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THE STATE OF NEW HAMPSHIRE

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MERRIMACK COUNTY

SUPERIOR COURT

NH SUPERIOR COURT
MERRIMACK COUNTY
CONCORD, NH

In the Matter of the Liquidation)
of The Home Insurance Company)

Docket No: 03-E-0106

HEARING

Before: Honorable Kathleen A. McGuire,
Presiding Justice, held at
Concord, New Hampshire, on
April 23, 2004

* * *

APPEARANCES:

For the Liquidator: Peter C.L. Roth
Senior Assistant Attorney General
New Hampshire Attorney
General's' Office

J. David Leslie
Attorney at Law

(ACE Companies) Ronald L. Snow
Attorney at Law

Gail M. Goering
Gary Lee
Attorneys at Law

(Benjamin Moore) Andre D. Bouffard
Attorney at Law

I-N-D-E-X
(Continued...)

APPEARANCES:

Court Reporter: Michelle A. H. McGirr
CSR/RPR
Official Court Reporter

* * *

April 23, 2004

P R O C E E D I N G S

* * *

THE COURT: Okay. We're here on arguments on the liquidator's motion to approve the agreement.

Why don't -- I'd like to have you all identify yourselves for the record again. Why don't we start at that end and go this way.

MR. LESLIE: Good morning, Your Honor. My name is David Leslie. I'm from the Boston firm of Rackemann, Sawyer & Brewster. I'm special counsel to the liquidator of the Home Insurance Company.

THE COURT: Okay. Your last name is Leslie?

MR. LESLIE: L-E-S-L-I-E.

THE COURT: Okay.

MR. ROTH: Good morning, Your Honor.

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1 I'm Peter Roth with the New Hampshire Office of
2 the Attorney General and I'm counsel to the
3 liquidator.

4 MS. GOERING: Good morning, Your
5 Honor. My name is Gail Goering. I'm with the
6 law firm of Lovells and I represent the ACE
7 Companies.

8 MR. LEE: Good morning, Your Honor.
9 My name is Gary Lee. I'm with the New York
10 office of Lovells and I represent the ACE
11 Companies.

12 MR. SNOW: Ron Snow, Orr & Reno,
13 representing the ACE Companies.

14 MR. BOUFFARD: Good morning, Your
15 Honor. Andre Bouffard, Downs, Rachlin, Martin.
16 I represent Benjamin Moore and Company.

17 THE COURT: Okay. Mr. Roth, it's your
18 motion.

19 MR. ROTH: Good morning Your Honor.

20 The liquidator filed its motion -- his
21 motion to approve the agreement with the AFIA
22 Cedents to bring into the estate an important
23 asset. We have shown through our papers and are

1 prepared to argue today that statutory powers
2 exist for the Court to approve that agreement
3 and to approve the liquidator's entry into that
4 agreement. Statutory powers are contained
5 primarily in RSA 402-C:25, IV, VI, IX, XXII and
6 XXIII. In addition to these powers, there are
7 equitable powers that exist surrounding the
8 liquidation environment under the receivership
9 and those powers are specifically referenced in,
10 I believe, it's XXIII.

11 The ACE Companies have objected and we
12 believe that their objection is pretextual
13 because they have another interest that they're
14 protecting. Benjamin Moore has also objected
15 and Benjamin Moore is a creditor and we don't
16 dispute their standing as a creditor, but we
17 believe they're mistaken. We believe that ACE
18 Company -- or that Benjamin Moore has confused
19 the concept of an asset recovery with an asset
20 distribution.

21 I'm not certain how familiar the Court
22 is with the facts concerning the AFIA pool and
23 the AFIA Cedents and I can --

1 THE COURT: Let me just ask you this.

2 MR. ROTH: Certainly.

3 THE COURT: There are 30 AFIA Cedents,
4 is that correct.

5 MR. ROTH: (Conferring off the
6 record). Two hundred approximately.

7 THE COURT: Two hundred?

8 MR. ROTH: Yes.

9 THE COURT: Okay. Well, how many are
10 involved in this agreement or part of this
11 agreement?

12 MR. ROTH: Well, the agreement
13 involves -- I believe there are eight or nine.
14 And that they represent 75 percent of the AFIA
15 Cedents' claims and under English law -- English
16 insolvency law, that's a sufficient number to
17 bring it to a scheme and get a scheme approved
18 if I'm -- I think I'm speaking correctly. So
19 that if a scheme is approved in England, based
20 upon the votes of those nine, that scheme will
21 be binding on all other AFIA Cedents in
22 England. I hope I've not -- (conferring with
23 Attorney Leslie off the record).

1 Once the scheme is proposed -- I'm
2 told that I misspoke. Fifty percent in number
3 of the AFIA Cedents will have to vote in favor
4 of it.

5 THE COURT: Fifty percent of the 200?

6 MR. ROTH: Fifty percent of the 200.

7 And that those -- there will be a meeting of all
8 the AFIA Cedents convened in England where
9 they're permitted to vote for it.

10 THE COURT: Well, okay. Are there any
11 other members of the Home UK branch that are not
12 the 200 AFIA Cedents? Do you know what I'm
13 asking?

14 MR. ROTH: If we understand -- my
15 understanding of it is that they are not
16 involved in this problem, the scheme will only
17 concern AFIA Cedents. Other --

18 THE COURT: What about the non AFIA
19 Cedents?

20 MR. ROTH: Non AFIA Cedents are not
21 affected by the scheme. (Conferring with
22 Attorney Leslie off the record).

23 I'm sorry. There are no non AFIA

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Cedent creditors in the UK branch.

THE COURT: So the 200 are it?

MR. ROTH: That's correct.

THE COURT: Right, okay. And then 50 percent of the two -- even though only eight or nine of them are involved in the agreement, 100 of them will have to agree to the agreement before it can be effective?

MR. ROTH: To accept the scheme -- before the scheme can be effective.

THE COURT: Okay. Let me ask then why weren't all 200 asked to be made part of the agreement?

MR. ROTH: It's simply not practical to try to corral that many people into working out the details of the agreement. We spent -- as it was with just the nine -- a good six or eight months fairly intensely working with them, responding to their complaints and criticisms.

THE COURT: And they represent 75 percent of what?

MR. ROTH: Of the dollar amount of the AFIA Cedents.

1 THE COURT: Okay. All right. Go
2 ahead.

3 MR. ROTH: The Home insolvency created
4 a dilemma for Home with respect to the AFIA
5 Cedents. It split the asset of the reinsurance
6 that the Home was supposed to get from the
7 Century indemnity and CIRC through the bath
8 could instrument apart from the obligation of
9 the Home and it created a priority scheme and it
10 invoked sort of a panoply of problems for the
11 Home.

12 THE COURT: Okay. Go back again.
13 What created the problems?

14 MR. ROTH: The Home's insolvency.

15 THE COURT: Okay.

16 MR. ROTH: Yes. It inspired the AFIA
17 Cedents, who would not be able to share because
18 of their low priority of claim in the Home
19 estate, to explore other opportunities, other
20 avenues for recovery on their claims. Because
21 their claims were -- if they filed them -- would
22 be entitled to a very low priority and it was
23 their belief and it's our belief that that level

1 of priority is not going to experience any real
2 recovery out of this estate. So they looked at
3 what they call a cut-through, which is an avenue
4 directly to Century and CIRC leaving out the
5 Home. They considered what has been referred to
6 in the papers as ring fencing or walling off and
7 that means that they would identify certain
8 English assets and try to keep them in England
9 for distribution to English creditors like them.

10 THE COURT: Who did that? Who did
11 that?

12 MR. ROTH: The AFIA Cedents were
13 exploring this as a possibility and these were
14 discussed with the liquidator and the joint
15 provisional liquidators in England; and that's
16 established, I think pretty clearly, by the
17 affidavits that we had filed already. There was
18 also the issue of the claims nonfiling where in
19 order for the Home to enjoy the indemnity
20 recoveries from Century and CIRC, these Cedents
21 had to file claims and if there was nothing in
22 it for them, other than comparatively modest
23 amount of setoff recoveries, then they wouldn't

1 be interested in filing claims beyond that. And
2 we couldn't --

3 THE COURT: Is that an inference on
4 your part or is that something that has been
5 represented?

6 MR. ROTH: That was represented to us
7 by the AFIA Cedents that we were talking to.

8 THE COURT: Okay.

9 MR. ROTH: And that is established by
10 the affidavit of Vernot Varmut and also the
11 affidavit of Rittian Williams and also the
12 affidavit of Gareth Hughes (phonetic).

13 The other problem that sort of started
14 all this, last -- and started our thinking on it
15 -- last spring, what we call the question of
16 dual liquidation. We believed from the
17 beginning that there should be but a single
18 unitary liquidation and it should be held here
19 in Merrimack County Superior Court. I think
20 that what we were facing was the prospect of a
21 second liquidation of the Home for the benefit
22 of worldwide creditors in England and with -- as
23 an asset based property that had been identified

1 as potentially English property; and I know
2 there's some dispute about that, but it was a
3 concern of ours that there would be a separate
4 liquidation being conducted in England and that
5 it would involve -- it would be a costly and
6 difficult and complicated endeavor which would
7 require essentially a treaty between this court
8 and the English court.

9 With that in mind, with those problems
10 in mind, the liquidator set out to craft a
11 commercial solution. Because the prospect of
12 chasing AFIA Cedents over the cut-through
13 because we believe that the cut-through would
14 have been wrongful and we could and would have
15 litigated them if we had to. We also would
16 believe that the ring fencing question is wrong
17 and we would have litigated that. And rather
18 than litigate those things, we decided that we
19 would do our best to come up with a commercial
20 resolution to this problem. Hence the
21 agreement. The agreement operates to get the
22 claims filed by the AFIA Cedents and proved --
23 and proved means that they're put through the

1 crucible of the claims procedure that we have
2 already in place here and that the referee will
3 be overseeing and ACE will be invited to
4 participate in that because they are the agent
5 and Century and CIRC will be paying --
6 ultimately paying reinsurance claims on recovery
7 on those claims. Recoverables, that is, the
8 Century and CIRC indemnity would be brought into
9 the estate and would be shared under the
10 agreement. And we have submitted to the Court
11 with our last filing a chart showing the amount
12 of money that we think is out there and how it's
13 going to be split up. Also as part of the
14 agreement the Cedents agree not to do the
15 cut-through so we've settled their assertion or
16 their claim that we have a right to cut through
17 and they don't -- they're not going to ring
18 fence, they're not going to pursue ring fencing,
19 we've avoided and settled and compromised those
20 two rights they have and the right of the
21 liquidator to have to challenge those if need be
22 and I think the most important goal is that
23 we've established that there will be one

1 liquidation in New Hampshire with asset
2 repatriation from the United Kingdom to New
3 Hampshire and we will obtain the approval of the
4 English regulatory body, the FSA, and we will
5 have English court orders approving the scheme
6 and repatriation of the asset.

7 Those are conditions to the agreement.

8 THE COURT: As I understand it now,
9 all of the relevant bodies, I should say, in
10 England approve of this, is that correct?

11 MR. ROTH: Yes, that's correct. We
12 have submitted --

13 THE COURT: The provisional liquidator
14 has approved this?

15 MR. ROTH: The provisional liquidator
16 -- the joint provisional liquidators are both
17 parties to the agreement with the Cedents. And
18 the FSA, the Financial Services Administration
19 -- I believe I'm getting it right -- has also
20 indicated its nonobjection to the scheme and has
21 given the joint provisional liquidators
22 indicating his support for what we're doing here
23 today. We view this as a very significant

1 accomplishment actually because the FSA is very
2 stingy about its approval and it's very guarded
3 in the way it handles these things because it
4 has a very important role.

5 So we spent many hours and many
6 months, starting back really in August, working
7 on the agreement and meeting with the AFIA
8 Cedents.

9 THE COURT: Well, did you attempt to
10 get the ACE Companies on board or make them part
11 of the agreement?

12 MR. ROTH: There were discussions at
13 various points with the ACE Companies. They
14 were not specifically invited in to participate
15 in the agreement from before the English
16 proceeding began. Back in early May of last
17 year, our goal was to figure out a way to make
18 sure that there would be but one liquidation.
19 This agreement accomplishes that and it's a win
20 for the estate and the policy holders like
21 Benjamin Moore Corporation. We're kind of
22 puzzled why they wanted to object to it,
23 frankly. Our first -- sort of our single

1 thought is are they in collusion with ACE
2 because within Benjamin Moore's primary
3 insurance carrier for 20 some years was ACE.
4 But we thought that's -- it's a bit strange and
5 that's kind of unfair so what we thought is
6 they're probably acting in a principal basis but
7 they're just mistaken. And we know why ACE
8 objects because they're out to protect
9 themselves and protect their companies from
10 having to pay on the indemnity. If this
11 agreement doesn't take place, they get a very
12 nice windfall. If they do cut-throughs, they're
13 going to save some money, but if they don't do
14 cut-throughs and have to deal with us, they're
15 going to have to pay according to the --
16 according to the agreement that they reached
17 with the Home many years ago.

18 THE COURT: If this agreement is
19 approved, can this situation come up again
20 either in the UK or in the United States? In
21 other words, are there any other Home Cedents
22 that you anticipate will require incentives to
23 get them to file claims?

1 MR. ROTH: No, we don't. And that was
2 a point raised in one of the objector's papers,
3 whether there were other -- other low credit --
4 low priority creditors who could make the same
5 demand, why can't you pay us so we can file
6 proofs of claim. And that raises a question,
7 why are we discriminating in favor of the AFIA
8 Cedents? And the reason for that is very
9 simple. The AFIA Cedents have presented to us a
10 problem that nobody else could present. The
11 AFIA Cedents have presented this question of
12 cut-through and the question of ring fencing.
13 And the AFIA Cedents have presented the problem
14 of whether they're going to have one liquidation
15 or two and because of those differences, we felt
16 that it was appropriate to discriminate against
17 -- or we're not discriminating against anybody
18 actually -- and that's kind of the gist of it.
19 We're discriminating in favor of the AFIA
20 Cedents but nobody else gets hurt. The point --
21 you know, the case law, I believe it was Calcam
22 (phonetic), says some discrimination is okay as
23 long as it's in the best interest of the estate

1 and implicitly I believe is that it's equitable
2 and equitable is that nobody gets hurts. And in
3 this case the way we've structured it, nobody
4 gets hurt. In fact, the estate and the
5 creditors benefit from it.

6 Anyway, as to Benjamin Moore
7 Corporation, we'd prefer the second explanation,
8 that simply they're mistaken and their papers
9 make this really quite clear. On page eleven
10 they say what -- of their last brief, what new
11 capital are the AFIA Cedents bringing in to
12 justify giving them all this money? Well, the
13 new capital that they're bringing in or they're
14 helping us bring in is the indemnities from CIRC
15 and Century. Without the AFIA Cedents' claims
16 being made, we wouldn't be able to get those
17 indemnities and as you can see, that's a lot of
18 money. And without the AFIA Cedents' claims,
19 it's not there and that's the new money, the new
20 value, that's being brought into the estate.
21 And I don't know how to make it more clear.
22 They see it as an asset distribution which, of
23 course, they would object to. If this was

1 simply, all right, we're going to give these
2 guys a bunch of money and basically going to
3 come out of their pockets, I could understand
4 why that -- why that would be objectionable but
5 that's not what's happening. If the liquidator
6 had the 231 million dollars in his pocket and
7 for whatever reason there was some extortion and
8 demand and gave away 40 percent of it, he would
9 need a significant justification to do that;
10 and, you know, I'm not saying it couldn't be
11 justified in some circumstances, but I guess I
12 would concede that it won't -- these -- those
13 circumstances don't exist, but fortunately those
14 facts don't exist. We don't have the 231
15 million dollars in our pocket. We have to get
16 it from ACE and if we don't get it, we can't get
17 it -- we cannot get it from ACE if we don't have
18 the AFIA Cedents' claims to cooperate with. So
19 that's the new value that the AFIA Cedents bring
20 to the table.

21 THE COURT: Okay. But actually
22 they're only bringing seventy-two and a half
23 million, right? Because that's all that it will

1 go in for -- that's all that will be returned
2 for distribution, correct?

3 MR. ROTH: It actually works out to be
4 more than that because with the 72 point
5 something million, then there's -- which we get
6 as our share of what -- of the recoveries, but
7 we also are -- also because of the way the
8 agreement is structured, we also get our setoffs
9 and we get our costs of collection and
10 administering it.

11 THE COURT: Let me ask you about the
12 setoff. The setoff, as I understand it from
13 your chart is -- the setoff is 58 million for
14 the AFIA Cedents, correct?

15 MR. ROTH: I believe that's correct.

16 THE COURT: So if there's no
17 agreement, what will happen with that? Does the
18 Home keep that 58 million that it otherwise
19 would have had to pay any setoff?

20 MR. ROTH: If there's no agreement
21 what --

22 THE COURT: Or was that -- would that
23 have been a class V that the Home wouldn't have

1 paid anyway?

2 MR. ROTH: If there's no agreement,
3 the AFIA Cedents, to the extent that they file
4 claims, simply to get setoffs that will result
5 in some setoff money coming to the Home.

6 THE COURT: Some of that setoff money
7 will come --

8 MR. ROTH: Some of that setoff money
9 insures to the Home as a result of AFIA Cedents
10 filing claims simply to protect their setoff
11 position.

12 THE COURT: Okay. So in other words,
13 the AFIA Cedents don't have to file all the
14 claims, they can just file the ones where it
15 would be beneficial to them.

16 MR. ROTH: That's correct. Under the
17 agreement, they have to file all of their claims
18 and prove them. If there is no agreement, there
19 is some incentive, some small -- I shouldn't
20 call it small, I shouldn't understate it -- but
21 there is some incentive for them to file some of
22 their claims in order to recover their setoffs.

23 THE COURT: They could file only the

1 claims which they're entitled to setoffs and
2 they don't have to file all the claims.

3 MR. ROTH: That's correct.

4 THE COURT: Is that what you're
5 saying?

6 MR. ROTH: Yes.

7 THE COURT: Okay.

8 MR. ROTH: So if we had the money and
9 we gave it away without a good reason, that
10 would be a problem, but we don't have the money
11 and in order to get the money we need the AFIA
12 Cedents and that's the new value they bring.
13 That's where the misconception of Benjamin Moore
14 comes in. We don't have the money and we've
15 determined that a reasonable way to get it, a
16 reasonable way to bring the money into the
17 estate, is through the agreement. It brings the
18 claims in. In their approach, they go through
19 the crucible of the claims adjudication process
20 with the referee. This Court will then have
21 final say on those claims. And there was an
22 allegation made that this will result in
23 inflated claims being brought in and it will be

1 an abuse of the process and it will destroy the
2 ACE indemnities. This Court is not going to sit
3 around and approve inflated claims over the
4 objections of other parties. I mean, it's going
5 to be, I think, a fairly vigorous examination of
6 those claims.

7 THE COURT: All right. I just want to
8 see your position -- I just want to make sure I
9 understand your position of what the benefit of
10 this agreement is monetarily to the Home and the
11 Home's claimants. So you're saying that the
12 benefit is the 72 and a half million plus the 58
13 million in setoffs basically is what the Home
14 would have after the agreement as opposed to
15 what they would have absent the agreement.

16 MR. ROTH: That's correct. That's our
17 position and it's on the chart.

18 THE COURT: Yes.

19 MR. ROTH: There's a bit of
20 arithmetic. It shows us coming out with, what
21 was it, 66 percent or something like that --

22 THE COURT: Yes.

23 MR. ROTH: -- of the total.

1 THE COURT: Okay.

2 MR. ROTH: They also misperceive the
3 compromise. They suggest that it would be
4 compromising the AFIA Cedents' claims, but
5 that's not what it's all about. And we've said
6 that over and over in our pleadings in paragraph
7 13 of our motion and paragraph 21. It's a
8 compromise of the dispute over whether they can
9 cut through, it's a compromise of the dispute
10 whether they can ring fence and comprise over
11 whether there's going to be a second liquidation
12 in England. It's not a compromise of the
13 claims. It's very clear that the law in New
14 Hampshire provides ample authority for this
15 Court to approve the agreement. And there's
16 been a lot said in papers about whether the
17 statutory interpretation is fair, but I think
18 it's worth looking at the statutes in question.
19 The liquidator has the authority to pay costs of
20 bringing in assets and that's in Roman Numeral
21 VI. They have the authority to pay the costs of
22 the administration; he has the authority to
23 settle disputes and compromise debts for the

1 purpose of collecting; he has the authority to
2 use and dispose of property of the estate; he
3 has the mandate to liquidate assets rapidly and
4 economically; and he has the authority to do
5 essentially whatever is necessary to get the job
6 done in accordance with all the law. And I was
7 going -- I'd like to just read from the statute
8 a little bit, and I know it's maybe kind of dull
9 -- but under 402-C:25, IV, it says that the
10 liquidator may defray all expenses of taking
11 possession of, conserving, conducting,
12 liquidating, disposing of or otherwise dealing
13 with the business and property of the insurer.
14 And in Roman Numeral VI starting in the middle,
15 the liquidator can do such other acts as are
16 necessary or expedient to collect, conserve,
17 protect its assets or property, including sell,
18 compound, compromise or assign for purposes of
19 collection upon such terms and conditions as he
20 deems best any bad or doubtful debts and pursue
21 any creditors' remedies available to enforce his
22 claims.

23 THE COURT: Okay. Mr. Roth, your

1 characterizing what the liquidator wants to do
2 here as marshalling assets, but aren't you -- in
3 marshalling -- it's kind of maybe a unique
4 situation because in marshalling the assets
5 here, aren't you in effect though meddling with
6 the distribution scheme?

7 MR. ROTH: No, we're not, Your Honor.
8 The AFIA Cedents have level V claims and those
9 claims will be filed in the liquidation and
10 proved and then they will sit and they will
11 await distribution. As compensation to the AFIA
12 Cedents for bringing in the proofs of claim when
13 they weren't going to do it, we have agreed with
14 them to share the proceeds of the indemnity
15 recoveries. It's an inducement and it's
16 compensation for having done it. That is an
17 administrative claim, that is not a level V
18 priority claim and it's not a payment which
19 is -- which is in satisfaction of their level V
20 claims. And that's -- I mean, that is why this
21 doesn't upset the priority scheme. The priority
22 scheme does -- we can't pay their level V claims
23 ahead of everything else and I would add that

1 equitably speaking, even if that's what were
2 happening, we could probably do that but the
3 statute provides a way to do it so that we don't
4 have to do that. The statute says that the
5 liquidator and the Court can approve the
6 liquidator's use and disposal of assets. Well,
7 that includes any money in the estate and the
8 liquidator has the authority to bring -- to
9 defray the costs of collecting. One of the
10 costs -- one of the costs of collecting is the
11 demand made by the AFIA Cedents and that's what
12 we're paying. We're not paying their level V
13 claim.

14 THE COURT: Are the -- let me ask you
15 this. Looking at your chart again, are the AFIA
16 Cedents -- according to your chart, they would
17 have gotten 58 -- they're entitled to 58 million
18 as offsets, correct?

19 MR. ROTH: I don't think it's actually
20 that high, I think the 58 is -- is actually 49,
21 is that -- (conferring with Attorney Leslie off
22 the record). It's 50 -- I'm sorry, it is 58,
23 yes.

1 THE COURT: I mean, are they then
2 under this agreement only getting 14 and a half
3 million more than they would have gotten if they
4 filed their claims because they're going to get
5 72? I'm not --

6 MR. ROTH: That's an interesting
7 question. How the arithmetic works --

8 MR. LESLIE: No.

9 MR. ROTH: I'm told that's not true.

10 THE COURT: How does it work?

11 MR. LESLIE: Your Honor, the offset
12 rights are rights that the AFIA Cedents have to
13 offset against Home claims.

14 THE COURT: Yes.

15 MR. LESLIE: So Home has claims, the
16 AFIA Cedents file their claims, they have an
17 economic interest in filing claims to offset
18 Home's claims against themselves.

19 THE COURT: Right.

20 MR. LESLIE: That's what the 58
21 million dollars represents. So --

22 THE COURT: But they would be entitled
23 to that if they filed claims or no?

1 MR. LESLIE: No. In order to be able
2 to assert rights against the Home in this
3 proceeding, they need to file proofs of claim.
4 We expect they will file proofs of claim to
5 protect their offset rights. We doubt, and we
6 have been told by them, they will not invest
7 money in prosecuting claims beyond those offset
8 amounts because it's not in their economic
9 interest to do so. So in any event, we expect
10 them to file claims to protect their offset
11 rights. When they do that --

12 THE COURT: Which is 58 million
13 dollars, isn't it?

14 MR. LESLIE: Yes, Your Honor.

15 THE COURT: Okay. So that's -- that's
16 what I'm asking. If they're entitled -- by
17 filing proof of claims where they have these
18 offset rights for 58 million dollars, why is it
19 they're only getting under the agreement an
20 additional 14 and a half million dollars more
21 than they would be entitled to if they filed
22 claims where they have offset rights?

23 MR. LESLIE: Your Honor, what -- the

1 way the arrangement works is, first of all,
2 we're working from ACE's last report of the
3 amounts due, the 231 million dollars
4 approximately. So these numbers are numbers
5 based on the latest available reported
6 information. We chose to use that in order
7 to --

8 THE COURT: Let me see counsel up
9 here. I want to show this chart -- and maybe
10 because I'm not asking the question clearly --
11 and maybe if I show you the chart, okay?
12 Somebody want to come up from each party?

13
14 (Counsel approaching the Bench. Discussion at
15 the Bench off the Record)

16
17 THE COURT: Okay.

18 MR. ROTH: Thank you for indulging us
19 in that.

20 THE COURT: I think I should go back
21 to these criminal cases. (Laughter).

22 MR. ROTH: I'll take her 90 days if I
23 can leave now. (Laughter).

1 THE COURT: Okay.

2 MR. ROTH: Among the powers that are
3 in the statute is the power to exercise all
4 powers now held or hereafter conferred upon
5 receivers by the laws of the state not
6 inconsistent with this chapter. And the
7 enumeration of the powers and the authority of
8 the liquidator is not a limitation upon him nor
9 does it exclude his right to do such other acts
10 not herein specifically enumerated or otherwise
11 provided for as are necessary or expedient for
12 the accomplishment of or in aid of the purpose
13 of the liquidation.

14 So these powers, rather than the
15 cramped and pinched view that's presented by the
16 creditors, are really very broad and they bring
17 in, I believe, the entire messy tableau of
18 receivership and equitable principles and
19 bankruptcy law that's out there and has been out
20 there for a couple of hundred years going back
21 to old English courts. The statute is remedial
22 and it's supposed to be liberally construed.
23 It's not supposed to be cramped and say, well,

1 you know, we're going to limit everything by
2 this sort of parsed construction and make it
3 difficult for the liquidator to do things. It's
4 intended to work sort of in a liberal way in
5 order to bring in assets and enable the
6 liquidator to take advantage of all the tools
7 available to him. There's no evidence that the
8 Legislature intended to wipe all of the old
9 equity and all the old bankruptcy stuff off the
10 slate when it wrote this chapter. Instead, it's
11 clear that, I believe, that the Legislature
12 actually believed the opposite and that's why
13 they put in section 25, XXI and XXII. Among the
14 old powers that come out of the equity
15 jurisprudence and the old bankruptcy cases is
16 the ability to prefer certain old creditors and
17 reward them for bringing in new value. This is
18 Benjamin Moore's second error. Without the
19 Cedents' claims, there would be no referee in
20 Century and CIRC. That is the new value and I
21 spoke of that earlier. To quote justice Douglas
22 of the Supreme Court, who was the Supreme
23 Court's preeminent bankruptcy man for many

1 years, the rule is based on practical
2 necessity. Without the inducement, new money
3 could not be obtained. And that rule existed
4 for a long time and continues to exist. Though
5 there's a lot of academic sort of mind crunching
6 about it, it's still -- the Supreme Court its
7 last visit to it declined to say whether it was
8 good or not under the new bankruptcy code, but
9 that's neither here nor there for us because the
10 bankruptcy code is very different than the
11 insurance liquidation statute and, in fact, the
12 insurance liquidation statute is very much more
13 like the bankruptcy act of 1898 which operated
14 in the days when this new value exception really
15 was quite respected and respected by Justice
16 Douglas.

17 I'll just digress a little bit about
18 the absolute priority rule. The absolute
19 priority rule has its genesis in the requirement
20 that creditors be treated fairly and equitably
21 and this was -- it's a codification of the
22 concept of fair and equitable and I view, and I
23 think the law views, fair and equitable as is

1 anybody getting screwed here, and in this case
2 nobody is getting hurt. The ACE Companies are
3 being made to do what they're supposed to do,
4 the level V Cedents are not getting hurt and the
5 general creditors are actually being
6 advantaged. Benjamin Moore is being advantaged
7 by this arrangement so to say that it's fair and
8 equitable I think answers the question. Nobody
9 is getting hurt and, in fact, there's a benefit
10 coming into the estate.

11 Another doctrine that is still alive
12 and well, despite the K-Mart case, is the
13 necessity of payment doctrine. Now, K-Mart,
14 when I looked at it again, I discovered that at
15 least one, maybe two, parties have petitioned
16 for rehearing and rehearing in bank and people
17 who are close to the case tell me there's a very
18 strong likelihood there will be a petition for
19 certiorari. In any event, in that case it came
20 down to one issue for Judge Estabrook and that
21 is that there was really not enough necessity
22 shown in that case. He might have gone for it
23 if there was enough necessity. This court fully

1 has approved a necessity of payment doctrine
2 case and that was Judge Manias in the Tufts
3 case. And in the Tufts case in chapter -- or
4 paragraph five of the liquidation order it was
5 provided that doctors who were seeing patients
6 would be afforded preferential treatment for the
7 pre-liquidation claims because without them,
8 there would be no post-liquidation business
9 going on and patients wouldn't be treated. So
10 the necessity of payment doctrine is still doing
11 well and it has, in fact, been used by this
12 court in the not so distant past.

13 The necessity of payment doctrine has
14 also been used in the Second Circuit in
15 bankruptcy courts and the Third Circuit and
16 Sixth Circuit and I'm sure other places. In our
17 case, we have a necessity, again, maybe I'm
18 saying it often, but the necessity is without
19 paying the Cedents, the AFIA Cedents this money,
20 we cannot bring the asset in and that therein
21 lies the necessity. We could not come up with
22 another better way to do it that would be
23 consistent with the statutes mandated that we

1 efficiently and effectively and quickly
2 liquidate an asset. There is -- just give the
3 Court a reference to a law review which
4 discusses the necessity of payment doctrine if
5 it chooses to. In that law review, the author
6 says the necessity of payment doctrine can be
7 used to justify post-petition payments if they
8 will, quote, help to stabilize the debtor's
9 business relationships without significantly
10 hurting any party. And that's in the September
11 3 Marquette law review, page 1, 1989.

12 Finally, I guess I'd like to sum up by
13 pointing out that Benjamin Moore in its papers
14 has misleadingly misquoted and twisted the words
15 of 402-C:44 and particularly number one, I,
16 which provides the allowance of the
17 administrative expenses. In its brief on page
18 four, the last brief, the misquote implies that
19 since the costs that we're proposing aren't
20 listed in their list of their revised statute,
21 they cannot be administrative expenses. We
22 would caution the Court not to make the same
23 kind of mistakes that Benjamin Moore does. This

1 case is about bringing in assets. The statute
2 is much broader than the cramped view that is
3 given by these objections. And I'll read what
4 402-C:44,I actually says. This is perfectly
5 consistent with 402-C:25, IV, VI, IX and XXII
6 and XXV. And it says, the costs and expenses of
7 administration, including but not limited to the
8 following, the actual and necessary costs of
9 preserving and recovering the assets of the
10 insurer. That's what we're trying to do, we're
11 trying to pay the actual and necessary costs of
12 preserving or recovering the assets of the
13 insurer.

14 THE COURT: What if I decide in favor
15 of the ACE Companies, what's next?

16 MR. ROTH: I'm sorry?

17 THE COURT: If I decide in favor of
18 the ACE companies on this, what's next?

19 MR. ROTH: You decide -- aside from
20 the appeal?

21 THE COURT: Pardon me?

22 MR. ROTH: Aside from the appeal?

23 THE COURT: Yes. And the appeal would

1 be to the New Hampshire Supreme Court.

2 MR. ROTH: Correct.

3 THE COURT: All right.

4 MR. ROTH: We would lose the benefit
5 of the agreement.

6 THE COURT: No. Actually, I was
7 asking as a procedural matter.

8 MR. ROTH: Procedural, yes.

9 THE COURT: Okay. Thank you.

10 MR. ROTH: Thank you, Your Honor.

11 THE COURT: All right. Will there be
12 one person, one lawyer, speaking for the ACE
13 Companies?

14 MR. SNOW: Yes, Your Honor. That will
15 be Gail Goering.

16 MS. GOERING: The underlying problem
17 that the liquidator is faced with in this
18 instance is not unusual. Insurance insolvencies
19 unfortunately in the United States are not a new
20 or unique problem, particularly for companies
21 that wrote the kind of business that the Home
22 wrote. The fact that those insolvent companies
23 also did business outside of the United States

1 and had creditors throughout the world is also
2 not a unique problem. The fact that the New
3 Hampshire Insurers Rehabilitation and
4 Liquidation Act contains a priority of
5 distribution statute that affords a preference
6 to the claims of policy holders and places those
7 of other creditors, general creditors like
8 creditors for reinsurance, such as the AFIA
9 Cedents, below the claims of policy holders is
10 also not unique. Every state in the United
11 States has a priority of distribution scheme
12 similar to the one contained in New Hampshire's
13 code. The types of problems relating to assets
14 backing claims other than policy holder claims
15 like the ones that we're dealing with here are
16 not unique. This issue has been faced by
17 liquidators of insolvent companies in numerous
18 estates and particularly within the last 15 to
19 20 years. As large property casualty companies
20 became insolvent, liquidators have been faced
21 with this problem of, well, we have reinsured
22 creditors who have claims. There is reinsurance
23 that would pay on those claims if they would be

1 filed, but what do we do about that? Well, the
2 first way that liquidators tried to stop those
3 reinsured creditors and reinsurers who paid them
4 was to try and deny them the right of offset.
5 They said in courts, well, you, Your Honor, you
6 have equitable discretion to limit the
7 reinsurer's right of offset as a reinsured
8 creditor on the one hand and as a reinsurer of
9 the estate on the other, to just amounts owing
10 on a single contract and not across contract.
11 And the reason that you can do that, Your Honor,
12 they said, in New York, in Illinois, in
13 California was because that would protect those
14 reinsurer assets. Those would come into the
15 estate and they wouldn't be allowed to satisfy
16 the claims 100 percent through offset; and
17 uniformly throughout the United States, courts
18 will -- not at the trial level, I think at the
19 trial level the judges all said, sounds like a
20 great idea. It went up on appeal and uniformly
21 the courts held, no, the statute provides that
22 that is a right available to the creditor and
23 the offset and the fact that that company is

1 also a reinsurer and there's a great big asset
2 out there that could come into the estate if
3 that right were limited is not relevant. It's
4 what the statute says that matters. And that's
5 particularly true in the liquidation. That's a
6 distinction I'm going to come back to a number
7 of times because a liquidation's corporate
8 death. There's no ongoing business of the
9 company. The idea is not to try and take a sick
10 company and make it well, the idea is to divide
11 it up and end it. And you will see in the cases
12 as you go through them that there is a different
13 set of powers given to rehabilitators who are
14 trying to fix and manage a financially troubled
15 company than to liquidators who are simply
16 dividing up a dead company and distributing the
17 proceeds to the creditors.

18 THE COURT: Of the ACE Companies, how
19 many -- there are four of them, correct?

20 MS. GOERING: Yes.

21 THE COURT: How many are claimants?

22 MS. GOERING: They are all claimants.

23 THE COURT: Are they class IV or V

1 claimants?

2 MS. GOERING: Five general creditors.
3 They're claimants for reinsurance of Home just
4 like the AFIA Cedents. Some through AFIA, I
5 believe, and some through -- because everyone
6 participated in that -- and some through other
7 contracts of reinsurance that they had. Home
8 was their reinsurer.

9 THE COURT: Okay. So all are class V
10 claimants.

11 MS. GOERING: Yes.

12 THE COURT: Well, if the agreement is
13 approved, will these claims, class V claims, be
14 paid through offset?

15 MS. GOERING: For some companies, some
16 of their claims will be satisfied through
17 offset.

18 THE COURT: Why just some companies?

19 MS. GOERING: Because some companies
20 were not a re -- also a reinsurer of Home.

21 THE COURT: Okay. Go ahead.

22 MS. GOERING: The unique thing -- for
23 all of the things that are not unique about the

1 dispute that's before you today, the unique
2 thing is the way that the liquidator in this
3 instance is proposing to solve the problem. The
4 type of arrangement that the liquidator is
5 asking you to approve has never before -- before
6 any court considering any insurer insolvency in
7 the United States, of which I am aware, or
8 anyone that I know is aware, has been presented
9 with the type of unique solution that's being
10 proposed to you today. You're being asked to
11 justify this unique and unprecedented
12 arrangement for two reasons. One, you're told
13 this is in the best interests of the estate and
14 that's all that matters, and that seems to be in
15 the first brief that the liquidator filed was
16 the principal justification for approval of the
17 agreement because it would help the estate bring
18 money into the estate. Then once an objection
19 was raised in the next brief, there was the
20 statement, well, actually it doesn't really
21 violate section 44, the priorities in that,
22 because this is really just a class I
23 administrative expense of the estate. It's not

1 a payment of a claim.

2 I'd like to deal with actually the
3 last point -- the second point first because I
4 think it's the most easily dismissed. Section
5 44, the priority of distribution statute, is
6 mandatory. It's specific. The order of
7 distribution shall be as stated, it says, in the
8 statute. Every claim in one class shall be paid
9 before any other claim in the next class has
10 been paid. Moreover, no sub classes shall be
11 established. Section 44 and its priorities are
12 mandatory. It doesn't say except as ordered by
13 the court; it doesn't say except where it is in
14 the best interest of the estate to do something
15 else; it doesn't say or give discretion
16 anywhere. In light of that fact, and to try and
17 get around that fact, the liquidator makes the
18 argument that these are class I administrative
19 expenses of the estate, they're not a
20 distribution of an asset, they're not a payment
21 of a claim. There is a certain Alice in
22 Wonderland, Through the Looking Glass, Mad
23 Hatter's tea party element to this

1 characterization of what's really happening
2 here. I think Your Honor put her finger on it
3 before. In order for there to be any obligation
4 by the ACE Companies that reinsure Home to pay,
5 one thing must happen. First, there must be a
6 claim against Home. And if there's no claim
7 against Home, there's no obligation to pay. So,
8 I think it is creative to describe what's
9 happening under the agreement which depends on
10 the presentation of a claim, the approval of the
11 claim, the payment of a claim, the collection of
12 the money and then that money from those claims
13 then gets distributed to the AFIA Cedents as
14 anything other than a distribution of the assets
15 of the estate. The fact that arrangements for
16 the payment are being made pursuant to the
17 agreement doesn't somehow transform what's
18 really happening here into an administrative
19 expense and the Oxedine (phonetic) case we
20 referred to in our briefs, both in the first
21 brief and in the second brief, is instructive on
22 that. It makes clear that the fact that you can
23 characterize something as a settlement doesn't

1 somehow magically transform it into an
2 administrative expense, that you can
3 characterize it as a cost of collecting an asset
4 or preserving an asset. The argument was made,
5 this preserves the assets of the estate, doesn't
6 transform what it fundamentally is, which here
7 it's distribution of reinsurance collected on a
8 claim somehow magically changed that into
9 something akin to an attorney's fee, rent,
10 salaries, investigative costs. One is apples
11 and one is oranges. Whether -- so I think just
12 to leave that point, that a common sense view of
13 what administrative expenses is, common sense
14 reading of the types of things that are
15 contemplated by that and cannot be used to
16 justify the distribution of tens of millions of
17 dollars of money to creditors who would not
18 otherwise receive anything in the estate, that
19 doesn't turn it into an administrative expense.

20 Moving on to what was the primary
21 argument in the first brief, the question of
22 whether the agreement may be approved regardless
23 of what the insurer's rehabilitation and

1 liquidation says and specifically regardless
2 what section 44 says, so long as it's in the
3 best interest of the estate; and I take it from
4 what's been said in the briefs and here today
5 that in the best interests of the estate can be
6 read to mean financially advantageous. All of
7 the cases say that the statutory mandates
8 contained in the priority of distribution
9 statute may not be ignored in the interests of
10 equity. The Security Casualty case says that,
11 the Cornett case says that, the Aspen Indemnity
12 case says that. All liquidation of insolvent
13 insurance companies, all arguments rejected to
14 the effect that equity somehow justifies a
15 deviation from the statutory priorities. As I
16 mentioned before, liquidation is corporate
17 death. There's no reason to deviate because
18 you're not trying to fix anything. It is
19 certainly fair to say that you will be able to
20 find a few cases, one of the Executive Life
21 cases being an example, where in rehabilitation,
22 the Court has granted the rehabilitator greater
23 discretion to make decisions with regard to

1 statutory priority. And in that one case, the
2 issue there was a certain type of product that
3 the insurer had issued which was life
4 insurance. They present slightly different
5 issues than property casualty companies do
6 because they issue a very broad variety of
7 products, many of which have characteristics of
8 not a contract of insurance so much as an
9 investment product. And there was much
10 litigation in the rehabilitation of the
11 Executive Life as to how those various products
12 should be characterized. Some were held firmly
13 in the investment camp and therefore would go in
14 a general creditor priority. Others had
15 characteristics of an annuity and therefore were
16 held to be something that should be allowed
17 policy holder distribution. And in the one case
18 to which the liquidator refers, the court said,
19 well, in a rehab there is some leeway for these
20 products that don't anchor the spectrum, they're
21 not clearly policy and they're not clearly
22 investment for some settlements to be made as to
23 what that product is. It did not hold that the

1 rehabilitator in that case had discretion to pay
2 those claims as an administrative expense,
3 merely in light of the parameters that had been
4 established by case law to decide and settle
5 which camp, which type of claim, they will fall
6 into.

7 The liquidator has made a number of
8 arguments about relying on the New Hampshire Act
9 itself as to why the Act gives the liquidator
10 the discretion to do this agreement in the
11 liquidation context. There's references to the
12 preamble of the Act. I think that argument can
13 be fairly easily dismissed because the preamble
14 of a statute cannot trump specific provisions
15 contained later in the statute. There's
16 reference to certain sections of section 25
17 relating to marshalling assets, but there's
18 nothing in here that says you may solicit claims
19 against the estate and pay statutory -- outside
20 the statutory priority scheme in order to bring
21 those claims in to collect the asset that backs
22 that claim. There is always a cart and horse
23 problem in insurance insolvencies where

1 reinsurance is involved. Unless a claim is
2 made, there is no asset. The reinsurance
3 doesn't exist in a vacuum, as it has been talked
4 about, just this huge pool of money that only
5 needs to be tapped. It pays only if there are
6 claims.

7 THE COURT: Well, by the way, where is
8 this 231 million dollars now? Is it carried as
9 a liability on the ACE books?

10 MS. GOERING: My understanding of the
11 231 million dollars is that is a very
12 conservative estimate that was represented to
13 the Financial Services Authority in the UK that
14 represents, I think, based on some fairly old
15 reserving figures. So my understanding is the
16 number is considerably inflated or that's the
17 understanding that I have from my clients, that
18 it is a high number because it contains very
19 conservative estimates.

20 THE COURT: Well, whatever the number
21 is.

22 MS. GOERING: Reserves and IBNR.

23 THE COURT: Is it a liability on the

1 books?

2 MS. GOERING: It would be a liability
3 on the books, yes.

4 THE COURT: Are the reserves booked?

5 MS. GOERING: My understanding is that
6 they are.

7 THE COURT: What is the number that
8 you say it is?

9 MS. GOERING: Well, I would have to
10 consult or speak with my client as to whether
11 there has been a number actually put on it.

12 THE COURT: Why don't you --

13 MS. GOERING: (Conferring off the
14 record). What I understand is that the number
15 has been conservatively reserved for statutory
16 purposes. There is not a precise number, but
17 the -- as to how much less than that, a recent
18 calculation has not been done as to what the
19 most recent estimate would be of the actual
20 number; but it is the understanding of the
21 persons who are handling the business that the
22 number would be less than that number because
23 that is a very conservative estimate -- reserve

1 estimate.

2 THE COURT: So you're saying there
3 is -- the reserve is booked, but you don't know
4 how much?

5 MS. GOERING: No, this is the number
6 that is booked.

7 THE COURT: This number is reserved?

8 MS. GOERING: Yes.

9 THE COURT: Okay. Great. Thank you.

10 MS. GOERING: The point is that the
11 actual number of claims that are anticipated to
12 flow through would be --

13 THE COURT: Yes. Okay.

14 MS. GOERING: -- less than that.

15 THE COURT: That's all I was asking.
16 Okay. Thank you. Go ahead.

17 MS. GOERING: I believe I was on the
18 various statutory powers within section 25. It
19 is certainly fair to say that the liquidator has
20 certain powers under the Act. That's what it's
21 designed to do. An important premise, though,
22 is that the liquidator, like any other receiver,
23 steps into the shoes of the insolvent company.

1 It has all of the rights and all of the
2 obligations of the insolvent company except
3 where the statute gives it greater rights. In
4 this case, there are specific provisions in the
5 statute that need to be followed. General
6 equitable powers cannot override the specific
7 exceptions. As Judge Estabrook said in the
8 K-Mart case, which I would like to point out is
9 a Chapter 11 reorganization case, not a
10 liquidation case, what general equitable
11 doctrines do in insolvencies where there is a
12 statutory scheme, in that case the bankruptcy
13 code, in this case, the Act, is fill in the
14 gaps. But there is no gap here. Section 44 is
15 very clear. You cannot distribute assets of the
16 estate to creditors in a lower priority class
17 unless every creditor in the prior class has
18 been paid in full. You cannot create a sub
19 class of creditors within a single class and
20 it's quite clear that the agreement does both of
21 those things. It pays class V AFIA Cedents
22 before the policy holders are paid in full and
23 it pays the AFIA Cedents as part of class V

1 before it pays the remaining members of class V,
2 but can, the question is, the agreement be
3 justified because it nonetheless is in the best
4 interest of the estate.

5 THE COURT: Okay, but none of the --
6 the other class V members really are not going
7 to get anything, correct?

8 MS. GOERING: True.

9 THE COURT: With or without the
10 agreement?

11 MS. GOERING: That's right.

12 THE COURT: And the result of the
13 agreement is going to be that the class II
14 people are going to get more.

15 MS. GOERING: That is the argument,
16 yes.

17 THE COURT: Okay. And as for the ACE
18 Companies, I mean, aren't you going to be in the
19 same position with the agreement as you would be
20 if all of the AFIA Cedents filed all of their
21 claims?

22 MS. GOERING: Possibly.

23 THE COURT: How not so?

1 MS. GOERING: Well, it would depend on
2 the extent to which, absent the agreement, they
3 filed the same type of claim.

4 THE COURT: Well, I'm assuming they
5 filed all their claims -- if they filed all
6 their claims.

7 MS. GOERING: Well, I mean, all of
8 their claims is not as obvious a concept as it
9 might seem. These are claims, some of them
10 actual claims, that have been paid for which
11 they seek reimbursement, other claims would be
12 an estimated amount and then some claims would
13 be estimates of claims that may exist but they
14 don't know about, the IBNR claims, so that
15 amount -- the amount that is filed is subject
16 to --

17 THE COURT: Okay, but ACE --

18 MS. GOERING: It's not a clean number.

19 THE COURT: But basically it's true
20 that the ACE Companies are in the same position
21 with the agreement as they would be if the AFIA
22 Cedents filed their claims.

23 MS. GOERING: If the AFIA Cedents

1 filed the same claim without the agreement, yes.

2 THE COURT: Okay. And I guess I'm
3 concerned that if the agreement isn't approved,
4 that the ACE Companies may receive a huge
5 windfall.

6 MS. GOERING: It is always the case in
7 an insolvency that the priority of distribution
8 statute will have certain incentives for certain
9 creditors. Whenever they are not all treated in
10 one big class, ranking them by priority gives
11 incentives. That is not a problem unique to the
12 Home estate. That's been true in every large
13 insurance insolvency in the United States. With
14 knowledge of that problem, it's not unique.
15 Everyone who does this stuff knows it exists,
16 the priority of distribution scheme exists
17 nonetheless. It is certainly possible to adjust
18 the incentives of creditors in filing claims.
19 For example, you could make all creditors
20 general creditors. Everyone shares and shares
21 alike. That would affect the incentive of lower
22 priority creditors to file.

23 THE COURT: But how would that not

1 violate the statute?

2 MS. GOERING: If the Legislature
3 amended the statute to do that.

4 THE COURT: You couldn't --

5 MS. GOERING: You could not do that
6 now.

7 THE COURT: Is there any way that you
8 say that the liquidator could give incentives to
9 the AFIA Cedents to file their claims?

10 MS. GOERING: Well, one option that
11 could have been pursued and could be pursued is
12 for there to be a dialogue, not just between the
13 liquidator and the AFIA Cedents, but also with
14 ACE.

15 THE COURT: Settle the whole thing.

16 MS. GOERING: Speaking from my
17 practical experience, that is how this problem
18 ordinarily is addressed in insolvent estates.

19 THE COURT: Okay. And from your
20 perspective, if the agreement -- if I do approve
21 the agreement, what's next?

22 MS. GOERING: Beyond an appeal?

23 THE COURT: No. I want -- the appeal

1 -- and you agree it would be to the New
2 Hampshire Supreme Court.

3 MS. GOERING: Yes.

4 THE COURT: Okay. Okay. Anything
5 else?

6 MS. GOERING: I would like to
7 highlight again the fact that this is not a new
8 problem. The New Hampshire Legislature has the
9 power to fix the problem and it has not done
10 so. It would be wrong in my submission to
11 exercise a general equitable power to write
12 section 44 out of the code. It would be wrong
13 for the liquidator to be authorized to pay
14 creditors to file claims against the estate.
15 There's nothing unique really about AFIA. There
16 are other class V creditors who can make a
17 cut-through argument. That's not anything
18 unusual to English conditions. American
19 companies try to do it, too. It was -- it's
20 being litigated in Pennsylvania in the Alegent
21 (phonetic) estate right now.

22 THE COURT: Well, I asked the
23 liquidator that question because I was worried

1 about is this going to come up again. The
2 liquidator says, no, that this is a unique
3 situation. Do you know of any other specific
4 situations involving the Home?

5 MS. GOERING: I certainly do not know
6 it has been threatened because I'm not in the
7 liquidator's office. It is not unusual for
8 creditors of an insolvent company to try and
9 make an end-run around the insolvency or to
10 narrow -- ordinarily what happens in those cases
11 is that the liquidator goes to court and stops
12 it. There are certainly powers under the Act to
13 take those types of injunctive steps and for the
14 most part, those types of efforts have not been
15 successful.

16 THE COURT: Well, let's say that ACE
17 had been involved in the discussions in the
18 beginning and there had been a settlement
19 involving the ACE Companies. Could Benjamin
20 Moore come in and challenge that settlement?

21 MS. GOERING: I suppose it would
22 depend on the terms of the settlement, what was
23 settled and how. It is always possible for a

1 creditor of an insolvent company to challenge
2 actions taken by a liquidator of that company as
3 not being appropriate. That's true in a
4 settlement among parties here as it is in any
5 settlement that the liquidator enters into.

6 THE COURT: Okay.

7 MS. GOERING: That's all I have. I'm
8 happy to answer more questions if you have any.

9 THE COURT: Okay.

10 Mr. Bouffard.

11 MR. BOUFFARD: Thank you, Your Honor.
12 Let me start by responding to the liquidator's
13 suggestion that my client must be insane to be
14 paying me to be here today making this
15 argument. I don't think my client's insane.
16 There are several very good reasons why Benjamin
17 Moore is here today and probably the most
18 powerful one is illustrated by the chart that
19 the liquidator attached to his most recent
20 filing. The chart suggests to Benjamin Moore
21 that the ACE Companies are potentially on the
22 hook here for in excess of 200 million dollars
23 to the estate and rather than go to ACE and try

1 to negotiate a resolution of that liability at a
2 significant discount, the liquidator has made
3 this unprecedented arrangement with the AFIA
4 Cedents to pay them around 72 million dollars.
5 And when I do that math, it seems to me that
6 there's at least some room in there for a
7 discussion between the liquidator and ACE over
8 whether or not ACE is willing to pay more than
9 72 million dollars, the effect of which would be
10 to benefit my client.

11 THE COURT: So you're just disagreeing
12 with the terms of the agreement, then that the
13 liquidator could have done a better job to
14 marshal more assets?

15 MR. BOUFFARD: I think that is one
16 possibility here. One aspect of this that
17 concerns my client is that the liquidator may
18 very well do better.

19 THE COURT: The liquidator should have
20 gone to ACE and not included the AFIA Cedents.

21 MR. BOUFFARD: Well, the AFIA Cedents,
22 by virtue of the statute in this state, are
23 class V creditors.

1 THE COURT: Um-hum.

2 MR. BOUFFARD: That's the reality of
3 it.

4 THE COURT: So what? They should have
5 gone -- the liquidator should have gone straight
6 to the ACE Companies?

7 MR. BOUFFARD: Well, my client's not
8 an insurance liquidator, I'm not an insurance
9 liquidator. I'm looking at the perspective of
10 this as a creditor and so is my client. And
11 looking at that from that perspective it looks
12 to us like there may be an approach to this that
13 would be of greater benefit to policy holder
14 creditors like my client that would not violate
15 the statutory scheme.

16 THE COURT: You know that the AFIA
17 Cedents have to file claims, do you agree with
18 that, that everybody else seems to agree with,
19 before your client would get anything from ACE.

20 MR. BOUFFARD: Well, not in the
21 context of a commutation, Your Honor.

22 MS. GOERING: With respect, I would
23 disagree that it is essential that those claims

1 be filed.

2 THE COURT: In order to get ACE on the
3 hook.

4 MS. GOERING: Well, when you're having
5 a negotiated settlement --

6 THE COURT: No, I know.

7 MS. GOERING: -- there are -- many
8 things are possible.

9 THE COURT: Okay.

10 MR. BOUFFARD: So that's our first
11 concern. Our second concern as a policy holder
12 creditor is that it seems to us what the
13 liquidator is doing -- proposing to do something
14 here that is so extraordinary and so out of line
15 with the statutory mandates that by doing so he
16 may be, in fact, jeopardizing the recoverability
17 of this asset. Now I'm not saying that
18 definitively that that's what's going to happen,
19 but the ACE group has already indicated on the
20 record in this proceeding that it may take the
21 position in any litigation over -- that may take
22 place over the recovery of this reinsurance that
23 they may be in a position to make arguments in

1 defense of those claims by Home based upon the
2 actions that have been taken by the liquidator
3 here and that concerns me because my client's a
4 policy holder creditor and if the liquidator is
5 doing something that's going to jeopardize the
6 recovery of this asset, that's a big problem.

7 Thirdly, I'm not sure I'm persuaded
8 that the answer to the Court's question about
9 whether or not this is going to come up again
10 has really been addressed adequately here. I
11 think what I heard the liquidator's counsel say
12 is that this -- in response to the Court's
13 question is that this is a unique situation in
14 the sense that the AFIA Cedents are foreign
15 reinsurers of Home such that they are in a
16 position to make these arguments for ring
17 fencing for example. But I'm not sure that
18 there are not domestic reinsured of Home that
19 might be in the exact same position to make a
20 cut-through argument, for example, and it may be
21 that by approving this arrangement here, the
22 Court would be setting a precedent that would be
23 relied upon in other situations that could be

1 disadvantageous to policy holder creditors like
2 Benjamin Moore.

3 THE COURT: Okay.

4 MR. BOUFFARD: Now, in terms of the --
5 and I'm going to try to limit my remarks to the
6 point that the Court --

7 THE COURT: Just one second.

8 THE CLERK: My apologies, counsel.

9 (Conferring with the Court off the record).

10 Excuse me, counsel. Thank you.

11 THE COURT: Okay. Mr. Bouffard.

12 MR. BOUFFARD: In terms of the point
13 that the Court asked to us brief on the
14 existence of statutory authority for this
15 agreement, I don't think the Court really needs
16 to look beyond really the plain language of the
17 agreement between the AFIA Cedents and the
18 Home. That's in the record, it was attached to
19 the liquidator's motion to come to some fairly
20 quick conclusions about what exactly is this
21 agreement about. I couldn't agree more with Ms.
22 Goering's comments, there's a certain Alice in
23 Wonderland quality about the liquidator's

1 description about what he has done here and let
2 me just cite a few sections of that agreement
3 that I think would be illustrative of what I'm
4 trying to say here. In section 1.9.1, that's
5 really the core of this agreement, that's where
6 this scheme -- the core of the scheme is
7 described. And in section 1.9.1 of the
8 agreement, that deals with how the money is
9 going to be dealt with that is brought in by
10 virtue of this agreement and the agreement says
11 that the AFIA Cedent, as subject to subparagraph
12 1.9.7, are going to be distributed to the AFIA
13 Cedents. These are reinsurance recoveries that
14 they're going to be distributed. This is a
15 distribution of an asset of the estate, the
16 language of the agreement acknowledges that it's
17 a distribution. It goes on to say that these
18 assets of the estate are going to be distributed
19 according to the value of the claims against
20 Home. So how anyone could characterize this as
21 anything other than a distribution on an allowed
22 claim in this estate really escapes me and it
23 should escape the Court. That is exactly what

1 this is and there are other provisions of this
2 agreement that emphasize what I'm saying to
3 you. Section 1.9.7 deals with how costs are
4 going to be allocated in the context of disputed
5 claims proceedings. The liquidator's counsel
6 this morning has emphasized the point that these
7 claims are going to have to be adjudicated in
8 this court. These are claims in this case that
9 are going to be paid ultimately under this
10 agreement. Section 1.1.4 of the agreement deals
11 with a process for reducing the costs of
12 disputed claims proceedings. There is no
13 question that what this agreement envisions is
14 that there will be claims proceedings that take
15 place in this court followed by distributions to
16 those claimants that have their claims allowed.
17 So to suggest -- to suggest that this is not a
18 distribution that would come within the auspices
19 of section 44 of the statute really is quite
20 difficult to fathom.

21 I think that it is very notable that
22 the liquidator makes no reference in his
23 briefing or at least just very minimal reference

1 in his briefing and in his arguments to section
2 44 and to the other sections of the statute
3 around section 44 that deal with the
4 distribution that takes place in a liquidation
5 case like this; and in particular, no one has
6 referenced 46 of the statute. I think section
7 4, the section of the statute is very
8 important. It directs the court to pay
9 dividends -- dividends in a manner that will
10 assure the proper recognition of priorities and
11 the priorities that are referenced there are the
12 section 44 priorities. The liquidator I think
13 would simply have the court overlook that
14 section of the statute in the same fashion that
15 he would have the court overlook section 44.

16 The last point that I'd like to make,
17 Your Honor, because this has gone on for quite
18 sometime already now, is on the question of
19 whether or not these payments can be properly
20 characterized as administrative expenses. There
21 is a huge body of case law in the bankruptcy
22 arena that deals with this distinction and I
23 know that this case will give the Court an

1 opportunity to wrestle with that distinction a
2 bit. I think at the end of the day the Court
3 will find that it's not a difficult distinction
4 to make. The primary distinction between
5 administrative expenses and other things is that
6 the administrative expense payment is a payment
7 made on an obligation that arises
8 post-liquidation by definition. Attorney's fees
9 incurred in pursuing claims on behalf of the
10 liquidator, rent, insurance costs, these are all
11 obligations that arise in the course of the
12 liquidation. That is not what we are dealing
13 with here. We are dealing with pre-liquidation
14 claims of creditors that are -- that the
15 liquidator proposes to pay here. And on that
16 point I would just offer to the Court some very
17 good language in the K-Mart case that the
18 liquidator cited from Judge Estabrook, where an
19 argument was made in that case that necessity
20 payments to vendors of a Chapter 11 debtor could
21 be viewed as administrative expenses. And what
22 was most interesting to me about Judge
23 Estabrook's discussion is that he said, wrong,

1 these are the antitheses of administrative
2 expenses. These are payments on account of a
3 preliquidation claim. Those types of payments
4 are the opposite of administrative expenses.
5 And I would take the position here that
6 that's -- the same analysis applies here. What
7 the liquidator is wrong to do here is pay claims
8 which are really the opposite of administrative
9 expenses.

10 THE COURT: Okay.

11
12 (Conclusion of proceedings at this time)
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C-E-R-T-I-F-I-C-A-T-E

I, MICHELLE A. H. MCGIRR, Certified Shorthand Reporter in and for the State of New Hampshire, New Hampshire Superior Court, do hereby certify that the foregoing 70 pages are true and accurate to the best of my ability, skill, knowledge and belief.

DATED:

May 24, 2004 Michelle A. H. McGirr

MICHELLE A. H. MCGIRR

CSR/RPR
Official Court Reporter
New Hampshire Superior Court

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