THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In the Matter of the Liquidation of
The Home Insurance Company

No. 2004-0319

<u>MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS</u>

NOW COMES the appellee, Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire ("Commissioner"), in his capacity as Liquidator (the "Liquidator") of The Home Insurance Company ("Home"), by and through counsel, the Office of the Attorney General, and submits this Memorandum of Law in Support of Motion to Dismiss. The Liquidator moves this Court to dismiss this appeal for lack of jurisdiction because both appellants lack standing to appeal.

INTRODUCTORY STATEMENT

The present appeal was brought by two intervenors in a matter concerning the liquidation of Home being conducted by the Commissioner pursuant to his statutory duties and powers provided in RSA 402-C. The appeal is of an order of the Merrimack Superior Court, McGuire J. (the "Order"), granting the Liquidator's motion for approval of an agreement and compromise with certain cedents (reinsureds) of Home reflected in a letter agreement ("Agreement") that will enable the Liquidator to bring a significant asset into the estate: recoveries on indemnities provided by one of the intervenors, the ACE Companies. The intervenors objected, contending that certain aspects of the Agreement that would result in money being paid to the cedents through a "scheme of arrangement" under English law were inconsistent with New Hampshire law. The Superior Court granted the Liquidator's motion, and the objectors appealed.

This motion is brought to dismiss the appeals because neither appellant is aggrieved by the Order. The ACE Companies are not aggrieved because no interest of theirs is harmed by the Order. They are potential class V creditors who are unlikely to receive a distribution from the Home estate in any event. Their opposition is prompted by the fact that they are a net debtor to the Home. The arrangement with the cedents does not, however, increase the ACE Companies' obligations; it is simply a means to ensure that they do not receive a windfall because of the liquidation. The other objector, Benjamin Moore & Co. ("BMC"), is not aggrieved because it is a potential class II creditor who will actually receive a substantial benefit, which would not otherwise be available, as a result of the arrangement facilitated by the Order. Its opposition is explicable only as an effort to advance the debtor interests of one of its corporate affiliates, which ultimately reinsures the ACE Companies' obligations to Home.

BACKGROUND

A. <u>The Liquidation</u>

On May 8, 2003, the Commissioner filed a petition to liquidate Home on grounds of insolvency with the Merrimack Superior Court pursuant to RSA 402-C. As Home is domiciled in New Hampshire, the Commissioner is the insurance regulatory official charged with overall responsibility for Home's worldwide liquidation upon appointment as Liquidator by the Superior Court. *See* RSA 402-C:21, 57, 61. Ancillary proceedings may be instituted in foreign countries and by insurance regulators in other states. *See* RSA 402-C:55, 61. On May 8, 2004, the Commissioner also sought and obtained the appointment of Joint Provisional Liquidators in respect to the Home under English law by the High Court of Justice in London. The Superior Court declared Home insolvent and appointed the Commissioner as its Liquidator under New Hampshire law in an Order of Liquidation entered June 13, 2003.

B. <u>The AFIA Treaties and the ACE Companies' Obligations</u>

Home had an unincorporated branch operation in the United Kingdom that wrote business as a participating member of the American Foreign Insurance Association, an unincorporated association of American insurers ("AFIA"), and then reinsured that business with AFIA as well as a number of other third party reinsurers. As pertinent here, a number of insurers (the "AFIA Cedents") ceded insurance risk to Home through its UK branch under certain reinsurance treaties (the "AFIA Treaties").

The Insurance Company of North America ("INA"), agreed in an Insurance and Reinsurance Assumption Agreement dated January 31, 1984 (the "INA Agreement") to assume and handle liabilities with respect to the Home UK branch business, including the AFIA Treaties. Affidavit of Jonathan Rosen ¶ 2 (May 27, 2004) ("Second Rosen Aff.") The AFIA Treaties were not formally transferred under English law, however, and remained an obligation of Home, through the Home UK branch, subject to the indemnities afforded by the INA Agreement as well as additional reinsurance protection.

As the Superior Court concluded, these non-novated AFIA Treaty exposures are now reinsured or indemnified by the ACE Companies, and these obligations are substantial assets of the Home estate estimated at $231 million. Order at 1. One of the objecting ACE Companies, Century Indemnity Company ("Century"), has succeeded to INA's obligations under the INA Agreement. Affidavit of Jonathan Rosen ¶ 4 (March 26, 2004) ("Rosen Aff."), Second Rosen Aff. ¶ 3. The ACE Companies acknowledge that, as of December 31, 2002, they had reported that the ultimate claims under the AFIA Treaties subject to the INA Agreement indemnity totaled $231 million. *Id.* ¶¶ 4, 6. (The ACE Companies have asserted that the number is now lower.)

In light of the insolvency and liquidation of Home, the AFIA Cedents' claims under the AFIA Treaties must be filed with the Liquidator. *See* RSA 402-C:37; 402-C:57. Further, the ACE Companies must make payments under the INA Agreement to the Liquidator. The agreement contains an insolvency clause specifically requiring that INA (now Century) is to pay obligations directly to Home or its Liquidator in the event of Home's insolvency. Rosen Aff. ¶ 5. *Cf.* RSA 402-C:36 and 405:49.

As the Superior Court noted, the ACE Companies' obligations are only collectible if and when the AFIA Cedents file and prosecute claims. Order at 1. Absent the Agreement approved by the Superior Court, the principal AFIA Cedents had informed the Liquidator they would not file claims, except to preserve offset rights, because they are unlikely to receive distributions from the Home estate. Rosen Aff. ¶¶ 5-6. Claims of the AFIA Cedents fall in the residual priority class, class V, under RSA 402-C:44, and it is likely that there will not be sufficient assets for Home to make a distribution to this class.

The Agreement that is the subject of this appeal addressed this claim filing problem (and others not pertinent to the standing question presented by this motion to dismiss) by providing that a portion of the recoveries on the ACE Companies' obligations would be paid to AFIA Cedents through a "scheme of arrangement" under UK law. As a consequence, AFIA Cedents would be more likely to submit claims to the Liquidator (equivalent to what would have been submitted absent Home's insolvency), and those claims, if allowed, would support recovery of the ACE Companies' obligations for the benefit of the Home estate and its policyholders and other creditors. *See* Order at 2.

C. <u>The Interests of the Objectors/Appellants</u>

1. <u>The ACE Companies</u>. Although the ACE Companies assert that they are creditors of Home, they are net debtors of the Home estate. The claims of the Liquidator against Century, ACE Property and Casualty Insurance Company and ACE American Reinsurance Company vastly exceed – by over $260 million – the claims of those companies against Home. Rosen Aff. ¶ 3. Only Pacific Employers Insurance Company ("PEIC") is a potential net creditor of Home Home, and those claims total approximately $25,000. *Id.* Even so, because it is "inextricably entwined" with the other ACE Companies, PEIC should similarly be treated as a debtor. *See* infra at 10-12. In any event, the ACE Companies' <u>potential</u> claims (they have yet to file a proof of claim) are under reinsurance agreements, which would fall in class V, and as the Superior Court noted, they are thus unlikely to receive a distribution from the estate. Order at 2-3.

The largest obligation of the ACE Companies to Home is the INA Agreement discussed above. Under that agreement, Century is obligated to pay the Liquidator for the allowed claims of AFIA Cedents. The ACE Companies thus stand to benefit if the AFIA Cedents do not submit and prove up claims because that will reduce Home's indemnity entitlements. Rosen Aff. ¶ 5. To secure their windfall, it is accordingly in the ACE Companies' self-interest to block the Liquidator from being able to effectively pursue the INA Agreement. The Superior Court found, however, that "while the agreement assures that the Ace Companies will not receive a windfall of $[231] million, it imposes no additional liability upon them than those they have already assumed." Order at 3. At the hearing, counsel to the ACE Companies conceded that the Agreement leaves the ACE Companies in the same

position that they would be in if the AFIA Cedents simply filed their claims without the Agreement. Transcript of Hearing on April 23, 2004, p. 54-57.

2. BMC. BMC asserts that it is a policyholder (class II) creditor of Home. As the Superior Court found, BMC as a creditor would not be harmed by the Agreement because as a class II claimant it would benefit from an increase in the amount to be distributed as a result of the Agreement. Order at 3. BMC also appears to have other interests. In its Rule 7 Notice of Mandatory Appeal, BMC disclosed that it is a wholly owned subsidiary of Berkshire Hathaway, Inc. ("Berkshire"). It is thus an affiliate of National Indemnity Company ("NICO"), another subsidiary of Berkshire. NICO has a reinsurance obligation to indemnify Century for losses arising from the AFIA Treaties through reinsurance protection NICO provided to Brandywine Holdings Corporation ("Brandywine"), another indirect subsidiary of ACE Limited and parent of Century. Second Rosen Aff. ¶¶ 3, 4. *See also* Berkshire website http://www.berkshirehathaway.com/subs/sublinks.html (showing links to subsidiaries BMC and NICO). Finally, INA was BMC's primary insurance carrier for over 20 years, and Century (and NICO) now bears those obligations. Second Rosen Aff. ¶ 5.

ARGUMENT

THE COURT SHOULD DISMISS THE APPEALS OF BOTH APPELLANTS BECAUSE THEY LACK STANDING TO APPEAL.

A party to a mandatory appeal may file a motion to dismiss based upon lack of subject matter jurisdiction. N.H. Sup. Ct. R. 25(7) (2004). The Liquidator respectfully submits that subject matter jurisdiction is lacking here because neither appellant has standing to appeal. It is well established that standing implicates the court's subject matter jurisdiction. *E.g.* Devere v. State, 149 N.H. 674, 676 (2003); Asmussen v. Commissioner, 145 N.H. 578, 588-89 (2000).[1] The question of standing is separate from the merits. Weeks Family Restaurant Corp. v. City of Dover, 119 N.H. 541, 545 (1979).

The undisputed facts demonstrate that neither the ACE Companies nor BMC has standing to appeal because they are not aggrieved by the entry of the April 29, 2004 Order. The ACE Companies admitted (and the Superior Court so found) that the Agreement does them no harm other than to deny them a windfall. BMC is a class II claimant. The Agreement was made expressly to benefit policyholders like BMC by bringing in an asset that absent the Agreement would become a windfall to the ACE Companies, so clearly, no harm will come to BMC as a result of the Order. If the appellants are not aggrieved persons they have no standing to appeal and the appeals should be dismissed. Further, the appellants are, in effect, debtors to the liquidation estate of Home, not creditors with a legitimate interest in the administration of the estate. While the appellants have cloaked themselves in creditor clothing, their conduct in the

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[1] The mere fact that the appellants were intervenors below, does not confer upon them appellate standing. *See* Bryant v. Allen, 6 N.H. 116, 118 (1833) ("every person whose rights are in any way involved in the proceeding . . .has a right to become a party . . . and to be heard [but only a] person or party aggrieved . . . may appeal therefrom"); *see also* In re Troutman Enterps, Inc., 286 F.3d 359, 363-64 (6th Cir. 2002); In re Public Serv. Co. of N.H., 88 B.R. 546, 557 (Bankr. D.N.H. 1988) (appellate standing is "separate question" from intervenor status).

liquidation is driven by more wolfish debtor appetites. Debtors to the estate do not have standing to appeal and the appeals should be dismissed.

I. To Have Standing To Appeal, The Appellants Must Be Aggrieved By The Order.

"In evaluating whether a party has standing to sue, [the courts] focus on whether the plaintiff suffered a legal injury against which the law was designed to protect." Lake v. Sullivan, 145 N.H. 713, 716 (2001) (quoting Roberts v. General Motors Corp., 138 N.H. 532, 535 (1994)). "A party will not be heard to question the validity of a law, or of any part of it, unless he shows that *some right of his* is impaired or prejudiced thereby." Asmussen v. Commissioner, New Hampshire Dept. of Safety, 145 N.H. 578, 587 (2000) (quoting Silver Bros., Inc. v. Wallin, 122 N.H. 1138, 1140 (1982)). The injury must be "direct and immediate." Appeal of Campaign for Ratepayers Rights, 142 N.H. 629, 632 (1998).

This appeal involves a challenge to the decision of the Superior Court approving an agreement in its supervisory capacity over the liquidation of Home pursuant to RSA 402-C:25. In proceedings that involve the interests of many persons, the Legislature and the Court have recognized the heightened appellate standing requirement as particularly important. *See* Caspersen v. Town of Lyme, 139 N.H. 637, 640 (1995) (zoning); Swan v. Bailey, 84 N.H. 73 (1929) (decedent's estate); Worthen v. New York C. & H. R. R., 77 N.H. 520, 522 (1915) (same). "Aggrievement is found when the appellant shows a direct definite interest in the outcome of the proceedings." Caspersen, 139 N.H. at 640. This is a particular application of the more general "legal interest" standard. *See* Weeks Family Restaurant Corp., 119 N.H. at 543; Blanchard v. B. & M. R.R., 86 N.H. 263, 264 (1933) ("person aggrieved" means those "who were interested in or affected by the proceedings" differently than the public generally); Bryant v. Allen, 6 N.H. 116 (person aggrieved in probate proceeding is one "whose rights may be

affected by the decree"). Federal bankruptcy courts have also applied a "person aggrieved" standard in determining standing to appeal. *E.g.* Davis v. Cox, 356 F.3d 76, 93 n.15 (1st Cir. 2004); Spenlinhauer v. O'Donnell, 261 F.3d 113, 117-118 (1st Cir. 2001); In re el San Juan Hotel, 809 F.2d 151, 154 (1st Cir. 1987); In re J.M. Wells, Inc., 575 F.2d 329, 331 (1st Cir. 1978).

The "person aggrieved" standard furthers the goals of the necessarily complex and fast moving insolvency process by limiting the appeal of issues to those for whom the problem really matters so that the proceeding may move forward. *See* RSA 402-C:1, IV(c) (purpose of statute is "the protection of insureds, creditors, and the public generally . . . through [e]nhanced efficiency and economy of liquidation"); RSA 402-C:29, II ("The liquidator shall reduce the assets to a degree of liquidity that is consistent with the effective execution of the liquidation as rapidly and economically as he can."); RSA 402-C:46, I (stressing expedition in completion of liquidation). Insolvency proceedings involve a "myriad of parties, directly and indirectly involved or affected by each order and decision of the [supervising] court, [which] mandates that the right of appellate review be limited to those persons whose interests are directly affected." In re el San Juan Hotel, 809 F.2d 151, 154 (1st Cir. 1987); *see* Kehoe v. Schindler, 221 B.R. 285, 287 (B.A.P. 1st Cir. 1998). The person aggrieved standard is "necessary to insure that [insolvency] proceedings are not unreasonably delayed by protracted litigation that does not serve the interests of either the [insolvent's] estate or its creditors." In re el San Juan Hotel, 809 F.2d at 154.

Thus, for a party to have standing to appeal from an insolvency proceeding, the order appealed from must in some way diminish the party's property, increase its burdens or detrimentally affect its rights. *See, e.g.*, Spenlinhauer, 261 F.3d at 118; Pignato v. Dein Host, Inc. (In re Dein Host, Inc.), 835 F.2d 402, 407 (1st Cir. 1987); In re el San Juan Hotel, 809 F.2d at 154. The party's interest cannot be remote or speculative. *See* Davis v. Cox, 356 F.3d 76, 93

& n. 15 (1st Cir. 2004) (no standing for party with contingent property interest). A very similar interpretation has been applied by this Court in analogous contexts. *See* Nautilus of Exeter, Inc. v. Town of Exeter, 139 N.H. 450, 452 (1995) (interest in zoning decision must not be remote — increased competition not sufficient to constitute legal harm); In re Estate of Kelly, 130 N.H. 773, 777-78 (1988) (will contestant must have "direct legal or equitable interest"); Swan v. Bailey, 84 N.H. at 73-74 (appellant not a person aggrieved and appeal must be dismissed "unless he has some interest which will be concluded" by the issue on appeal and he will be entitled to a distribution if he prevails).

II. The ACE Companies Suffered No Injury And Are Not A Person Aggrieved.

The ACE Companies conceded that they will not be harmed by the Agreement. *See* Transcript April 23, 2004 at 54-56; Order at 3. To the extent that they have a creditor interest in the estate, that interest is at a priority level which the ACE Companies counsel conceded is "not going to get anything . . .." Transcript at 54; Order at 2-3 (class V creditors will get nothing irrespective of the Agreement so members of that class not harmed by it). This does not support standing. *See* J.M. Wells, 575 F.2d at 331. The Order will not diminish the ACE Companies' property, increase their burdens or detrimentally affect their rights as creditors.

The real interest of the ACE Companies is in the protection of their windfall through the avoidance of their indemnity obligations, that is, to reduce their obligations as debtors of Home. As this Court held long ago, debtor's interests do not support appellate standing to challenge the administration of an estate. Worthen, 77 N.H. at 521 (Debtor "is not a party interested in the estate. On the contrary, its interests are wholly adverse to the estate. Its avowed purpose . . . is not that the estate be more properly administered here, but that any administration in this

jurisdiction be prevented.").[2] *See also* C-E Building Prods., Inc. v. Seal-Rite Aluminum Prods. of N.H., Inc., 114 N.H. 150, 151-52 (1974) (surety lacks standing to oppose judgment against principal on which surety must perform because judgment is not admissible against surety); In re el San Juan Hotel, 809 F.2d at 155 (party whose only interest in the case is as a future party defendant does not qualify as an "aggrieved person"); In re Multiple Service Indus., Inc., 46 B.R. 235, 236-37 (E.D. Wis. 1985) (guarantor of debtor's obligations is not person aggrieved with standing to appeal because the "interests of the creditors of the bankruptcy estate would be severely impaired if the bankruptcy laws served to protect a guarantor such as the appellant").

The protection of the ACE Companies' windfall through the avoidance of their obligations under the INA Agreement and its insolvency clause is wholly inconsistent with the interests that "the law was designed to protect." *See* Lake v. Sullivan, 145 N.H. at 716 (quoting Roberts v. General Motors Corp., 138 N.H. at 535); Nautilus of Exeter, 139 N.H. at 452 (desire to have protection from competition is not basis for standing). The New Hampshire Insurers Rehabilitation and Liquidation Act is designed to protect the interests of policyholders and creditors and promote expeditious and economical liquidation. *See* RSA 402-C:1, IV. Courts in other states have recognized that debtors, specifically reinsurers, lack standing to challenge actions under insurance statutes intended to protect the interests of policyholders or other creditors. *See* In the Matter of Electric Mutual Liability Ins. Co., 426 Mass. 1007, 1007 (1998); LaFarge Corp. v. Pennsylvania Ins. Dept., 690 A.2d 826, 838 (Pa. Cmwlth. 1997), rev'd on other grounds, 735 A.2d 74 (Pa. 1999). PEIC is the only ACE company that is actually

[2] As the Court noted, this rule against debtor standing to appeal has a long ancestry in law. *Id.* at 522, citing Veazie Bank v. Young, 53 Me. 555, 560 (1866), and Swan v. Picquet, 20 Mass. (3 Pick.) 443, 473 (1826) ("a party aggrieved must be one who is interested in the administration of the estate, and not a debtor merely. If one debtor has a right to appeal, every debtor must have the same right; which would be inconvenient.")

a potential creditor, and it is too "inextricably entwined" with the debtor ACE Companies to have independent standing. *See* Palmer v. U.S. Savs. Bank of America, 131 N.H. 433, 441-442 (1989). The ACE Companies do not have any protected interest that would be harmed by the Superior Court's Order, and their appeal should be dismissed for lack of appellate standing.

III. The ACE Companies Have No Standing To Advance The Purported Interests of Other Creditors.

The ACE Companies suggested below that they intervened because they believe that the allowance of the Agreement is unlawful and not in the best interests of the estate.[3] These issues, however, are not pertinent to non-creditors and do not affect a party, like the ACE Companies, that at best has a claim in a priority that will not be benefited or harmed in any way by the Agreement. If appellants such as the ACE Companies are allowed to advance their views of the interests of other persons, those persons' true interests may be disregarded. *See* Palmer v. U.S. Savs. Bank of America, 131 N.H. at 440 (no standing for party engaged in "economic antagonism" inimical to interests of other interested parties); Blanchard v. Boston & M. R.R., 86 N.H. at 265 (discussing practical problems of dueling advocates for the public interest); *accord* Kane v. Johns-Manville Corp., 843 F.2d 636, 644-45 (2d Cir. 1988). As the Superior Court noted, Home's principal class II creditors, the state guaranty funds, did not object to the Agreement because they understood that bringing a significant asset to the estate was in their best interests. Order at 2. It would be unfair to the guaranty funds and other class II creditors to have the ACE Companies usurp their position and purport to assert their interests for the ACE Companies' own self-interested purposes. It is to avoid this kind of unfairness and confusion that

[3] *But see* Transcript, April 23, 2004 at 57, 59-60 (counsel to the ACE Companies suggesting that Agreement might have been lawful and appropriate if they had been brought to the table).

a person must rely on its own interests, and not, abstractly, the interests of others. *See* Johns-Manville, 843 F.2d at 644-45.

IV. BMC Is Not A Person Aggrieved

As the Superior Court made clear, BMC is a class II creditor that will actually benefit from the Superior Court's authorization of the Agreement, and conversely, BMC will be harmed if it is successful with its appeal. *See* Order at 3. If BMC will benefit from the Agreement it certainly cannot fairly be said that BMC is also "aggrieved" by it, nor that BMC's interest as a class II policyholder creditor will be harmed or impaired. BMC will suffer no diminishment of its property, increase of its burdens or detrimental effect to its rights.

A possible explanation for BMC's illogical behavior is that BMC is not acting for its own interests, but instead for those of the corporate group of which it is a member. BMC is a subsidiary of Berkshire, which is also the parent of NICO, which is, in turn, a reinsurer of the INA Agreement obligations. Second Rosen Aff. ¶¶ 4-5. In addition, BMC's primary insurance coverage for 20 years was through INA, for which Century (and thus NICO) is now obligated. *Id.* ¶ 5; *see* Transcript April 23, 2004 at 15-16 & 60-70 (counsel to Liquidator raising issue of collusion between ACE Companies and BMC because of historical coverage and lack of disagreement on that point by BMC's counsel). These two handclasp factors indicate BMC's entanglement with the ACE Companies and may explain why BMC would embark on a course that is apparently contrary to its own economic interests. *See* Palmer, 131 N.H. at 441-442. Clearly, the Superior Court was not persuaded by the explanation given by BMC's counsel for its illogical posture in the case. *See* Transcript April 23, 2004 at 60-70; Order at 3 (BMC benefits from agreement).

In either case, however, BMC is not harmed. BMC benefits from the implementation of the Agreement, and whatever its real motivation, BMC cannot be relied upon to bring to this appeal the "concrete adverseness that is essential to proper judicial resolution of the issues." Weeks Restaurant Corp., 119 N.H. at 545. At most BMC can be heard to say that the Liquidator might "have done better." Transcript at 61. Yet BMC offers nothing concrete on this point and the Liquidator's judgment must stand. The vague notions of equity that BMC raises are not sufficient for standing and its appeal should be dismissed. *See* Austin Associates v. Howison, 288 B.R. 1, 5 (D. Me. 2002).

CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal for lack of jurisdiction.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, SOLELY IN HIS CAPACITY AS LIQUIDATOR OF THE HOME INSURANCE COMPANY,

By his attorneys

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/ s /

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June 1, 2004

I, Peter C.L. Roth, hereby certify that on June 1, 2004, two copies of this Memorandum of Law were served on counsel to the appellants, Ronald L. Snow, Esq., Orr & Reno, and Eric D. Jones, Esq., Downs Rachlin Martin PLLC, by first class mail, postage prepaid.

Dated: June 1, 2004

/ s /

Peter C.L. Roth

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

/ s /

Kathleen A. McGuire
Associate Justice