

MERRIMACK, SS.

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

INTERLOCUTORY APPEAL STATEMENT

I. Statement of the Case and Statement of Facts

This interlocutory appeal is taken by 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”), and Benjamin Moore & Co. (“Benjamin Moore”) from the ruling issued on October 8, 2004 by the Merrimack County Superior Court (McGuire, J.) (the “Order on Remand”) in favor of Roger Sevigny, Insurance Commissioner for the State of New Hampshire, as Liquidator (the “Liquidator”) of the Home Insurance Company (“Home”) that potential payments to certain insurers who had ceded insurance risk to the Home’s UK branch (the “AFIA Cedents”) are administrative expenses authorized under RSA 402-C:1, III and IV; RSA 402-C:25, IV, VI and XXII; and RSA 402-C:44, I. (Order on Remand at 14.) The ACE Companies and Benjamin Moore had intervened, without objection, in the Home liquidation proceedings to challenge the agreement between the Liquidator and the AFIA Cedents (the “Agreement”), pursuant to which the AFIA Cedents would be provided financial incentive for their filing and prosecution of claims in Home’s liquidation.

In its Order issued on April 29, 2004 (the “April 29 Order”), the Superior Court ruled that “[t]he 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

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statute to protect the interests of the insured and creditors.” (April 29 Order at 2.) The New Hampshire Supreme Court accepted an appeal from the April 29 Order.

After briefing and oral argument, the New Hampshire Supreme Court, in an Order dated September 13, 2004 (the “September 13 Order”), vacated the April 29 Order approving the Agreement, and remanded the case to the Superior Court. It specifically directed the Superior Court to consider five issues upon remand:

- (1) Whether the New Hampshire liquidation proceedings should be stayed pending the completion of the regulatory and judicial proceedings in the United Kingdom;
- (2) Whether the Superior Court has an independent obligation to assess the fairness of the Agreement;
- (3) Whether the intervenors have standing to contest the Agreement;
- (4) Whether the “Necessity of Payment Doctrine” or some other equitable doctrine authorizes the Liquidator or the Superior Court to vary the mandatory priorities set forth in RSA 402-C:44; and
- (5) Whether the proposed payments to the AFIA Cedents qualify as administrative expenses under RSA 402-C:44, I.

(September 13 Order at 2.)

Following conferences with counsel and the submission of papers regarding a draft order, the Superior Court issued the Order on Remand and ruled, *inter alia*, that (1) the ACE Companies and Benjamin Moore have standing to contest the Agreement; (2) consideration of a stay of the New Hampshire proceedings is not appropriate in the circumstances; (3) equitable doctrines such as the Necessity of Payment doctrine may not override a statute enacted on a

particular topic; and (4) it recognized an independent obligation to assess the fairness of the Agreement. (Order on Remand at 4-6, 10-13).

In response to the Supreme Court's specific inquiry whether the proposed payments to the AFIA Cedents qualify as administrative expenses under RSA 402-C:44, I, the Superior Court ruled that such payments would be administrative expenses authorized under RSA 402-C:1, III and IV; 402-C:25, IV, VI, and XXII; and RSA 402-C:44, I. (See Order on Remand at 6-10.) The parties agreed that the Superior Court's determination as to whether the proposed payments to the AFIA Cedents qualify as administrative expenses under RSA 402-C:44, I is a matter of law. (See Order on Remand at 6).

The Superior Court granted the ACE Companies and Benjamin Moore leave to appeal the legal issue of whether the proposed payments to the AFIA Cedents qualify as administrative expenses. (*Id.* at 14). The facts forming the basis of the Superior Court's Order on Remand in this case are summarized in said Order which accompanies this statement, pursuant to Supreme Court Rule 8.

II. Question of Law

The following controlling question of law is transferred in accordance with Supreme Court Rule 8 and RSA 491:17:

Whether, as a matter of law, the payments to the AFIA Cedents under the Agreement qualify as administrative expenses under RSA 402-C:44, I.

III. Statement of Reasons for Interlocutory Transfer

Rule 8 of the Supreme Court Rules requires "a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an interlocutory appeal may materially advance the termination or clarify further proceedings of the litigation, protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an

issue of general importance in the administration of justice.” N.H. Sup. Ct. R. 8(1)(d) (emphasis added). The requirements of Rule 8 are met here.

A. A Substantial Basis Exists for a Difference of Opinion on Whether the Proposed Payments to the AFIA Cedents Qualify as Administrative Expenses

Before the Superior Court and in the appeal to the Supreme Court, the Liquidator characterized the proposed payments to the AFIA Cedents as administrative expenses within the scope of RSA 402-C:44, I, which defines the “costs and expenses of administration” to include “the actual and necessary costs of preserving or recovering the assets of the insurer.” The ACE Companies and Benjamin Moore disputed the Liquidator’s casting of the proposed payments as administrative expenses. (*See* Order on Remand at 7, 9-10.) It is the ACE Companies and Benjamin Moore’s position that such a classification of the payments is not supported by the language of the statute, the applicable case law or public policy.

It is also the ACE Companies and Benjamin Moore’s position that in relying on RSA 402-C:25, IV and VI, and RSA 402-C:1, III and IV, in the Order on Remand the Superior Court simply restated its original (and now vacated) finding that the Proposed Agreement is “authorized under the broad array of powers granted the Liquidator under 402-C:25, and is consistent with the goals and purposes of the statute to protect the interests of the insureds and creditors.”

Accordingly, a substantial basis exists for a difference of opinion on the controlling question of law identified above.

B. Resolution of the Issue of Whether the Proposed Payments to the AFIA Cedents Qualify as Administrative Expenses Will Materially Advance the Termination of, or Clarify Further Proceedings in, the Subsequent Litigation

The Superior Court noted that a decision by the Supreme Court that the proposed payments to the AFIA Cedents do not qualify as administrative expenses would resolve this key

issue. (Order on Remand at 13.) It is also likely that a determination that the proposed payments are administrative expenses would help frame the issues, thus clarifying further proceedings and streamlining the litigation before the Superior Court.

C. Opportunity to Decide Issue of Importance

An interlocutory transfer would provide an opportunity for the New Hampshire Supreme Court to decide an issue that is of obvious interest to that Court, but was not decided on the previous appeal. The administrative expense provision is a core provision in the statute, and the issue of whether the proposed payments to the AFIA Cedents qualify as administrative expenses is of critical importance in this liquidation and future liquidations in New Hampshire. Also, since virtually every state liquidation statute refers to administrative expenses, a decision by the Supreme Court could have far-reaching consequences throughout the United States.

IV. Counsel

The names and addresses of the lawyers involved in this appeal and the names of their respective clients are as follows:

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V. **Record**

Copies of the applicable statutes, pleadings, affidavits, transcripts, and orders are contained in the Joint Appendix and the Liquidator's Appendix previously submitted to the New Hampshire Supreme Court. In addition, the following exhibits are annexed hereto:

Exhibit 1: Order on Remand.

Exhibit 2: Transcription of the oral argument before the Supreme Court on July 15, 2004.

Transfer Ordered:


Honorable Kathleen A. McGuire

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TABLE OF CONTENTS OF EXHIBITS
TO INTERLOCUTORY APPEAL STATEMENT*

1. Merrimack County Superior Court Order on Remand, dated October 8, 2004
2. Transcription of the oral argument before the Supreme Court on July 15, 2004

* The Joint Appendix in the Briefs of the ACE Companies and Benjamin Moore and the Liquidator's Appendix including citations to relevant statutes and case law previously submitted to the New Hampshire Supreme Court are incorporated by reference.