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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

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

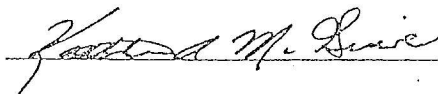
other Class V claimants who will receive nothing with or without the agreement.

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



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402-C:1

INSURANCE

Risk-based capital for life and health insurers, see RSA 404-F.  
Safety funds of fire insurance companies, see RSA 404.

ANNOTATIONS

Cited

Cited in *In re Beacon Health, Inc.*, 105 B.R. 178 (Bankr. D.N.H. 1989).

LIBRARY REFERENCES

New Hampshire Code of Administrative CJS  
Rules, Insurance § 119 et seq.  
Rules of the Insurance Commissioner, Ins  
201.01 et seq., New Hampshire Code of Ad-  
ministrative Rules Annotated.

402-C:1 Title, Construction and Purpose.

I. SHORT TITLE. This chapter may be cited as the "Insurers Rehabili-  
tation and Liquidation Act."

II. CONSTRUCTION: NO LIMITATION OF POWERS. This chapter shall not  
be interpreted to limit the powers granted the commissioner by other  
provisions of the law.

III. LIBERAL CONSTRUCTION. This chapter shall be liberally construed  
to effect the purpose stated in paragraph IV.

IV. PURPOSE. The purpose of this chapter is the protection of the  
interests of insureds, creditors, and the public generally, with minimum  
interference with the normal prerogatives of proprietors, through:

(a) Early detection of any potentially dangerous condition in an  
insurer, and prompt application of appropriate corrective measures, neither  
unduly harsh nor subject to the kind of publicity that would needlessly  
damage or destroy the insurer;

(b) Improved methods for rehabilitating insurers, by enlisting the  
advice and management expertise of the insurance industry;

(c) Enhanced efficiency and economy of liquidation, through clarifica-  
tion and specification of the law, to minimize legal uncertainty and litigation;

(d) Equitable apportionment of any unavoidable loss;

(e) Lessening the problems of interstate rehabilitation and liquidation  
by facilitating cooperation between states in the liquidation process, and by  
extension of the scope of personal jurisdiction over debtors of the insurer  
outside this state; and

(f) Regulation of the insurance business by the impact of the law  
relating to delinquency procedures and substantive rules on the entire  
insurance business.

HISTORY

Source. 1969, 272:1, eff. June 23, 1969.

INSURANCE

402-C:2 Persons  
may be applied to:  
I. All insurers who  
this state, and against  
now or in the future;  
II. All insurers who  
III. All insurers who  
IV. All other persons  
intent to do an insurance  
V. All nonprofit  
and all fraternal benefit

Source. 1969, 272:1, eff. Jan. 1, 1998.

Health maintenance

402-C:3 Definitions

I. "Commissioner" means  
insurance supervisory

II. "Receiver" means  
the context requires.

III. "Insurer" means  
or is licensed to do an  
authority of, or to liquid  
by, a commissioner. For  
under this section shall

IV. "Delinquency pro-  
an insurer for the pur-  
conserving such insur-  
14.

V. "State" means an  
Zone.

VI. "Foreign country

VII. "Domiciliary sta-  
rated or organized or,  
insurer has, at the com-  
amount of its assets  
policyholders and cred

VIII. "Ancillary sta-

IX. "Reciprocal sta-  
substance and effect  
402-C:55, 57, and 60

## HISTORY

Source. 1969, 272:1, eff. June 23, 1969.

## 402-C:24 Federal Receivership.

**PETITION FOR FEDERAL RECEIVER.** Whenever in the commissioner's opinion, liquidation of a domestic insurer or an alien insurer domiciled in this state would be facilitated by a federal receivership, and when any ground exists upon which the commissioner might petition the court for an order of rehabilitation or liquidation under RSA 402-C:15 or 20, or if an order of rehabilitation or liquidation has already been entered, the commissioner may request another commissioner or other willing resident of another state to petition any appropriate federal district court for the appointment of a federal receiver. The commissioner may intervene in any such action to support or oppose the petition, and may accept appointment as the receiver if he is so designated. So much of this chapter shall apply to a federal receivership as can be made applicable and is appropriate. Upon motion of the commissioner, the courts of this state shall relinquish all jurisdiction over the insurer for purposes of rehabilitation or liquidation.

**I. COMPLIANCE WITH FEDERAL REQUIREMENTS.** If the commissioner appoints a receiver under this section, he shall comply with any requirements necessary to give him title to and control over the assets and affairs of the insurer.

## HISTORY

Source. 1969, 272:1, eff. June 23, 1969.

**402-C:25 Powers of Liquidator.** The liquidator shall report to the court monthly, or at other intervals specified by the court, on the progress of the liquidation in whatever detail the court orders. Subject to the court's control, he may:

**I.** Appoint a special deputy to act for him under this chapter, and determine his compensation. The special deputy shall have all powers of the liquidator granted by this section. The special deputy shall serve at the pleasure of the liquidator.

**II.** Appoint or engage employees and agents, legal counsel, actuaries, accountants, appraisers, consultants and other personnel he deems necessary to assist in the liquidation. RSA 98 shall not apply to such persons.

**III.** Fix the compensation of persons under paragraph II, subject to the control of the court.

**IV.** Defray all expenses of taking possession of, conserving, conducting, liquidating, disposing of or otherwise dealing with the business and property of the insurer. If the property of the insurer does not contain sufficient cash or liquid assets to defray the costs incurred, the liquidator may advance the costs so incurred out of any available appropriation. Any amounts so paid shall be deemed expense of administration and shall be

repaid for the credit of the insurance department out of the first available moneys of the insurer.

V. Hold hearings, subpoena witnesses and compel their attendance, administer oaths, examine any person under oath and compel any person to subscribe to his testimony after it has been correctly reduced to writing, and in connection therewith require the production of any books, papers, records or other documents which he deems relevant to the inquiry.

VI. Collect all debts and moneys due and claims belonging to the insurer, wherever located, and for this purpose institute timely action in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts; do such other acts as are necessary or expedient to collect, conserve or protect its assets or property, including sell, compound, compromise or assign for purposes of collection, upon such terms and conditions as he deems best, any bad or doubtful debts; and pursue any creditor's remedies available to enforce his claims.

VII. Conduct public and private sales of the property of the insurer in a manner prescribed by the court.

VIII. Use assets of the estate to transfer policy obligations to a solvent assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under RSA 402-C:44.

IX. Acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon or otherwise dispose of or deal with any property of the insurer at its market value or upon such terms and conditions as are fair and reasonable, except that no transaction involving property the market value of which exceeds \$10,000 shall be concluded without express permission of the court. He also may execute, acknowledge and deliver any deeds, assignments, releases and other instruments necessary or proper to effectuate any sale of property or other transaction in connection with the liquidation. In cases where real property sold by the liquidator is located other than in the county where the liquidation is pending, the liquidator shall cause to be filed with the register of deeds for the county in which the property is located a certified copy of the order appointing him.

X. Borrow money on the security of the insurer's assets or without security and execute and deliver all documents necessary to that transaction for the purpose of facilitating the liquidation.

XI. Enter into such contracts as are necessary to carry out the order to liquidate, and affirm or disavow any contracts to which the insurer is a party.

XII. Continue to prosecute and institute in the name of the insurer or in his own name any suits and other legal proceedings, in this state or elsewhere, and abandon the prosecution of claims he deems unprofitable to pursue further. If the insurer is dissolved under RSA 402-C:23, he may apply to any court in this state or elsewhere for leave to substitute himself for the insurer as plaintiff.

XIII. Prosecute any action which may exist in behalf of the creditors, members, policyholders or shareholders of the insurer against any officer of the insurer, or any other person.



- XIV. Remove any records and property of the insurer to the offices of the commissioner or to such other place as is convenient for the purposes of efficient and orderly execution of the liquidation.
- XV. Deposit in one or more banks in this state such sums as are required for meeting current administration expenses and dividend distributions.
- XVI. File any necessary documents for record in the office of any register of deeds or record office in this state or elsewhere where property of the insurer is located.
- XVII. Assert all legal and equitable defenses available to the insurer against third persons. A waiver of any defense by the insurer after a petition for liquidation has been filed shall not bind the liquidator.
- XVIII. Exercise and enforce all the rights, remedies and powers of any creditor, shareholder, policyholder or member, including any power to avoid a transfer or lien that may be given by law and that is not included within A 402-C:30-32.
- XIX. Intervene in any proceeding wherever instituted that might lead to the appointment of a receiver or trustee, and act as the receiver or trustee whenever the appointment is offered.
- XX. Enter into agreements with any receiver or commissioner of any other state relating to the rehabilitation, liquidation, conservation or liquidation of an insurer doing business in both states.
- XI. Exercise all powers now held or hereafter conferred upon receivers under the laws of this state not inconsistent with this chapter.
- XII. The enumeration in this section of the powers and authority of the liquidator is not a limitation upon him, nor does it exclude his right to do any other acts not herein specifically enumerated or otherwise provided for as are necessary or expedient for the accomplishment of or in aid of the purpose of liquidation.

#### HISTORY

Source: 1969, 272:1, eff. June 23, 1969.

References in text. RSA 98, referred to in par. II, was repealed by 1986, 12:12, I, effective March 27, 1986. See now RSA 21-I.

#### CROSS REFERENCES

State personnel system, see RSA 21-I.

402-C:26 Notice to Creditors and Others.

#### NOTICE REQUIRED.

(a) GENERAL REQUIREMENTS. The liquidator shall give notice of the liquidation order as soon as possible by first class mail and either by telegram or telephone to the insurance commissioner of each jurisdiction in which the insurer is licensed to do business, by first class mail within this state and by airmail outside this state to all insurance agents having a duty under RSA 402-C:27, and by first class mail within this state and by airmail outside this state at the last known address to all persons known or

except that where justice requires the court may order them discounted at the legal rate of interest.

HISTORY

Source. 1969, 272:1, eff. June 23, 1969. 1998, 99:4, eff. July 19, 1998. Amendments—1998. Paragraph II: Substituted "the claimant" for "him" following "notice was mailed to" in the first sentence and "RSA 402-C:44, II" for "RSA 402-C:44, III" in the second sentence.

402-C:44 Order of Distribution. The order of distribution of claims from the insurer's estate shall be as stated in this section. The first \$50 of the amount allowed on each claim in the classes under paragraphs II, V, and VI except claims of the guaranty associations as defined in RSA 404-B, 404-D, and 408-B shall be deducted from the claim. Claims may not be cumulated by assignment to avoid application of the \$50 deductible provision. Subject to the \$50 deductible provision, every 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. ADMINISTRATION 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 liquidation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorney's fees.

II. POLICY RELATED CLAIMS. All claims by policyholders, including claims for unearned premiums in excess of \$50, beneficiaries, and insureds arising from and within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company, and liability claims against insureds which claims are within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company and claims of the New Hampshire Insurance Guaranty Association, the New Hampshire Life and Health Insurance Guaranty Association and any similar organization in another state. All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds or investment values, shall be treated as loss claims. That portion of any loss for which indemnification is provided by other benefits or advantages recovered or recoverable by the claimant shall not be included in this class, other than benefits or advan-

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gages recovered or recoverable in discharge of familial obligations of support or by way of succession at death or as proceeds of life insurance, or as gratuities. No payment made by an employer to an employee shall be treated as a gratuity.

### III. CLAIMS OF THE FEDERAL GOVERNMENT.

### IV. WAGES.

(a) Debts due to employees for services performed, not to exceed \$1,000 to each employee which have been earned within one year before the filing of the petition for liquidation. Officers shall not be entitled to the benefit of this priority.

(b) Such priority shall be in lieu of any other similar priority authorized by law as to wages or compensation of employees.

V. RESIDUAL CLASSIFICATION. All other claims including claims of any state or local government, not falling within other classes under this section. Claims, including those of any non-federal governmental body, for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction or proceeding out of which the penalty or forfeiture arose with reasonable and actual costs occasioned thereby. The remainder of such claims shall be postponed to the class of claims under paragraph VIII.

VI. JUDGMENTS. Claims based solely on judgments. If a claimant files a claim and bases it both on the judgment and on the underlying facts, the claim shall be considered by the liquidator who shall give the judgment such weight as he deems appropriate. The claim as allowed shall receive the priority it would receive in the absence of the judgment. If the judgment is larger than the allowance on the underlying claim, the remaining portion of the judgment shall be treated as if it were a claim based solely on a judgment.

VII. INTEREST ON CLAIMS ALREADY PAID. Interest at the legal rate compounded annually on all claims in the classes under paragraphs I through VI from the date of the petition for liquidation or the date on which the claim becomes due, whichever is later, until the date on which the dividend is declared. The liquidator, with the approval of the court, may make reasonable classifications of claims for purposes of computing interest, may make approximate computations and may ignore certain classifications and time periods as de minimis.

VIII. MISCELLANEOUS SUBORDINATED CLAIMS. The remaining claims or portions of claims not already paid, with interest, as in paragraph VII:

- (a) Claims under RSA 402-C:39, II;
- (b) Claims subordinated by RSA 402-C:61;
- (c) Claims filed late;
- (d) Portions of claims subordinated under paragraph V;
- (e) Claims or portions of claims payment of which is provided by other benefits or advantages recovered or recoverable by the claimant.

IX. PREFERRED OWNERSHIP CLAIMS. Surplus or contribution notes, or similar obligations, and premium refunds on assessable policies. Interest at the legal rate shall be added to each claim, as in paragraphs VII and VIII.

X. PROPRIETARY CLAIMS. The claims of shareholders or other owners.

#### HISTORY

Source. 1969, 272:1. 1975, Amendments—1998. Amended section generally.  
348:14. 1977, 499:1, eff. Sept. 12, 1977.  
1977. 1998, 99:1, eff. July 19, 1998.

*[RSA 402-C:50 effective until January 1, 2004;  
see also RSA 402-C:50 set forth below.]*

**402-C:50 Disposition of Records During and After Termination of Liquidation.** Whenever it appears to the commissioner that the records of any insurer in process of liquidation or completely liquidated are no longer useful, he may recommend to the court what records should be retained for future reference and what should be disposed of. The court shall enter an order thereon. The commissioner shall immediately submit to the state historical society a copy of the court order, and on written application of the historical society within 3 months after receipt from the commissioner of the copy of the court order, the commissioner shall deliver to the society such records which are to be disposed of as the society deems of historical significance and shall destroy the remainder whether or not the records have been photographed or otherwise reproduced. Until further order of the court, the commissioner shall keep all records the court orders preserved.