

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

2003 OCT -1 P 2:59

**RESPONSE TO LIQUIDATOR'S REPLY TO  
OPPOSITION TO MOTION FOR SCHEDULING  
ORDER OF CONFERENCE TO ADDRESS REMAND ORDER**

Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company, and ACE American Reinsurance Company (collectively, the "ACE Companies") respond to the Liquidator's Reply to the Oppositions by the ACE Companies and Benjamin Moore & Co. ("Benjamin Moore") to the Liquidator's Motion for Scheduling Order or Conference to Address Remand Order as follows:

1. The directive by the Supreme Court to provide a "sufficient evidentiary record" to decide the issues raised by the parties before this Court, but not earlier decided by this Court, will be a nullity if the ACE Companies and Benjamin Moore are not permitted reasonable discovery in order to test the factual allegations made in the affidavits already submitted to this Court. That is precisely what the Liquidator, once again, seeks to prevent the ACE Companies from doing.

2. The procedure proposed by the Liquidator does not differ materially from the truncated procedure previously followed by this Court in approving the Agreement based upon the unchallenged affidavits submitted by the Liquidator and arguments of counsel. Cf. Administrative Rule 15 (Offers of proof must be made with supporting

witnesses in the courtroom subject to cross-examination; where credibility is challenged, court may require witness testimony to be presented from the witness stand).

3. Each of the ACE Companies and Benjamin Moore was permitted to intervene in this liquidation, without objection by the Liquidator. See Order dated April 5, 2004. Explicit in the Court's Order of April 29, 2004, approving the Agreement, is its recognition that the ACE Companies and Benjamin Moore had properly intervened, and had fully participated in the proceedings.

4. The Liquidator did not contest the standing of the ACE Companies and Benjamin Moore to contest the Motion for Approval of the Agreement with the AFIA Cedents, and, in fact, assented to the Motions to Intervene. The Liquidator conceded the standing of the ACE Companies, on the record, before this Court. The Liquidator only contested the right of the ACE Companies and Benjamin Moore to appeal this Court's Order approving the Agreement, an argument rejected by the Supreme Court when it accepted the appeal.

5. Further, the Liquidator in his reply fails to acknowledge or address the holding in In Re Petition for Admission of Demers, 130 N.H. 21, 33 (1987) ("Once a party has been allowed to intervene as a party, he has all of the rights of a party in the case as it then exists and develops.") The ACE Companies, having been granted the right to intervene in these proceedings, became a party for all purposes with respect to these proceedings. Id; see also, 4 R. Wiebusch, New Hampshire Practice, Civil Practice and Procedure, § 6.23 (2d. Ed).

6. The two cases cited by the Liquidator in the Reply papers provide no guidance here. Ainsworth v. Old Sec. Life Ins. Co., 685 S.W.2d 583 (Mo. App.

1985), a Missouri court of Appeal decision is cited by the Liquidator in support of its argument that the ACE Companies should not be permitted to participate as intervenors in these proceedings. That case actually stands for the proposition that a "receivership" is not an "action" for purposes of intervention under Rule 52.12(a) of the Missouri Supreme Court Rules. *Id.* at 585, 586. That holding has no application in this case. In fact, on the question of the right of intervention, Missouri law provides quite the opposite of what the Liquidator advocates here. *In re Profl Med. Ins. Co.*, 92 S.W.3d 775, 778 (2003) (reversing judgment denying intervention, citing *Ainsworth v. Old Sec. Life Ins. Co.*, 685 S.W.2d 583, 586 (Mo. App. 1985)).

7. Moreover, it appears that subsequent decisions related to *Ainsworth* and decided by the same Missouri Court of Appeal in related proceedings were in effect overruled by the Missouri Supreme Court, and as such, the *Ainsworth* case should have no persuasive effect on this or any other court. See *Pulitzer Publishing Co. v. Transit Casualty Co.*, 43 S.W.3d 293 (2001), overruling *Ainsworth v. Dalton*, 694 S.W.2d 833 (Mo. Ct. App. 1985) (on grounds of right of appeal by intervenor in a receivership proceeding), a decision related to *Ainsworth v. Old Sec. Life Ins. Co.*, 685 S.W.2d 583, the authority cited by the Liquidator.

8. Similarly, the Liquidator's reliance on *Rand v. Merrimack River Savings Bank*, 86 N.H. 351 (1933) is misplaced. *Rand* involved the question whether a receiver appointed pursuant to Chapter 268 of the New Hampshire Public Laws in a bank receivership proceeding was subject to judicial control. *Id.* at 352. That issue has no application in our case given that this is not a receivership and a different statutory scheme altogether is at issue.

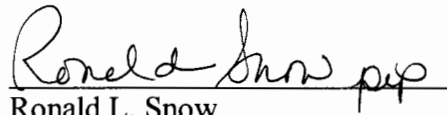
9. Accordingly, the ACE Companies have all the rights of a party in this proceeding, including, the right to reasonable discovery.

WHEREFORE, the ACE Companies respectfully request this Court:

A. Deny the Liquidator's Motion for Scheduling Order, to the extent that it seeks to have this Court follow the summary and truncated procedure that led to the remand by the New Hampshire Supreme Court; and

B. Grant such other and further relief as may be just and equitable.

Dated: October 1, 2004



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CERTIFICATE OF SERVICE

The undersigned certifies that I served a copy of the foregoing on the following counsel via First Class mail on October 1, 2004.

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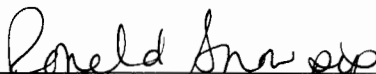
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