

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

**REPLY BRIEF IN FURTHER SUPPORT FOR STAY OF
ORDER PENDING MANDATORY APPEAL PURSUANT TO RULE 7**

Defendants, Century Indemnity Company (“Century”), ACE Property and

Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, “the ACE Companies”), by their attorneys, Orr & Reno P.A., respectfully submit this reply brief in further support of their motion, pursuant to Rule 7-A of the New Hampshire Supreme Court Rules (the “Supreme Court Rules”), for a stay of the order dated April 29, 2004 (the “April 29 Order”) on the Liquidator’s Motion for Approval of Agreement and Compromise with AFIA Cedents pending the mandatory appeal by Benjamin Moore & Co. to the New Hampshire Supreme Court.

I. A Stay Pending Appeal Is Clearly Warranted Under The Circumstances

A. The Liquidator Has Misstated The Standard For Stays Pending Appeal

The Liquidator claims that “[a] party seeking a stay pending appeal must meet all the criteria for the issuance of injunctive relief.” (Response at 3.) However, there is no support for this statement in the New Hampshire statutes or case law.

The ACE Companies have moved for a stay pursuant to Rule 7-A of the Supreme Court Rules, which provides the procedural mechanism for stays pending appeal.

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According to the New Hampshire Supreme Court, the trial court has the authority to “make such orders and decrees as may be necessary for the protection and preservation of the subject matter of the appeal; and it may do anything that is necessary for the presentation of the case in this Court, or in furtherance of the appeal.” *Rautenberg v. Munnis*, 107 N.H. 446, 447 (1966). This includes the power to “preserve the status quo” pending appeal. *Id.* at 448. In determining whether a stay should be issued, the Supreme Court balanced the merits of the appeal against the “delay and inconvenience” to the opposing party. *Id.* In other cases, the Supreme Court has referred to the potential for irreparable harm to the movant. *See, e.g., In re Larry B.*, 125 N.H. 376, 377 (1984). That is why the ACE Companies, in their motion, discussed the merits of the appeal, the harm they would suffer in the absence of a stay and the lack of prejudice to the Liquidator.

The Liquidator instead argues that the ACE Companies’ request for a stay is governed by a three-part test under New Hampshire law for the granting of injunctions. The whole basis of the Liquidator’s claim is a First Circuit case, *Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13 (1st Cir. 2002), which has nothing to do with New Hampshire law. *Acevedo-Garcia*, moreover, discusses the standard for stays of injunctive orders, which the court notes, are evaluated under the same standard applied to injunctions. *Id.* at 16. From this faulty premise, the Liquidator draws an analogy to New Hampshire case law on injunctions. Those cases do not control, and the Court should exercise its authority under *Rautenberg* and other applicable precedent.

B. The Merits Of The ACE Companies’ Appeal Outweighs Any Delay Or Inconvenience To The Liquidator

The Liquidator virtually ignores the merits of the appeal, stating simply that the Court “has already determined the merits of the issue adversely to the moving party.”

(Response at 4; emphasis in original.) The Liquidator's statement is both obvious and beside the point. The issue before the Court on this motion is whether the appeal has merit. The ACE Companies pointed out in their motion that the appeal raises important issues relating to the violation of a New Hampshire statute, and that the resolution of the appeal will have an effect on liquidations in New Hampshire and elsewhere (as many other states have similar provisions). This Court has also recognized (and the Liquidator agrees) that the Proposed Agreement presents a question of first impression in New Hampshire. (*See* April 29 Order at 1; Liquidator's Response to the Motion to Expedite Appeal at 4.) Thus, the ACE Companies have shown that their appeal has merit (regardless of whether the Liquidator agrees with their position).

Furthermore, the merits of the appeal outweigh any prejudice to the Liquidator. The Liquidator asserts that a stay would "create confusion and uncertainty among the AFIA Cedents over the filing of their claims in the liquidation" and would delay the implementation of the Proposed Agreement for a year (which is what the Liquidator describes as the "likely time required for the appeal"). (Response at 7.) First, the alleged "confusion and uncertainty" cited by the Liquidator would exist even if the stay were denied because the AFIA Cedents cannot be sure whether the Proposed Agreement will survive the appellate process. Indeed, the whole point of the ACE Companies' motion for a stay is to make sure that the parties do not expend significant resources only to find out later that the Liquidator's scheme violates New Hampshire law. The Liquidator could also mitigate the alleged "confusion and uncertainty" by following through with his plan to extend the standstill with the AFIA Cedents to December 31, 2004. (*See* Liquidator's Response to the Motion to Expedite Appeal at 4.) Such an extension, along

with an extension of the bar date for the AFIA Cedents, would allow time for the Supreme Court to decide the issues on appeal.

Second, the Liquidator's assumption that the appeal would take a year is contrary to his response to the ACE Companies' motion for an expedited appeal. The Liquidator has requested that the Supreme Court give the ACE Companies' appeal a higher priority status. (*See id.*) Thus, even if the Supreme Court does not grant the expedited schedule requested by the ACE Companies, the time for deciding the appeal is likely to be much shorter than the Liquidator anticipates.

The Liquidator also maintains that a delay could affect his ability to collect from Century because of Century's "relatively thin capitalization." (Response at 7.) However, the Liquidator has not shown that the AFIA-related obligations will not be met, nor is there any reason to suggest that the ability of Century to satisfy its obligations will decrease over time.

The Liquidator further contends that the Court should require the ACE Companies to post a bond in the amount of \$231 million in the event that it grants the stay. As an initial matter, the Liquidator has not provided any relevant authority for his request. The Liquidator relies on RSA 491:18 and Superior Court Rules 161 and 163, none of which applies here. RSA 491:18 allows the court to impose "terms and conditions" with respect to orders staying the execution of judgments in a case. "Execution" clearly refers to an attempt to enforce a money judgment, and, therefore, RSA 491:18 does not apply to a situation where, as here, no money judgment was issued. Rules 161 and 163 are similarly inapposite because they relate to injunctions, and refer to the posting of a bond by the movant to cover "such costs and damages as may be incurred

or suffered by any party who is found to have been wrongfully enjoined or restrained.” Super. Ct. R. 161(c). As noted above, a stay pending appeal is not the equivalent of an injunction.

Even if there were any authority for the posting of a bond, the Liquidator has not offered any concrete basis for his request. Rather, the Liquidator claims that a bond of \$231 million is warranted because of the “risk” that a stay “could” cause the AFIA Cedents to withdraw from the Proposed Agreement as well as the “risk” that the Liquidator “may be unable to collect the indemnity obligations of the ACE Companies” at the conclusion of the appeal. (Response at 7-8.) The ACE Companies have already demonstrated above that the granting of a stay will not affect the Liquidator’s ability to collect on any obligations owed by the ACE Companies. Also, the Liquidator has not shown that any of the AFIA Cedents plan to withdraw in the event of a stay. Indeed, it is telling that the filing of the ACE Companies’ appeal — which involves some delay and uncertainty as well — has not caused the AFIA Cedents to withdraw from the scheme. To the contrary, the AFIA Cedents and the Liquidator are negotiating for an extension of the standstill agreement to December 31, 2004.

C. The ACE Companies Have Shown That They Will Suffer Actual And Imminent Harm If A Stay Is Not Issued

The Liquidator argues that the ACE Companies have failed to show that they will suffer “actual and imminent” harm in the event the Court denies their motion for a stay. (Response at 4.) If, however, the Court does not preserve the status quo by ordering a stay pending appeal, the harm to the ACE Companies would be clear.

The Liquidator castigates the ACE Companies for stating that they will oppose the scheme of arrangement in England, but the ACE Companies would be derelict if they

were to simply allow the Liquidator to have his way in the U.K. proceeding. By necessity, the ACE Companies must oppose the scheme and they will incur substantial costs in doing so. If the scheme is approved, the ACE Companies will also expend significant resources in the process of determining whether the AFIA Cedents' claims should be paid. Both of these efforts — *i.e.*, the participation in the U.K. proceedings and the claims determination process — would be wasted if the Supreme Court were to find that the Proposed Agreement violates New Hampshire law.¹ Given that the Liquidator's scheme presents novel issues, the ACE Companies respectfully submit that the prudent approach would be for the Court to issue a stay pending a determination of the appeal.

II. The Liquidator's Objections To The Extension Of The Claims-Filing Deadline Are Meritless And Cannot Be Squared With His Effort To Extend The Standstill Agreement

The Liquidator asserts a variety of objections to an extension of the claims-filing deadline for the AFIA Cedents. Those objections, however, do not withstand scrutiny.

The Liquidator argues that, pursuant to RSA 402-C:26, the deadline for filing of claims must be within one year of the liquidation order. (Response at 8.) It is ironic that the Liquidator is now insisting on a strict reading of the mandatory language in RSA 402-C:26, but earlier argued that the Court had the power to vary from the mandatory language in the New Hampshire priority statute in order to serve the "best interests" of the estate. The Liquidator has failed to cite any case law from New Hampshire holding that the Court cannot make any adjustments to claims-filing deadline. If, however, the Court is concerned about RSA 402-C:26, it could leave the bar date in place, but toll the

¹ The Liquidator's efforts in the U.K. proceedings and claims determination process would similarly be wasted in the absence of a stay.

running of the AFIA Cedents' time during the pendency of the appeal (from the date the appeal was filed on May 10, 2004 to June 13, 2004). After the appeal is decided, the AFIA Cedents would then have the same amount of time from the filing of the appeal to the June 13, 2004 bar date (*i.e.*, 34 days) to file their claims in the Home liquidation.

The Liquidator further asserts that any extension of the deadline must apply to all potential claimants, rather than just the AFIA Cedents, and he cites several alleged problems that would result from a global extension (such as cost, an increase in claims and the effect on guaranty funds). (*See* Response at 8-9.) However, there is no reason to extend the deadline for all claimants, and RSA 402-C:26(II) expressly states that “[t]he liquidator may specify different dates for the filing of different kinds of claims.” Thus, the supposed impediments cited by the Liquidator pose no real obstacles.

Finally, the Liquidator has already set the stage for an extension of the claims-filing deadline by reporting that he is in discussions with the AFIA Cedents for an extension of the standstill agreement between the parties. In light of those negotiations, the Liquidator should also be willing to extend the claims-filing deadline.

Conclusion

Accordingly, the ACE Companies respectfully request that the Court enter an

Order:

- A. Staying its April 29 Order pending appeal; and
- B. Granting such other and further relief as this Court deems just and proper.

Respectfully submitted,

ACE Companies

By Their Attorneys

ORR & RENO, P.A.

One Eagle Square

P.O. Box 3550

Concord, NH 03302-3550

(603) 224-2381

Dated: May 28, 2004

By: *Ronald L. Snow*
Ronald L. Snow

CERTIFICATE OF SERVICE

I, Ronald L. Snow, certify that I served by hand-delivery and/or first-class mail a copy of the foregoing Reply Brief on May 28, 2004 to the attached service list.


Ronald L. Snow

SERVICE LIST

Sherilyn R. Young, Esquire
Rath, Young & Pignatelli, P.A.
One Capitol Plaza
Box 1500
Concord, NH 03302-1500

Andrew W. Serell, Esq.
Rath, Young & Pignatelli, P.A.
One Capitol Plaza
Box 1500
Concord, NH 03302-1500

Michael Ram, Esq.
Levy, Ram & Olson, LLP
639 Front Street, 4th Floor
San Francisco, CA 94111-1913

Michael Sandler, Esq.
Sandler, Ahearn & McGonaughty, PLLC
1200 Fifth Avenue, Suite 1900
Seattle, WA 98101-3135

Richard V. Wiebusch, Esq.
Hale and Dorr, LLP
60 State Street
Boston, MA 02109

Connie Rakowsky, Esq.
ORR & RENO, P.A.
One Eagle Square
P.O. Box 3550
Concord, NH 03302-3550

Martin P. Honigberg, Esq.
Sulloway & Hollis, PLLC
9 Capitol Street – Box 1256
Concord, NH 03302-1256

Gregory W. Swope, Esq.
Swope & Nicolosi, PLLC
58 Pleasant Street
Concord, NH 03301

Peter C. L. Roth, Esq.
Senior Assistant Attorney General
Environmental Protection Bureau
New Hampshire Department of Justice
Attorney General's Office
33 Capitol Street
Concord, NH 03301-6397

J. David Leslie, Esq.
Rackermann, Sawyer & Brewster
One Financial Center
Boston, MA 02111

Suzanne M. Gorman, Esq.
Environmental Protection Bureau
New Hampshire Department of Justice
Attorney General's Office
33 Capitol Street
Concord, NH 03301-6397

Lucy J. Karl, Esq.
Shaheen & Gordon, PA
107 Storrs Street
Box 2703
Concord, NH 03302

Thomas Wamser, Esq.
ACE USA Legal Dept.
1601 Chestnut Street, T1 15A
Philadelphia, PA 19102

Eric Haab, Esq.
Lovells
330 N. Wabash Avenue
Suite 1900
Chicago, ILL 60611

Gail M. Goering, Esq.
Lovells
One IBM Plaza
330 N. Wabash Avenue
Suite 1900
Chicago, Illinois 60611

Pieter Van Tol, Esq.
Lovells
900 Third Avenue
16th Floor
New York, NY 10022

Eric D. Jones, Esq.
Downs, Rachlin, Martin PLLC
199 Main Street
Box 190
Burlington, VT 05402

Salvatore Tollis, Esq.
Lovells
900 Third Avenue
New York, NY 10022

Gary Lee, Esq.
Lovells – 16th Floor
900 Third Avenue
New York, NY 10022

Adam Goodman, Esq.
Lovells
One IBM Plaza
330 N. Wabash Avenue
Suite 1900
Chicago, Illinois 60611

Andre Bouffard, Esq.
Downs, Rachlin, Martin, PLLC
199 Main Street
Box 190
Burlington, VT 05402