreement would not be considered a "U.K. Asset" of Home. (*Id.* ¶ 40.) This is because the Assumption Agreement is governed by New York law (and/or New Hampshire law to the extent that Home's liquidation proceedings are relevant). (*Id.*) Any collection action under the Assumption Agreement would take place in a New York arbitration against Century, a Pennsylvania company. An English liquidator thus has no superior right to the proceeds of the Assumption Agreement (¶ 40), and those proceeds would not be available to be "ring-fenced" in England in any event.

Moreover, the proposed Agreement and underlying scheme of arrangement contain flaws that would be subject to challenge in an English court. For example, the scheme appears to apply only to the AFIA Cedents, and not to Home's other Class V creditors (such as the ACE Companies). It thus constitutes a violation of the *pari passu* principle and is subject to challenge under English law. (Hacker Affidavit ¶ 22.)

As demonstrated above and in the Hacker Affidavit, the Liquidator's claim that risky, complex litigation would result from opposing a "ring-fencing" claim does not withstand scrutiny. His assertion that opposing such a claim would result in substantial added expense to

the Home estate likewise is easily dismissed. Any such attempt would be dealt with by the English Companies Court -- a court with specialist knowledge in insolvency matters -- on a summary basis. (Hacker Affidavit ¶¶ 42-43.) Moreover, the Liquidator would recover a substantial portion of the attorneys' fees and costs incurred from the AFIA Cedents in the event he was successful in resisting their "ring-fencing" application (as should be the case). (*Id.* ¶ 44.) Thus, the Liquidator's claim that such expense justifies the "compromise" reflected in the Agreement should be summarily rejected.

Finally, it is worth noting that the Liquidator's attempt to avoid "complex, protracted and costly litigation" already has failed -- given the objections made to the Motion. Moreover, regardless of the result before this Court, it is the ACE Companies' present intent, for the reasons set forth above, to pursue all available remedies on appeal and in England to redress the inequities and flaws of the proposed scheme of arrangement.[12] Thus, "complex, protracted and costly litigation" is assured so long as the Liquidator continues to pursue implementation of the proposed Agreement.

There is no legitimate "dispute" to be "compromised" by the Agreement, and no good faith reason why the Liquidator seeks its approval from the Court. At bottom, the Liquidator seeks approval of for the payment of an unlawful "sweetener" to creditors that otherwise would receive no distribution of assets from the Home estate so that the Liquidator may use those creditors' claims to tap the reinsurance available under the Assumption Agreement. The Liquidator should not be allowed to make an "end-run" around § 402-C:44 by disguising this "sweetener" as a "compromise." If such conduct were permissible, there would be nothing to stop the Liquidator from, *e.g.*, agreeing to pay a holder of a large claim more than a holder of a

---

12 Indeed, given the obvious shortcomings of the proposed scheme under English law, it is possible that the Liquidator could be required to pay the ACE Companies' costs.

20

small one, or paying all persons who did business with the insolvent insurer to submit claims, regardless of their priority in the order of distribution scheme, in order to reach the maximum amount of assets that might relate to those claims. Section 402-C:44 was designed to prevent such dubious conduct, and it should not be sanctioned here.

C. The Liquidator's Purported Justifications for the Illegal "Incentive" Do Not Withstand Scrutiny

It should be self-evident that a Liquidator cannot violate the governing statutory framework simply because a proposed course of action ostensibly will bring more money into the insolvent estate. If that were the case, a liquidator would have free rein to employ all sorts of illegal schemes and incentives by claiming that the end justifies the means.

In that context, the Liquidator's claimed concern that the AFIA Cedents might not file proofs of claim with the Home estate is a red herring. It will always be the case in insurance insolvencies that parties with little prospect of recovering funds might decide that it is not worthwhile to pursue those claims. When the New Hampshire legislature relegated certain classes of claimants to the bottom of the priority list, it clearly understood that those claimants might not possess a strong incentive to file. That is the statutory scheme, and the Liquidator must live with the incentives put in place by the legislature. The Liquidator cannot create his own set of "incentives" by paying off creditors to file when those "incentives" are not sanctioned by the Act.

Moreover, the Liquidator's assertion that some AFIA Cedents will not bother to file proofs of claim absent an "incentive" to do so cannot be taken at face value. As an initial matter, the fact that some cedents have yet to file their proofs is irrelevant because those proofs are not due until June. Moreover, it is not typical for reinsured creditors of an insolvent insurer simply to abandon their claims. To the contrary, most creditors -- even Class V creditors -- do so as a matter of routine practice -- particularly where the claim is sizeable. One common reason for

doing so is that reinsured companies often are reinsurers as well, and they frequently will have the right to offset their obligations and their creditor claims (as some of the ACE Companies may be able to do in whole or in part). The Liquidator provides no explanation why one particular group of Class V creditors (the AFIA Cedents) requires an incentive to file when other Class V creditors do not.

The Liquidator's suggestion that certain unnamed AFIA Cedents might seek to enter into "side agreements" with Century likewise cannot justify the Liquidator's proposal. The Liquidator does not allege that any such "side agreements" actually exist; thus, the theoretical propriety of such arrangements is not ripe and hence not properly before the Court.[13] The mere potential for a dispute over a theoretical question cannot justify a wholesale violation of the order of distribution scheme contained in the Act.

D. The Liquidator Cannot Pass Off His Improper Distribution Scheme as an Administrative Cost of the Estate

The Liquidator suggests, in passing, that the tens of millions of dollars he is proposing to pay the AFIA Cedents can be justified as "a cost of obtaining and collecting an asset of the Home estate." (Motion ¶ 21.) This suggestion is so far from the ordinary and common sense interpretation of "administrative expenses" that it is difficult to take it seriously. Indeed, a past attempt to transform settlement proceeds into an "administrative expense" in an insurance insolvency was squarely rejected. In *Oxendine v. Commissioner (In re Coastal States Life Ins. Co.)*, 494 S.E.2d 545 (Ga. App. 1997), the Georgia Court of Appeals considered whether settlements that had been entered into with general creditors of an insurer during rehabilitation should be paid as an administrative expense once the insurer was placed into liquidation. The

[13] In the event that such a dispute ever would ripen for resolution, given that it would involve an interpretation of the parties' rights under the Assumption Agreement, the claim would be subject to the arbitration agreement contained therein, and Century reserves all of its rights in that regard.

court rejected the general creditors' argument that the settlements should be treated as administrative expenses because they "preserved the assets of the estate." *Id.* at 548. In so ruling, the court noted that "[n]o reasonable definition of 'costs' or 'expenses' can include the [settlement] claims . . . . These claims are for money which appellees claim from the [insurer's] estate and not administrative costs or expenses incurred." *Id.*

As in *Oxendine*, placing a judicial imprimatur upon the payment of tens of millions of dollars to unsecured creditors as an "administrative expense" defies "common sense and sound reasoning." *Id.* Indeed, if these payments can be characterized as an administrative expense, *anything* can be so characterized, thus rendering the entire statutory scheme meaningless. The Court should not sanction such an absurd result.

III. The Proposed Agreement Violates Well-Established Principles Governing Cross-Border Insolvencies and Ancillary Proceedings

Cross-border insolvencies are no longer a novelty. Most insolvencies of any size or complexity tend to have ramifications across state and national boundaries. Accordingly, well established principles have evolved in both the U.S. and the U.K. for administering such insolvencies -- principles that are virtually identical regardless of whether the primary liquidation is located in the U.S. or the U.K. The Liquidator's proposal flies in the face of those well established principles, and its approval would be unprecedented.

As discussed above, it is well recognized in the U.K. that "where a foreign company is being wound up in its place of incorporation, the 'home' liquidation is to be regarded as the principal liquidation with an English liquidation being only ancillary thereto" and that the home forum "has primary responsibility for the administration of the insolvency of a foreign incorporated or domiciled debtor." (Hacker Affidavit at ¶¶ 29-30). The doctrine of "universality" likewise requires that all of the assets of the company must be distributed by one

court "for the benefit of all [of the company's] creditors."[14] (*Id.* at ¶ 30) (emphasis in original). For these reasons, the English courts have squarely rejected the "ring-fencing" concept the Liquidator proposes. (*See id.* at ¶¶ 33-38.)

Ancillary proceedings in the United States follow similar principles. In the insurance insolvency context, as detailed in § I.B. above, the Act requires ancillary receivers to show deference to the domiciliary liquidation. N.H. REV. STAT. ANN. § 402-C:61. Similarly, § 304 of the Bankruptcy Code allows for the commencement in the U.S. of a case ancillary to a foreign proceeding.[15] As the bankruptcy court noted in *Armco Inc. v. North Atlantic Insurance Co. Ltd. (In re Bird)*, 229 B.R. 90 (Bankr. S.D.N.Y. 1999), a case which involved a § 304 proceeding commenced in New York in aid of an English liquidation of an insurance company:

> The principal goal of a § 304 case is to permit foreign debtors to prevent the piecemeal distribution of assets in the United States by means of legal proceedings initiated in domestic courts by local creditors.
>
> . . . The very purpose of the § 304 proceeding is to extend the English automatic stay to American creditors and assets and <u>not allow creditors to do here what they would not be allowed to do in the United Kingdom</u>.
>
> . . . The automatic stay is designed to offer the debtor repose from his or her creditors' collection efforts, to protect creditors from each other, and to insure an orderly liquidation or administration of the estate.

Id. at 94 (citations omitted; emphasis added). The federal bankruptcy courts have consistently followed these principles for ancillary proceedings commenced under § 304.[16]

---

[14] The Second Circuit has described the "universality" approach as follows: "[A] primary insolvency proceeding is instituted in the debtor's domiciliary country, and the ancillary courts in other jurisdictions -- typically in jurisdictions where the debtor has assets -- defer to the foreign proceeding and in effect collaborate to facilitate the centralized liquidation of the debtor's estate according to the rules of the debtor's home country." *Bank of N.Y. v. Treco (In re Treco)*, 240 F.3d 148, 153 (2d Cir. 2001).

[15] 11 U.S.C. § 304(a).

[16] Courts overseeing other § 304 cases have agreed that the role of an ancillary proceeding is to protect all creditors of the estate and to ensure equality of distribution. *See Aranha v. Eagle Fund, Ltd. (In re Thornhill Global*

The proposed Agreement allows the kind of "territorial grab" of assets by local creditors that U.S. and U.K. law heretofore have not permitted. It unfairly favors one subset of creditors over other creditors in the same class, as well as creditors in other classes. It undermines the priority scheme established by New Hampshire law rather than showing deference to it. In such circumstances, there can be no serious question that the proposed Agreement should not be approved by this Court.

IV. The Liquidator's Motion Is Procedurally Defective, and Its Approval Would Violate the Fifth and Fourteenth Amendments to the United States Constitution and Part I, Article XV of the New Hampshire Constitution

A. The Liquidator has provided grossly inadequate notice to interested parties

If the Liquidator's proposal is implemented, the economic interests of each of Home's numerous policyholders and creditors will be affected. Indeed, the Liquidator asserts that the present motion involves amounts in excess of $100 million. (Motion ¶ 14.) Moreover, Century and every other reinsurer of Home will be affected by the Liquidator's novel proposed "end run" around § 402-C:44. Indeed, virtually all companies who either reinsure or are reinsured by U.S. companies would be highly interested in this Motion and the potential precedent it could create, given that the scheme proposed by the Liquidator could create a gaping priority loophole that could be exploited in virtually any significant U.S. insurance insolvency.

Despite the unprecedented scope and value of the relief sought in the Motion, the Liquidator has deigned to provide notice only to *five* parties or groups of parties. *See* Notice of

Deposit Fund), 245 B.R. 1, 14 (Bankr. D. Mass. 2000) (enjoining state court action by U.S. creditor Mercurius of Bahamian debtor Thornhill Global and noting that the injunction "merely places Mercurius in the same position as Thornhill Global's other creditors"); *In re Culmer*, 25 B.R. 621, 628 (Bankr. S.D.N.Y. 1982) ("'The theme of the Bankruptcy Act is equality of distribution of assets among creditors, . . . and correlatively avoidance of preference to some . . . . The road to equity is not a race course for the swiftest.'") (quoting *Israel-British Bank (London) Ltd. v. FDIC*, 536 F.2d 509, 513 (2d Cir. 1976)). § 304(c), which lists the criteria for determining whether a party may obtain injunctive and other relief in a § 304 proceeding, reflects the same precepts of universality and deference to the principal liquidation. *See* 11 U.S.C. § 304(c)(1), (3), (4).

Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents at 1. What the Liquidator has done violates well settled constitutional norms:

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983). New Hampshire law is fully in accord:

> For more than a century, the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. The notice must be of such nature as reasonably to convey the required information and must be more than a mere gesture.

Berube v. Belhumeur, 139 N.H. 562, 567, 663 A.2d 598, 601 (N.H. 1995) (citations omitted); *see also State v. Hess*, 118 N.H. 491, 492, 387 A.2d 1183, 1184 (N.H. 1978) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950)) ("When the name and address of a party is known, due process requires at least that notification be attempted by mail addressed personally to the party."). The timing of a hearing is also of crucial importance:

> The fundamental requisite of due process is the opportunity to be heard, and that opportunity is useless unless one is informed of the matter pending and the hearing is granted at a meaningful time and in a meaningful manner.

Royer v. New Hampshire Dep't of Employment Sec., 118 N.H. 673, 679, 394 A.2d 828, 831 (N.H. 1978) (citing *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965)).

Each creditor of Home is potentially affected by the Motion and has a right to be heard with regard to it:

> It is not necessary for a proceeding to directly adjudicate the merits of a claim in order to 'adversely affect' that interest. In *Mennonite* itself, the tax sale proceedings did not address the merits of the mortgagee's claim. Indeed, the tax sale did not even completely extinguish that claim, it merely 'diminished the value' of the interest. Yet the Court held that due process required that the mortgagee be given actual notice of the tax sale.

Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 488 (1988) (citations omitted). Similarly, due process requires actual notice of the Liquidator's Motion to all affected parties.

The Liquidator certainly has records detailing the identities of Home's policyholders and other creditors (*e.g.*, reinsureds), and thus should be required to provide notice to these obviously interested persons. It would be wrong for the Court to rule on the Liquidator's Motion when even the most minimal due process requirements have been ignored.

B. Century's Rights Will be Violated If the Present Motion is Considered Without Adequate Discovery and Further Briefing

A "meaningful" hearing on the present motion will require adequate discovery and further briefing. The Liquidator's Motion does not cite any case law. In fact, the only support provided by the Liquidator for the Motion is the affidavit of Peter A. Bengelsdorf, which is virtually identical to the Motion itself and replete with legal conclusions, hearsay, and vague and unsupported assertions. The Liquidator cannot seriously contend that the proposed Agreement should be approved on this meager basis, and it would be manifestly unfair for meaningful evidentiary and case support for the proposal to be furnished for the first time in a reply brief.

The Liquidator's Motion rests on factual assertions about matters that the ACE Companies either contest or have no knowledge of. Therefore, the ACE Companies wish to obtain limited written discovery and to depose Mr. Bengelsdorf and possibly others with pertinent knowledge of the facts and circumstances described in the Motion.[17] As the Liquidator's factual position emerges, the ACE Companies may offer fact witnesses of their own to counter assertions made by the Liquidator's witnesses; if so, the Liquidator may wish to depose those witnesses. The Liquidator may wish to depose Mr. Hacker, the ACE Companies'

---

17 Copies of ACE Companies' proposed interrogatories and document requests are attached to their Objections as Exhibits A and B.

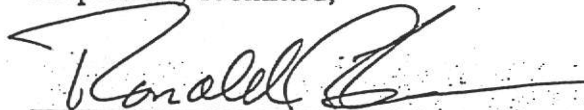
expert on English law; if the Liquidator is able to find someone to disagree with Mr. Hacker, the ACE Companies will want to depose that person.

Accordingly, unless this Court is prepared to deny the Liquidator's Motion summarily, the ACE Companies respectfully request a status conference so that the Court may set an appropriate schedule for the completion of discovery, further briefing and an evidentiary hearing.

CONCLUSION

For the foregoing reasons, the ACE Companies respectfully request that the Liquidator's Motion be denied, or alternatively that a hearing be held in which a fair and appropriate procedure is established to develop a legal and factual record upon which the Liquidator's Motion properly may be considered.

Respectfully submitted,



Ronald L. Snow
ORR & RENO, Professional Association
One Eagle Square
P.O. Box 3550
Concord, New Hampshire 03302-3550
Telephone (603) 224-2381
Facsimile (603) 224-2318

-and-

Gary S. Lee
Eric A. Haab
Gail M. Goering
LOVELLS
900 Third Avenue, 16th Floor
New York, New York 10022
Telephone (212) 909-0600
Facsimile (212) 909-0666

Attorneys for Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company, and ACE American Reinsurance Company

CERTIFICATE OF SERVICE

The undersigned certifies that he served a copy of the foregoing on the following counsel via electronic mail and overnight mail on March 19, 2004.

Peter C. L. Roth
Senior Assistant Attorney General
Environmental Protection Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397

J. David Leslie, Esq.
Eric. A. Smith, Esq.
Rackermann, Sawyer & Brewster
One Financial Center
Boston, MA 02111

Sherilyn R. Young, Esq.
Rath, Young & Pignatelli, P.A.
One Capital Plaza
Box 1500
Concord, NH 03302-1500

Andrew W. Serell, Esq.
Rath, Young & Pignatelli, P.A.
One Capital Plaza
Box 1500
Concord, NH 03302-1500

Michael S. Ram, Esq.
Levy, Ram & Olson, LLP
639 Front Street, 4th Floor
San Francisco, CA 94111-1913

Michael Sandler, Esq.
Sandler, Ahearn & McGonaughty, PLLC
1200 Fifth Avenue, Suite 1900
Seattle, WA 98101-3135

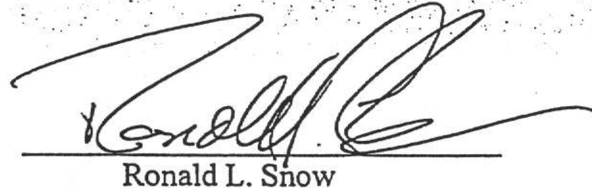
Richard V. Wiebusch, Esq.
Hale and Dorr, LLP
60 State Street
Boston, MA 02109

Thomas Warnser, Esq.
ACE USA Legal Dept.
1601 Chestnut Street, T1 15A
Philadelphia, PA 19103

Martin P. Honigberg, Esq.
Sulloway & Hollis, PLLC
9 Capitol Street – Box 1256
Concord, NH 03302-1256

Gregory W. Swope, Esq.
Swope & Nicolosi, PLLC
58 Pleasant Street
Concord, NH 03301

Connie Rakowsky, Esq.
Orr & Reno, PA
One Eagle Square
P.O. Box 3550
Concord, NH 03302-3550



Ronald L. Snow

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

ADDENDUM TO ORDER OF APRIL 29, 2004

The Court Order of April 29, 2004 granted the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents. The Order did not expressly address the alternative request by ACE Companies and Benjamin Moore & Co. for further evidentiary hearing to determine whether the Liquidator exercised his authority reasonably by endorsing the agreement. The matter is clarified below.

The agreement at issue was pursued in conjunction with the Provisional Liquidation in the United Kingdom. The Joint Provisional Liquidators appointed by the High Court and the Informal Creditors Committee established under English law negotiated the terms. In endorsing the agreement, the Liquidator moved to marshal assets and secure access to an estimated $231 million of ACE Companies reinsurance and indemnification obligations. The ACE Companies interest is directly contrary to the liquidation's interest which is to maximize opportunity to access this asset.

In the absence of the agreement, AFIA Cedents, whose filing and prosecution of claims triggers the reinsurance and indemnification obligations of ACE Companies, have little incentive to file claims. Under the specific financial realities of this liquidation, Class V claimants would bear the expense of filing and prosecuting claims without realistic prospect of any distribution.

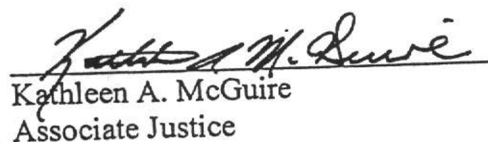
Under the agreement and in conjunction with their filing and prosecution of claims, AFIA Cedents in the aggregate will retain approximately $50 million for distribution to approximately 200 member companies under a formula governed by the terms negotiated. The remainder will be largely available for distribution to policyholder claimants with approximately $10 to be retained for administrative expenses in the United Kingdom Provisional Liquidation.

As noted above, the terms of the agreement were negotiated in conjunction with the Provisional Liquidation in the United Kingdom. The agreement will be the subject of further proceedings and applications for approval in both regulatory and judicial settings in the United Kingdom. Further, as noted in the April 29, 2004 Order, neither the Financial Services Authority, the regulator in the United Kingdom, nor the National Conference of Insurance Guaranty Funds Reinsurance Commutation Subcommittee on the Home Insurance Company in Liquidation, both of which have reviewed the agreement, have objections to it.

The Court hereby clarifies that, under these circumstances, a further evidentiary hearing into whether the Liquidator has reasonably exercised his authority in endorsing the agreement would not be helpful.

SO ORDERED:

DATED: 6/1/04



Kathleen A. McGuire
Associate Justice

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company

Docket No. 03-E-0106

ASSENTED-TO PETITION TO INTERVENE

Respondents Century Indemnity Company ("Century"), ACE Property and Casualty Insurance Company ("ACE P&C"), Pacific Employers Insurance Company ("PEIC"), and ACE American Reinsurance Company ("AARE") (collectively the "ACE Companies") by its attorneys, Orr & Reno, P.A., petition to intervene in the above-captioned action. In support of this Motion, the ACE Companies state:

1. Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator of the Home Insurance Company, has moved for Approval of Agreement and Compromise with FIA Cedents in accordance with the Order Establishing Procedures for Review of Certain Agreements to Assume Obligations or Dispose of Assets entered December 19, 2003, and the procedures set forth in the Liquidator's Motion to Amend Orders Establishing Review Procedures dated January 21, 2004.

2. Pursuant to the procedures established by that Order, as amended, the ACE Companies filed their Objection to the Liquidator's Motion for Approval of Agreement and Compromise With AFIA Cedents. The Liquidator's Motion for Approval

and the ACE Companies' Objection were filed with this Court by Peter Roth as counsel for the Liquidator on March 23, 2004.

3. The ACE Companies have a direct and immediate interest in the Liquidator's Motion for Approval of Agreement and Compromise With AFIA Cedents, which is set forth in their Objection to the Liquidator's Motion in their Memorandum in support of their Objection to the Liquidator's Motion, copies of which are attached to this Petition and incorporated in this Petition by reference.

4. In his counsel's letter to this Court of March 23, 2004, the Liquidator has requested a hearing on his Motion for Approval of Agreement and Compromise With AFIA Cedents to be scheduled within the next month.

5. The ACE Companies submit that the proposed Agreement with the AFIA Cedents squarely contravenes RSA 401-C:1, *et seq*, and they will be severely prejudiced if they are not permitted to intervene and raise their statutory objections to the Liquidator's Motion as well as their constitutional objections to the notice and summary procedure for approval proposed by the Liquidator.

6. Counsel for the Liquidator assents to the relief sought by this Petition to Intervene.

WHEREFORE, the ACE Companies respectfully request this Court:

A. To Grant this Petition to Intervene;

B. To issue Orders of Notice; and

C. To grant such other and further relief as this Court deems just and proper.

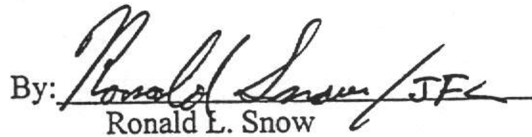
Respectfully submitted,

ACE Companies

By Their Attorneys

ORR & RENO, P.A.
One Eagle Square
P.O. Box 3550
Concord, NH 03302-3550
(603) 224-2381

Dated: March 26, 2004

By: 
Ronald L. Snow

359079

35

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

OBJECTIONS AND RESPONSE OF THE ACE COMPANIES TO THE LIQUIDATOR'S MOTION FOR APPROVAL OF AGREEMENT AND COMPROMISE WITH AFIA CEDENTS

Century Indemnity Company ("Century"), ACE Property and Casualty Insurance Company ("ACE P&C"), Pacific Employers Insurance Company ("PEIC") and ACE American Reinsurance Company ("AARe") (collectively the "ACE Companies") hereby submit their Objections and Response to the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents (the "Motion"), as more fully set forth in the accompanying Memorandum and Affidavits of Michael Durkin ("Durkin Affidavit") and Richard Hacker, Q.C. ("Hacker Affidavit").

I. Interest of the ACE Companies

1. The ACE Companies, each of which is incorporated in Pennsylvania, are creditors of Home Insurance Company in Liquidation ("Home") and will be submitting proofs of claims for current and future liabilities owed by Home under various reinsurance contracts. (Durkin Aff. ¶ 4) In total, the claims by the ACE Companies against Home exceed $13 million. (Durkin Aff. ¶ 5)

2. Century is also a reinsurer of Home. Pursuant to the Insurance and Reinsurance Assumption Agreement dated January 31, 1984 (the "Assumption Agreement") referenced in ¶ 3 of the Motion, Century has assumed Home's liabilities on contracts of reinsurance that Home

issued to various insurance companies through its U.K. branch office (the "AFIA Cedents").[1] (Durkin Aff. ¶¶ 6-10) The Assumption Agreement also vested Century with corresponding obligations and rights to investigate, adjust, and settle claims by AFIA Cedents against Home. (Durkin Aff. Ex. A ¶ 3) The Assumption Agreement is governed by New York law, and disputes between Home and Century must be resolved by arbitration in New York. (*Id.* ¶ 7, 10)

II. The Liquidator's Proposed Agreement Violates the Order of Distribution Scheme in the New Hampshire Insurers Rehabilitation and Liquidation Act

3. Section 402-C:44 of the New Hampshire Insurers Rehabilitation and Liquidation Act (the "Act") provides that:

> The order of distribution of claims from the insurer's estate shall be as stated in this section. . . .[E]very claim in each class shall be paid in full or adequate funds retained for the payment before the members or the next class receive any payment. No subclasses shall be established within any class.

N.H. Rev. Stat. Ann. § 402-C:44 (emphasis added). Section 402-C:44 defines the relevant classes as follows: Class I - expenses of administering the liquidation; Class II - policyholder claims; Class III - federal government claims; Class IV - wages; and Class V - a "residual classification," which includes unsecured creditors under reinsurance agreements such as the ACE Companies. (*Id.*)

4. Like the ACE Companies, the AFIA Cedents also are reinsurance creditors of Home and thus are Class V creditors. The Liquidator's proposed agreement with the AFIA Cedents (the "Agreement") at issue in the Motion guarantees the AFIA Cedents a distribution equal to 50 percent of the reinsurance recoveries attributable to their proofs of claim (less expenses of collection), an amount the Liquidator estimates at $50 million (Motion ¶ 14). However, the Liquidator acknowledges that creditors in classes above Class V are unlikely to

---

1 The Assumption Agreement is between Home and Insurance Company of North America ("INA"). As explained more fully in the ACE Companies' Memorandum, Century is the successor to INA with respect

receive payment of their claims in full and indeed that other Class V creditors are unlikely to receive any distribution from the Home estate. (Motion ¶ 6) Therefore, if approved, the Agreement would violate the mandatory provisions of § 402-C:44 by elevating the claims of a small group of Class V creditors (the AFIA Cedents) over the higher classes of creditors whose claims will not be paid in full (according to the Liquidator's Motion). Moreover, in direct contravention of § 402-C:44, the Liquidator's proposal creates a subclass of Class V (the AFIA Cedents) creditors who will receive preferential treatment over other Class V creditors such as the ACE Companies.

5. The Liquidator's proposal also violates ¶ (w) of the Court's Order of Liquidation dated June 13, 2003, which directs the Liquidator to administer the claims of residents of foreign countries in accordance with New Hampshire's priority statute.

III. The Liquidator's Proposal Violates the Provisions of § 402-C:61 Relating to Ancillary Receiverships in Foreign Countries

6. Section 402-C:61 of the Act provides:

> If an ancillary receiver in another state or foreign country, whether called by that name or not, fails to transfer to the domiciliary liquidator in [New Hampshire] any assets within his [or her] control other than special deposits, diminished only by the expenses of the ancillary receivership, if any, the claims filed in the ancillary receivership, other than special deposit claims or secured claims, shall be placed in the class of claims under § 402-C:44, VIII.

N.H. Rev. Stat. Ann. § 402-C:61 (emphasis added). The Liquidator's proposal violates this section because it would allow an ancillary foreign receiver to distribute assets other than "special deposits" to certain Class V creditors rather than relinquishing control of such assets to the Liquidator for distribution pursuant to the priority scheme in the Act, § 402-C:44.

IV. The Liquidator's Efforts to Justify His Violation of the Act are Meritless

---

to the Assumption Agreement by virtue of a corporate restructuring under Pennsylvania law. Century subsequently was acquired by the ACE Group in 1999.

A. **The Liquidator Has Nono Authority to Violate the Act on the Basis of an Alleged "Compromise"**

7. The Liquidator attempts to justify his violation of § 402-C:44 by characterizing the Agreement as a "compromise" of an alleged dispute with the AFIA Cedents with regard to their rights to "wall off" Home's "U.K. assets." The provisions of § 402-C:44, however, are mandatory. The order of distribution statute was established by the New Hampshire legislature and embodies clear policy judgments that neither the Court nor the Liquidator has discretion to compromise, negotiate, ignore or override. The case law leaves no question that the Liquidator lacks authority to "compromise" this core aspect of the governing liquidation statute.

B. **There Is No Credible "Threat" or "Dispute" Purportedly Justifying the Liquidator's "Compromise"**

8. The core of the Liquidator's argument is that some (unidentified) AFIA Cedents allegedly have threatened to petition the U.K. courts to establish a separate U.K. liquidation for Home pursuant to which any existing "U.K. Assets" of Home would be "walled off" and distributed exclusively to the U.K. creditors of Home. Although the Liquidator states that this threat lacks "any legal merit," he nonetheless asserts that the purported dispute must be "compromised" to avoid "complex, protracted and costly litigation." (Motion ¶¶ 7-8)

9. As established in the Hacker Affidavit, the Liquidator's claimed concern over complex or protracted litigation arising out of an effort by some AFIA Cedents to "wall off" English assets for their exclusive benefit is wholly unfounded. Such an action would fly in the face of well established case law prohibiting such a proposal, and would be summarily dismissed by an English Court, with the Liquidator entitled to reimbursement of most of its fees and costs. (Hacker Aff. ¶¶ 42-44.) The alleged dispute that justifies the Liquidator's motion is thus illusory and merely a pretext for seeking to circumvent the priority scheme in the Act.

10. Moreover, the Liquidator's "concerns" are founded on the false proposition that the proceeds from recoveries against Century pursuant to the Assumption Agreement constitute "U.K. Assets." To the contrary, by any definition, such recoveries are U.S. assets given that they are claims to be asserted by the Liquidator against a U.S. insurer under a contract governed by New York law with New York arbitration provisions.

C. **The Liquidator's Attempt to Justify His Unlawful "Incentives" to AFIA Cedents Does Not Withstand Scrutiny**

11. The Liquidator argues that it is permissible to give the AFIA Cedents a $50 million "incentive" to file and pursue proofs of claims because they otherwise might not do so (and if they do not file, the Liquidator has no right to submit a reinsurance claim to Century). The Liquidator cannot justify the unlawful "incentive" to certain Class V creditors and ignore the priorities established in § 402-C:44 merely because doing so theoretically might bring additional assets into the estate. Otherwise, <u>any</u> action that might lead to the collection of funds by the Liquidator, no matter how contrary to the statute, would be allowable because the "end justifies the means."

12. The Liquidator's professed concern that the AFIA Cedents will not file proofs of claim absent the Liquidator's proposed "incentive" need not be taken at face value. Class V creditors generally do not simply abandon potential recoveries in a liquidation, particularly where a claim is sizable, even when the prospects of a satisfactory distribution may be limited. Rather, creditors under reinsurance agreements typically file proofs of claims in liquidation proceedings as a matter of routine practice. Class V creditors who are reinsured by an insolvent company frequently file proofs of claim to protect offset rights they might have as a reinsurer of the company in liquidation (which is a very common occurrence). The fact that not all AFIA Cedents have submitted filings to date is meaningless -- proofs of claim are not even due until June 2004.

13. The Liquidator likewise cannot justify the proposal by his suggestion that certain AFIA Cedents might seek "side agreements" with Century to receive payment directly from Century outside of the liquidation. (Motion ¶ 7.) The Liquidator has provided no evidence of any such "side agreements," and the question of whether such agreements would be permissible is not before the Court. The mere theoretical possibility of a future dispute over that question cannot justify a wholesale violation of the priority scheme in the Act.

D. The Liquidator Cannot Pass Off His Improper Distribution Scheme as an Administrative Cost of the Estate

14. The Liquidator suggests that the $50 million "incentive" to be paid to the AFIA Cedents can be justified as "a cost of obtaining and collecting an asset of the Home estate." (Motion ¶ 21.) This remarkable suggestion has no support in the definition of "administrative expenses" contained in § 402C:44(I) and is wholly without basis in law.

V. The Liquidator's Proposal Violates Well Established Principles Governing Cross Border Insolvencies and Ancillary Proceedings

15. The Liquidator's proposal is entirely unprecedented. If approved, it would violate the well-established principles of cross border ancillary receiverships that have developed in both the U.S. and the U.K. The Court should not sanction a wholesale abandonment of those principles, particularly where the proposal violates New Hampshire law.

VI. The Liquidator's Motion is Procedurally Defective, and Its Approval Would Violate the Fifth and Fourteenth Amendments to the United States Constitution and Part I, Article XV of the New Hampshire Constitution

16. The Liquidator has provided grossly inadequate notice of his Motion. Despite the fact that the Liquidator's $50 million proposal affects the interests of all creditors of Home, the Liquidator has provided notice only to five parties or groups of parties. (Notice of Motion) Due process requires actual notice to the affected parties in such circumstances.

17. Due process requires a meaningful hearing and right to be heard on the Liquidator' Motion. Given that the Motion rests on numerous factual assertions, Century is entitled to reasonable discovery and an evidentiary hearing before the Motion can fairly be determined.

Respectfully submitted,

____

Ronald L. Snow
ORR & RENO, Professional Association
One Eagle Square
P.O. Box 3550
Concord, New Hampshire 03302-3550
Telephone (603) 224-2381
Facsimile (603) 224-2318

-and-

Gary S. Lee
Eric A. Haab
Gail M. Goering
LOVELLS
900 Third Avenue, 16th Floor
New York, New York 10022
Telephone (212) 909-0600
Facsimile (212) 909-0666

Attorneys for Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company, and ACE American Reinsurance Company

CERTIFICATE OF SERVICE

The undersigned certifies that he served a copy of the foregoing on the following counsel via electronic mail and overnight mail on March 19, 2004:

Peter C.L. Roth
Senior Assistant Attorney General
Environmental Protection Bureau
NEW HAMPSHIRE DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301-6397

J. David Leslie
Eric A. Smith
RACKEMANN, SAWYER & BREWSTER
One Financial Center
Boston, MA 02111

Ronald L. Snow

43

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

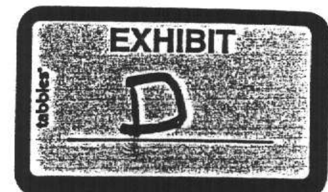
Docket No. 03-E-0106

In the Matter of the Liquidation of The Home Insurance Company

Before the Court is the Liquidator's Motion for Approval of Agreement and Compromise with the AFIA Cedents. The Ace Companies and Benjamin Moore & Co., interveners in this action, object to approval of this agreement. The Court has reviewed the pleadings and submissions of the parties and held a hearing on the motion on April 23, 2004.

The issue raised by this motion is whether the proposed agreement is consonant with RSA Chapter 402-C, and consistent with the powers of the Liquidator as contemplated by that statute. The Liquidator characterizes the agreement as marshalling assets as authorized by RSA 402-C:1, III and IV; and RSA 402-C: 25, V and XXII. The Ace Companies and Benjamin Moore argue that the agreement is in effect a distribution of assets in violation of the statutory distribution scheme of RSA 402-C:44. It appears that the concept formulated in the pending agreement is one of first impression.

By way of brief background, the agreement involves non-novated AFIA treaty exposures which are reinsured or indemnified by the Ace Companies. These Ace Companies' liabilities are substantial assets, estimated at $231 million, of the Home Insurance Company Liquidation. They are collectible by the Liquidator only if and when the AFIA Cedents file and prosecute claims with the Liquidator. Because the AFIA Cedents' claims are in Class V under the statute, however, they will not be reached and



paid. Thus, it is uncertain at best whether the AFIA Cedents will file their claims since they have no apparent reason to expend the resources necessary to do so except to the extent that they may have setoff opportunities. If the AFIA Cedents fail to file their claims, the Liquidator will not be able to access the substantial assets of the Ace Companies. With the purposes of addressing the uncertainty as to whether AFIA Cedents will file and prosecute their claims to trigger access to Ace Companies' assets, and of providing an incentive to do so, the Liquidator has endorsed the pending agreement between the provisional liquidators in the United Kingdom and the Informal Creditors' Committee. Neither the Financial Services Authority (FSA) nor the National Conference of Insurance Guaranty Funds Reinsurance Commutation Subcommittee on the Home Insurance Company in Liquidation has objected to the proposed agreement and compromise. Pursuant to the agreement, the AFIA Cedents will receive approximately $72.5 of the estimated $231 million the Liquidator will receive from the Ace Companies when the AFIA Cedents' Claims are filed and prosecuted.

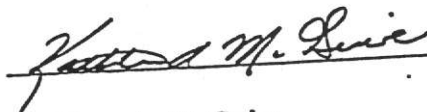
After reviewing the pleadings and statute, and considering the oral arguments of the parties, the Court is persuaded that, under the circumstances of this liquidation as explained below, the agreement proposed by the Liquidator is authorized under the broad array of powers granted the Liquidator under RSA 402-C:25 and is consistent with the goals and purposes of the statute to protect the interests of the insureds and creditors. RSA 405-C:1, IV. As a result of the agreement, the Liquidator will be able to marshall substantial assets to be distributed to creditors which would otherwise be unavailable. Also, although under the agreement AFIA Cedents will receive payments which, as Class V claimants, they would not otherwise receive, these payments are not to the detriment of

other Class V claimants who will receive nothing with or without the agreement. Moreover, the agreement benefits Class II claimants, including Benjamin Moore, because the amount to be distributed to members of this class will increase. Finally, while the agreement assures that the Ace Companies will not receive a windfall of $213 million, it imposes no additional liability upon them than those they have already assumed. For the above reasons, the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents is **GRANTED.**

While this matter has been decided favorably to the Liquidator, the Court is nevertheless concerned that the Ace Companies were not included in discussions whereby the proposed agreement was reached and that protracted litigation over this issue will ensue. Accordingly, the Court urges the parties to reach a global agreement on this issue. The Court schedules a further hearing on Friday, June 4, 2004 at 9 a.m. to discuss where the parties are at that time regarding any resolution of this matter.

So Ordered.

DATED: April 29, 2004



Kathleen A. McGuire
Associate Justice

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No.-03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

Docket No. 03-E-0112

In the Matter of the Liquidation of
US International Reinsurance Company

ORDER RELATIVE TO SERVICE LIST AND WEBSITE MATTERS

For purposes of assuring that claimants, counsel, and members of the general public wishing to monitor filings and Orders relating to the liquidations of The Home Insurance Company and U.S. International Reinsurance Company have appropriate notice of pending matters of interest, the Court has previously directed that all notices, filings, and Orders be posted on the New Hampshire Insurance Department website at www.nh.gov/insurance. Those postings are now comprehensive for any matters subsequent to February 18, 2004. Prior to that date, the postings were limited to notices and filings of the Liquidator and Orders of the Court.

Claimants, counsel, and members of the general public may also review the files at 286 Commercial Street, Manchester, N.H. at the Office of the Liquidation Clerk. Directions to that location are available at the Merrimack County Superior Court Clerk's Office and are also posted at the New Hampshire Insurance Department website. The telephone number of The Liquidation Clerk's office is 603.641.1211.

While accessibility to website postings is of great utility in providing information to claimants, attorneys, and the general public, the Court has some concern that the

47

existence of that resource may not be as widely known as it should be. To address that issue the Court orders that the Liquidation, using an updated address list of claimants, provide specific notice to each that the New Hampshire Insurance Department website is a resource for them to monitor liquidation activity.

The Merrimack County Superior Court Clerk's Office presently utilizes a service list which includes a number of attorneys whose initial interest appears to have been prompted by a matter disposed of in the course of the liquidations. The service list also includes attorneys who have appeared, but have not pursued formal intervention.

In the interest of efficiency, the Court establishes the following procedures regarding the service list:

1. Those persons/attorneys who filed appearances only will be deleted from the service list.

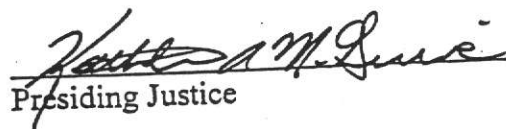
2. Those persons/attorneys who have been provided leave to intervene and no longer have an active issue before the Court will also be deleted from the service list.

3. Those persons/attorneys who have been provided leave to intervene and have a matter under active and continuing consideration by the Court will be retained on the service list until that matter has been finally determined by Court ruling or otherwise resolved, at which time the persons/attorneys involved will be removed from the service list.

4. Those persons/attorneys who have requested notice regarding any reinsurance commutation(s) before the Court for approval shall continue to receive such notice consistent with the procedures outlined in the Court's Order of July 23, 2003.

So Ordered.

Dated: 4/29/04



Presiding Justice

COPY

2004 APR 21 P 3:49
NH SUPERIOR COURT
MERRIMACK COUNTY
CONCORD, NH

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY SUPERIOR COURT

In the Matter of the)
Liquidation of the Home) Docket No: 03-E-0106
Insurance Company)

STATUS CONFERENCE

Before: Honorable Kathleen A. McGuire
Presiding Justice, held at
Concord, New Hampshire, on
Friday, April 9, 2004

* * *

APPEARANCES:

For the Liquidator: Peter Roth
Attorney at Law

For the Respondents: Ron Snow
(ACE Companies) Attorney at Law

Pieter Van Tol
Gary Lee
Attorneys at Law

(Benjamin Moore) Andre D. Bouffard
Attorney at Law

Court Reporter: Michelle A. H. McGirr
CSR/RPR
Official Court Reporter

* * *

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 Friday
2 April 9, 2004
3
4
5 PROCEEDINGS
6
7 * * *
8
9 THE COURT: Good morning.
10 As I understand it, we're here on a
11 status conference on the liquidator's motion for
12 approval of the agreement and compromise with
13 the AFIA Cedents. I know some of you, but I
14 don't know most of you, and I know you've
15 already given your name to the court reporter,
16 but if you'd repeat them for me now, I'd
17 appreciate it.
18 MR. BOUFFARD: Your Honor, my name's
19 Andre Bouffard. I'm with Downs, Rachlin &
20 Martin in Burlington, Vermont, and I represent
21 Benjamin Moore.
22 THE COURT: Yes.
23 MR. SNOW: Ron Snow, Orr & Reno,

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 representing ACE Companies. With me is Gary Lee
2 of the New York office of Lovells. Next to him
3 is his colleague, Pieter Van Tol, of the same
4 office, Your Honor. All of us are representing
5 the ACE Companies.
6 THE COURT: Okay.
7 MR. ROTH: Your Honor, Peter Roth for
8 the liquidator from the Attorney General's
9 Office.
10 THE COURT: Okay. Now, I understand
11 today we're just here for a status conference,
12 kind of a scheduling-type conference; and I
13 guess for the purposes of today, the most
14 important thing we have to determine is are we
15 having an evidentiary hearing on this matter,
16 right? Is that the number one thing we need to
17 determine?
18 MR. SNOW: Seems to me, Your Honor,
19 there are two issues. One, as you've just
20 announced, the second is the need for discovery,
21 limited discovery.
22 THE COURT: Okay. Does that matter --
23 does the discovery request or the resolution of

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 that involve whether it's going to be an
2 evidentiary hearing or not or is it the other
3 way around, the discovery will determine whether
4 there's a need for an evidentiary hearing?
5 MR. SNOW: I think it's little bit of
6 both. Clearly our clients believe there's a
7 need for an evidentiary hearing on something
8 this significant. It doesn't have to be a week
9 long hearing, but a day or two. They clearly
10 believe that they need discovery.
11 I have one housekeeping matter I have
12 to take up with the court which is my motion for
13 pro hac vice admission of these two gentlemen,
14 which was not contested but --
15 THE COURT: I think I've signed those.
16 MR. SNOW: I hadn't gotten it yet. I
17 wanted to make sure it was okay for the Court
18 for them to speak if necessary.
19 THE COURT: Yes. I'm pretty sure I
20 granted those, but maybe not.
21 MR. SNOW: Mr. Van Tol is going to be
22 the spokesman.
23 MR. VAN TOL: Good morning, Your

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 Honor.

2 THE COURT: Good morning.

3 Mr. Roth, do you agree that we're here

4 on those two issues, the discovery and the need

5 for an evidentiary rehearing and how they

6 interplay?

7 MR. ROTH: Yes, I agree with that. My

8 concern obviously is that the interest of these

9 parties and their desire to have that I think is

10 seriously tainted and I think that to engage in

11 those proceedings is a waste of the Court's

12 time, a waste of the liquidator's time and a

13 waste of --

14 THE COURT: Before we get to the

15 merits, before we get to argument on it, I want

16 to know if you agree those are the issues.

17 MR. ROTH: Yes, those are the issues.

18 If we need an evidentiary hearing of what scope

19 and when -- and if we do need an evidentiary

20 hearing, then what scope of discovery if any is

21 appropriate.

22 THE COURT: Now, does this issue have

23 to be resolved before -- is it June 31 when the

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 claims must be filed?
2 MR. ROTH: The claims date is June
3 13th. There is a deadline in the agreement
4 letter by which the agreement dies if it's not
5 approved by the Court and it's sometime in early
6 June. It could be the bar date, I'm not
7 certain. Our concern is that if this gets
8 brought forward through to June or late in May
9 or really much beyond today or next week, if
10 we're going to have to take this up on simply
11 oral argument and offers of proof --
12 THE COURT: But wait. Regardless, I
13 have to make an order --
14 MR. ROTH: Right.
15 THE COURT: -- and it's not exactly a
16 simple issue, at least --
17 MR. ROTH: Of course, but if there's
18 to be discovery --
19 THE COURT: But the question is again
20 does this issue have to be resolved by June
21 13th?
22 MR. ROTH: Absolutely and as early
23 before June 13th the better because if we send a

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 signal to the English AFIA Cedents, this is
2 going to drag on with evidentiary and a
3 discovery process, the deal could fall apart.
4 MR. VAN TOL: Your Honor, a simple yes
5 or no would suffice in our papers to move back
6 the bar date or any agreed upon dated for the
7 AFIA Cedents. On their date it's --
8 THE COURT: A different claims date
9 than for the rest?
10 MR. VAN TOL: Exactly, Your Honor. I
11 think that's very simple and cost effective and
12 we would propose that.
13 MR. ROTH: We're concerned that is not
14 going to make the AFIA Cedents comfortable. If
15 they see this is going to be a long, drawn out
16 process, if we lose one AFIA Cedent from the
17 deal, we have seven or eight or nine of them
18 lined up. If we lose one, they're going to
19 start running for the sky is falling kind of
20 thing and we're going to lose the deal.
21 THE COURT: Why don't we start then
22 with whether there's a need for an evidentiary
23 hearing. It seems to me just looking at the

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 issue that it seems to be a matter of law
2 whether or not under the statute setting forth
3 such an agreement is something that the
4 liquidators can approve of and the Court can
5 order.
6 MR. VAN TOL: We agree, Your Honor,
7 that it's a matter of law and if the Court is
8 inclined to go that way -- to find in favor of
9 the ACE Companies and find the liquidator cannot
10 do so, but if there's any question in the
11 Court's mind about whether the liquidator has
12 such discretion, there are fact issues which
13 form this case that must be fully fleshed out
14 and can't be handled on affidavits alone. These
15 affidavits are from people who have an interest
16 in the outcome of the matter. I'm not impugning
17 their motive, but I believe it's incumbent to
18 have those witnesses in front of Your Honor so
19 Your Honor can listen to their testimony, make a
20 credibility determination, how much weight is
21 the Court going to give this evidence. This is
22 an extraordinary, complex matter that can't be
23 handled on papers alone.

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 THE COURT: Well, isn't the issue, I
2 mean, whether the Court has the authority to
3 order such an agreement?
4 MR. VAN TOL: It is, Your Honor, in
5 the first instance. All we are saying as a back
6 up, if the Court is at all inclined to say that
7 the liquidator does have such a power, it is his
8 responsibility to show why that exercise of
9 discretion --
10 THE COURT: Okay.
11 MR. VAN TOL: -- is at all rational.
12 THE COURT: So there are two different
13 issues. One is whether such an agreement can be
14 ordered, but the second one is whether it's an
15 abuse of discretion, I guess, to order it.
16 MR. VAN TOL: Precisely, Your Honor.
17 We don't believe the liquidator has such
18 discretion, but to the extent he does, it has to
19 have a rational basis. It's that basis on which
20 there's a wealth of complex facts.
21 THE COURT: I guess then I would
22 rather do it in two parts then, the matter of
23 whether or not as a matter of law it's something

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 that can be ordered and then whether or not the
2 Court should exercise -- say that it is
3 something the Court can do -- whether the -- and
4 get to the later issue if -- and I don't even
5 know if that would be an issue, I'm not saying
6 that, but if it is an issue, then take it up at
7 that point --
8 MR. VAN TOL: Certainly.
9 THE COURT: -- and do it in two steps.
10 MR. VAN TOL: Would you anticipate
11 accepting further briefing? If there's late
12 issues raised in the Court's reply, we would
13 like to bring it to Court's attention.
14 THE COURT: Sure. Okay.
15 So is that okay, Mr. Roth?
16 MR. ROTH: Yeah, I think that would
17 work for us. Again, we're on -- time is of the
18 essence, Your Honor -- a very short time frame
19 so if they have additional briefing, I would say
20 let's see it by the middle of next week. I
21 mean, we've got -- I keep coming back to this
22 point. Why are they here and I think the
23 pleading they filed yesterday really says it

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 all. When put to defining and describing why
2 they're here, why they objected to this, the
3 best they could come up with is they have a
4 right to ensure that any action concerning the
5 reinsurance proceeds in which they have an
6 undisputed property interest comports with New
7 Hampshire statutory scheme and principles of due
8 process and fairness. Well, their interest in
9 it is in not paying the estate. That's their
10 undisputed property interest, in keeping their
11 money from us. And so they're here today and
12 this whole program is designed to keep their
13 money from us. They have a very small creditor
14 interest, but this appearance today alone
15 probably cost more than the creditor interest
16 they've already -- that they're claiming against
17 us. So I just -- it's -- to me it's frightening
18 that this kind of an array can be made for this
19 kind of a motive against what we're trying to
20 do, which is reasonable and lawful; and I think
21 that on the submissions that we have already
22 made, we can come up with a determination -- I
23 think the Court can determine that not only what

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 the liquidator is doing is lawful, but the
2 affidavits that we've presented and just the
3 overall nature of the scheme suggests that it is
4 also reasonable. What they're trying to do is
5 prevent paying a debt to the state -- to the
6 estate. They're trying to reap a windfall for
7 themselves for one of their own or two of their
8 own from this estate. And I just -- I implore
9 the Court to not allow that to happen because if
10 this deal falls apart, we're going to have these
11 guys and five other lawyers just like them in
12 courts all around the country and in England
13 fighting each one of these AFIA Cedent claims
14 and it's not going to be pretty and not produce
15 any benefit to the estate.
16 MR. BOUFFARD: Your Honor, may I
17 speak to that point?
18 THE COURT: Yes.
19 MR. BOUFFARD: I just want to make
20 sure it's clear that the ACE Companies don't
21 speak for my client. My client is entirely
22 separate and distinct. My client is a policy
23 holder claimant in these proceedings --

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 THE COURT: But are you still
2 objecting to the agreement?
3 MR. BOUFFARD: Yes. We have filed our
4 objection to the agreement.
5 THE COURT: All right. And you're
6 just concerned that there won't be enough money
7 in the class II pot --
8 MR. BOUFFARD: Well, no.
9 THE COURT: -- if the agreement goes
10 through, is that your position?
11 MR. BOUFFARD: No. Our view, Your
12 Honor, is that we cannot understand why the
13 liquidator has come to the conclusion that it is
14 a reasonable judgment to pay 50 million dollars
15 to the AFIA Cedents to incite them to file
16 claims in these proceedings; and despite the
17 liquidator's attempts in his papers to
18 articulate a rationale for that decision, it
19 isn't in there. There's no rationale, there's
20 no explanation for that for that position.
21 THE COURT: Okay. Am I wrong that if
22 this agreement doesn't go through, there's not
23 really a way for the liquidator to recoup the

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 money and get any of it into the class II pot?
2 MR. BOUFFARD: Yeah. I think that is
3 wrong, Your Honor. There are -- it seems to me
4 that there are any number of ways that the
5 liquidator might go about getting the money into
6 the pot, to use the Court's words.
7 THE COURT: Okay. How would the
8 liquidator do that?
9 MR. BOUFFARD: Well, one possibility I
10 suppose would be for the liquidator to go to the
11 ACE Companies and ask the ACE Companies whether
12 or not they want to commute their reinsurance
13 agreements, for example. That would be a very
14 simple way to do it. It doesn't -- I haven't
15 seen in the papers any suggestion that the
16 liquidator has done that. That's just one
17 possibility that I am suggesting here that would
18 be lawful under the liquidation statute. It
19 would be quick, easy and expeditious, but I
20 don't know from looking at the papers whether or
21 not the liquidator has ever had such a
22 conversation with the Ace group.
23 What do you say as to that, Mr. Roth?

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 MR. ROTH: We have had conversations
2 with the Ace group about commuting their
3 obligations to the estate and we'd be happy to
4 continue to do that, but what the end result is
5 going to be that we have to have AFIA Cedents
6 file claims here in order to make the Ace group
7 liable on their obligations to us and if the
8 AFIA Cedents don't file claims here, then we
9 have got very little weight to bring to the
10 table in a commutation. The Ace group I'm sure
11 would love for us to have the claims bar date
12 come and go and then count the claims and decide
13 what's a fair commutation; and we're going to
14 see that without the deal in place, we're going
15 to have not very many claims because the AFIA
16 Cedents, who are class V, are not inclined --
17 and I think our documents establish that -- that
18 we've heard from the AFIA Cedents that they
19 don't want to file claims because it's not worth
20 it.
21 I mean, in response to Benjamin
22 Moore's pleading, I just would say that they
23 seem to have an information issue, they want to

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 know more, and I think that with our affidavits
2 that we filed last Friday, we've answered almost
3 all of their questions. To the extent they're
4 saying, we still don't get it, I don't know what
5 else we can tell them. It's all spelled out
6 there pretty clearly what it is that motivates
7 the liquidator to do what he's doing. We have
8 issues about the cut through threats, we have
9 the issue about the ring fencing threat and we
10 have the issues about the claims filing. Now we
11 can debate and we can try to prove as a matter
12 of fact whether it is possible to ring fence in
13 England or possible to cut through and whether
14 that's legal and lawful in England; but the fact
15 remains we acted upon the threats of those
16 things and rather than simply sit back and
17 realize those things and go through possibly
18 years of foreign litigation -- the BCCI cases
19 that were cited by ACE and in their papers were
20 I think instructional. You have a case that was
21 filed in 1990. The issue comes up immediately,
22 they have a decision over eight days of hearing
23 in 1992 or '93, then you get a decision and

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 appeals and everything and it lasted until,
2 like, 1997 to decide whether ring fencing was
3 appropriate. And we just can't -- it's not
4 worth it to the estate to go through that
5 effort. The value of the asset is lost if we
6 have to do that.
7 The other issue that Benjamin Moore
8 brings up is purely legal. They say it's not
9 lawful to do what we're doing and I think we've
10 fairly briefed that and it's fairly presented in
11 front of you.
12 But as coming back to the commutation,
13 we'd be happy to do a commutation if it's
14 advantageous to us and worthwhile, but if we
15 wait until the claims bar date to decide to do
16 that commutation, without the deal, we're in
17 trouble. If we --
18 THE COURT: You can't do such an
19 agreement unless AFIA files the claims here --
20 MR. ROTH: We cannot have a
21 commutation without claims being made.
22 THE COURT: Okay. And I guess your
23 position is you can't make AFIA file claims.

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com

1 MR. ROTH: We cannot make the AFIA
2 Cedents file claims. What I would suggest is
3 it's really no skin off of ACE's neck if we do
4 this deal or we don't do this deal. If we do
5 the deal, we commute with ACE, we put the money
6 into the English agreement and the English
7 stream and it gets distributed the way we've
8 agreed with the AFIA Cedents. It doesn't affect
9 ACE in any way. It just has no impact on ACE at
10 all. All we're trying to do with this is make
11 sure that the agreements in place prior to the
12 liquidation with ACE, which included the
13 assumption agreement which has in it an
14 insolvency clause which says that if Home goes
15 insolvent, ACE continues to perform
16 notwithstanding the insolvency. We're trying to
17 make sure things work the same after the
18 insolvency as they did before the insolvency.
19 Ace's obligations to Home will not be any
20 different or any greater after the insolvency as
21 they were before and again, it goes to our sort
22 of mystery about -- it's no mystery they're
23 trying to protect themselves from having to pay

LASER BOND FORM A PENGAD • 1-800-631-6989 • www.pengad.com