

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In the Matter of the Liquidation of  
The Home Insurance Company

Docket No.

**MOTION FOR STAY OF ORDER PENDING MANDATORY APPEAL  
PURSUANT TO RULE 7**

Defendants, 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., move this Court to stay the order of the Merrimack County Superior Court (McGuire, J.), dated April 29, 2004 (the "Order"), on the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents in *In the Matter of the Liquidation of the Home Insurance Company*, Superior Court No. 03-E-0106, pending the mandatory appeal by Benjamin Moore & Co. ("Benjamin Moore") to this Court. (A copy of the Order is attached hereto as Exhibit A.) In support of this Motion, the ACE Companies respectfully state:

(1) In the Order, the Superior Court approved of an agreement (the "Proposed Agreement") that Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator (the "Liquidator" of Home Insurance Company ("Home")), entered into with representatives of certain insurers who had ceded insurance risk to Home as a participating member of the American Foreign Insurance Association ("AFIA") reinsurance pool. (Those insurers will be referred to herein as the "AFIA

Cedents” and the reinsurance contracts issued by Home to the AFIA Cedents will be referred to as the “AFIA Treaties.”)

(2) In the motion for approval of the Proposed Agreement, the Liquidator alleged that the AFIA Cedents would have no reason to submit their claims in the Home liquidation because their claims are Class V claims under N.H. Rev. Stat. Ann. § 402-C:44, and Class V claimants are unlikely to receive a distribution in Home’s liquidation. The Liquidator sought to justify the Proposed Agreement as a “compromise” or “settlement” of alleged threats by the AFIA cedents to seek to satisfy their claims against Home through separate proceedings in England or otherwise outside the New Hampshire liquidation. Although the Liquidator acknowledged that such attempts would be without legal basis and could be defeated, the Proposed Agreement purports to provide an “incentive” to the AFIA Cedents to file their claims in the Home liquidation by setting into motion a “scheme of arrangement” under English law which would pay the AFIA Cedents half of the net proceeds that are recovered from companies who reinsured the liabilities under the AFIA Treaties.

(3) The ACE Companies, which are reinsurers of Home’s AFIA liabilities and Class V creditors, objected to the Liquidator’s motion. The ACE Companies alleged that the Proposed Agreement directly violates the mandatory order of distribution provisions in N.H. Rev. Stat. Ann. § 402-C:44 because the AFIA Cedents would receive a distribution before the claims of higher classes of creditors had been paid in full and in an amount different from other Class V creditors. The ACE Companies further alleged that the Liquidator has no authority to enter into a “compromise” with certain creditors in violation of the order of distribution established by the Legislature. The ACE Companies

also requested (in the event that the Superior Court held that the Liquidator had the discretion to effect such a settlement) an opportunity to conduct limited discovery and present evidence on the issue of whether the Proposed Agreement was a reasonable exercise of the Liquidator's authority.

(4) Without allowing any discovery and without holding an evidentiary hearing, the Superior Court approved the Proposed Agreement in the Order and found that the Liquidator had the power to enter into the agreement "to protect the interests of the insureds and creditors" of Home. (Order Exhibit A at 2.)

(5) On May 6, 2004, shortly after receiving the Order, the ACE Companies filed a Motion for Interlocutory Transfer from Ruling with the Merrimack County Superior Court, and had planned to file a motion to stay the Court's Order with the Superior Court pending its interlocutory appeal.

(6) On May 7, 2004, Benjamin Moore filed a Rule 7 Notice of Mandatory Appeal directly with this Court, divesting the Superior Court of the jurisdiction to rule on a motion to stay.<sup>1</sup> As a result, the ACE Companies are seeking a stay from this Court rather than the Superior Court.

(7) Also on May 7, 2004, the Liquidator filed its Opposition to Motion to Transfer Question of Law For Interlocutory Appeal in the Superior Court and, in the opposition, agreed that the Order was final and appealable as of right. The Liquidator expressly stated in the opposition that he intended to begin to implement the Agreement

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<sup>1</sup> Pursuant to Rule 7, the ACE Companies are a party to this appeal by virtue of the Notice of Mandatory Appeal filed by Benjamin Moore. If this Court rules that the Benjamin Moore appeal does not divest the Superior Court of jurisdiction, the ACE Companies will promptly file a stay motion before Judge McGuire.

approved by the Court pending any appeal. *See* Liquidator's Opposition to Motion to Transfer, a copy of which is attached hereto as Exhibit B, at 2.

(8) A stay of the Order would preserve the status quo and the ultimate relief that the ACE Companies and Benjamin Moore seek in this appeal, which is a reversal of the Superior Court's decision that the AFIA Cedents may receive a multi-million distribution in violation of N.H. Rev. Stat. Ann. § 402-C:44. In the absence of a stay, the ACE Companies would suffer irreparable injury because the Liquidator (as he has already stated) will begin to implement the U.K. scheme of arrangement contemplated in the Proposed Agreement. That would include the initiation of proceedings in a court in England for approval of the scheme of arrangement, which, as noted above, would ultimately result in a payment to the AFIA cedents in violation of New Hampshire's mandatory order of distribution. The English court, in deciding whether to approve the scheme, would likely take into account the Superior Court's conclusion that the Liquidator's plan does not violate New Hampshire law. If, however, this Court agrees with the ACE Companies that the Proposed Agreement violates New Hampshire law, then the proceedings in the U.K. will have been unnecessary and wasteful. In order to avoid such a result, this Court should stay the Order while the appeal is heard.

(9) The ACE Companies will also be filing a motion with this Court for expedited consideration of the Order. However, in order to prevent the Liquidator from implementing the Proposed Agreement before even an expedited appeal may be heard, this Court should stay the Order pending appeal.

(10) The Liquidator will not be prejudiced by any stay entered by this Court as it can seek to move the June 2004 bar date for filing claims in the Home's liquidation, thereby obviating any need to immediately implement the Proposed Agreement.

WHEREFORE, the ACE Companies respectfully request this Court:

- A. To waive pursuant to Supreme Court Rule 7-A the requirement of filing a Motion to Stay in the Superior Court; and
- B. To stay the Superior Court's Order pending appeal; and
- C. To grant such other and further relief as this Court deems just and proper.


Respectfully submitted,

ACE Companies

By Their Attorneys

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Dated: May 11, 2004

By:   
Ronald L. Snow

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EXHIBIT

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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**

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 marshal 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



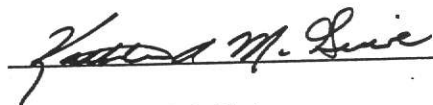
other Class V claimants who will receive nothing with or without the agreement.

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 27, 2004



Kathleen A. McGuire  
Associate Justice

EXHIBIT

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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

**LIQUIDATOR'S OPPOSITION TO MOTION TO TRANSFER  
QUESTION OF LAW FOR INTERLOCUTORY APPEAL**

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator of The Home Insurance Company, by his attorneys, the Office of the Attorney General, hereby opposes the Motion to Transfer Question of Law for Interlocutory Appeal filed by the ACE Companies (the "ACE Motion") in response to the Court's April 29, 2004 Order (the "Order") granting the Liquidator's Motion for Approval of Agreement and Compromise with FIA Cedents.<sup>1</sup> The Liquidator disagrees that the standards for interlocutory appeal in Rule 8 of the New Hampshire Supreme Court Rules ("Supreme Court Rules") are met. More importantly, the ACE Motion should be denied because the Order is final and appealable as of right.

**A. The Motion Is Unnecessary Because The Order  
Is Final and Appealable As Of Right.**

The underlying premise of the ACE Motion is that the Court's April 29, 2004 Order is interlocutory and therefore not subject to the usual appeal process, although they expressly "reserve their right to argue that the [Order] is final and may be appealed as a matter of right." ACE Companies' Interlocutory Appeal Statement

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<sup>1</sup> The Liquidator uses the terms defined in the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents.

("ACE Appeal Statement") at 1 n. 1. The Order, however, is final and appealable, and treating it as interlocutory would create uncertainty in the administration of the liquidation.

The Order finally resolved the question whether the Court would approve the proposed Agreement with the AFIA Cedents. The Court held that "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 40[2]-C:1, IV." Order at 2. Indeed, the ACE Companies acknowledge that the Court "granted the motion in its entirety." ACE Appeal Statement at 4. In light of the Order, the Liquidator will proceed to implement that Agreement, and there will be no further proceedings in this Court on the merits of the Agreement.<sup>2</sup> Accordingly, the Order is a final "decision on the merits" within Supreme Court Rule 3, and it is properly subject to appeal under Supreme Court Rule 7.

The ACE Companies contend that without an interlocutory transfer "they would not be able to appeal the Order until the conclusion of the liquidation." ACE Appeal Statement at 7. This is wrong because the Liquidator's motion for approval of the AFIA compromise addressed a discrete matter separate from the overall liquidation of Home. As the Liquidator would have responded if consulted under Superior Court Rule 57-A, rulings on the Liquidator's applications for approval of

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<sup>2</sup> The hearing scheduled for June 4, 2004 is to discuss the status of negotiations between the ACE Companies and the Liquidator, not the AFIA compromise, as that matter "has been decided favorably to the Liquidator." Order at 3.

agreements and other transactions are final and subject to appeal. A contrary position would mean that the Court's decisions could be subject to challenge years later, after the transactions at issue have been fully implemented. The need for the Liquidator and other parties to the agreements to be able to act on the Court's approvals and their reliance interests when they have so acted require that the Court's decisions be final and subject to appeal only within the thirty day period allowed by Supreme Court Rule 7.

"Final" orders in receiverships and bankruptcy proceedings are not limited to the order entered at the end of the proceeding. See, e.g., Tringali v. Hathaway Machinery Co., Inc., 796 F.2d 553, 558 (1<sup>st</sup> Cir. 1986) (citing cases). Insolvency proceedings involve many applications and individual controversies which need to be finally resolved long before the proceeding itself ends. In this context, "an order which disposes of a 'discrete dispute within a larger case' will be considered final and appealable." Id. (quoting In re American Colonial Broadcasting Corp., 758 F.2d 794, 801 (1<sup>st</sup> Cir. 1985)). The ACE Motion should be denied as unnecessary because they may appeal as of right from the April 29, 2004 Order.

**B. The ACE Companies' Proposed Interlocutory Appeal Statement Is Flawed.**

As the motion is unnecessary, and to provide an expedited response, the Liquidator does not address all of his many disagreements with the ACE Appeal Statement. Should the Court choose to consider the merits of the motion to transfer, however, the Liquidator notes three points:

1. The ACE Companies' proposed statement of the question inaccurately assumes facts and answers to the very legal issues to be decided. See ACE Appeal Statement at 5. The question presented assumes that the Agreement provides for a distribution to a subclass of Class V creditors as such and ignores the fact that the Agreement facilitates the collection of a significant asset that otherwise would be lost. If the Court were to endorse a statement of the issue, it should do so in a manner consistent with the Order, for instance:

Does the New Hampshire Insurer Rehabilitation and Liquidation Act, RSA 402-C:1, et seq., authorize the liquidator of an insolvent insurer to enter an agreement which enables the liquidator to marshall otherwise unavailable assets for distribution to creditors by providing for payments to certain creditors at no detriment to other creditors in the same class?

2. The "substantial basis for a difference of opinion" over the issue presented that is required by Supreme Court Rule 8(1) is lacking in this case. For the reasons set forth in the Liquidator's prior submissions, the Liquidator has clear statutory power to take necessary and expedient steps to collect debts and maximize the estate, including entry of the Agreement. See, e.g., RSA 402-C:25, VI, XXII. Further, the arrangement provided for in the Agreement is consistent with RSA 402-C:44 because the payments contemplated are administration costs within RSA 402-C:44, I.

3. Finally, the Liquidator has established that the Agreement benefits the liquidation and furthers the purposes of the statutes as described in the Order at pages 2-3. There is no substance to the ACE Companies' claims concerning discovery or an evidentiary hearing, and their assertion that the Court stated that it would permit them to conduct discovery and present evidence (ACE Appeal Statement at 3) is false. See

Transcript of April 9, 2004 Hearing at 19-20; April 9, 2004 Order ("If [the authority] issue is answered affirmatively, the Court will consider the agreement and whether further hearing on its approval is necessary.")

### CONCLUSION

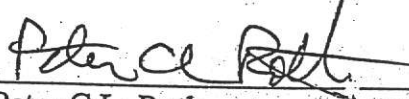
The Court should deny the ACE Companies' motion.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE  
COMMISSIONER OF THE STATE OF NEW  
HAMPSHIRE, SOLELY IN HIS CAPACITY AS  
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By his attorneys

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May 7, 2004

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

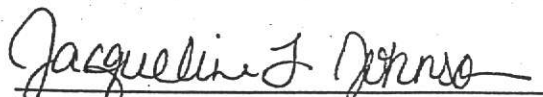
SUPERIOR COURT

In the Matter of the Liquidation of  
The Home Insurance Company  
Docket No. 03-E-0106

CERTIFICATE OF SERVICE

I, Jacqueline L. Johnson, do hereby certify that on May 7, 2004, I served a true copy of the foregoing upon parties identified on the attached Service List, by first class mail, postage prepaid.

Dated: May 7, 2004

  
Jacqueline L. Johnson



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The undersigned certifies that I served a copy of the Motion to Expedite Consideration of Appeal and to Suspend Rules, Motion to Waive filing of Motion to Stay in the Superior Court, Motion for Stay of Order Pending Mandatory Appeal on the following counsel via First Class mail unless otherwise indicated on May 11, 2004.

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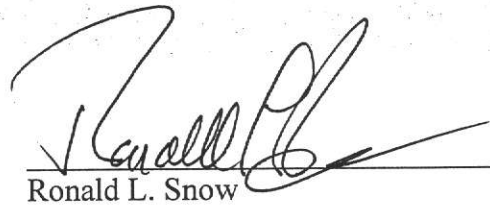
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