

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**

**OBJECTIONS AND RESPONSE OF THE  
ACE COMPANIES TO THE LIQUIDATOR'S MOTION FOR  
APPROVAL OF AGREEMENT AND COMPROMISE WITH AFIA CEDENTS**

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") hereby submit their Objections and Response to the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents (the "Motion"), as more fully set forth in the accompanying Memorandum and Affidavits of Michael Durkin ("Durkin Affidavit") and Richard Hacker, Q.C. ("Hacker Affidavit").

**I. Interest of the ACE Companies**

1. The ACE Companies, each of which is incorporated in Pennsylvania, are creditors of Home Insurance Company in Liquidation ("Home") and will be submitting proofs of claims for current and future liabilities owed by Home under various reinsurance contracts. (Durkin Aff. ¶ 4) In total, the claims by the ACE Companies against Home exceed \$13 million. (Durkin Aff. ¶ 5)

2. Century is also a reinsurer of Home. Pursuant to the Insurance and Reinsurance Assumption Agreement dated January 31, 1984 (the "Assumption Agreement") referenced in ¶ 3 of the Motion, Century has assumed Home's liabilities on contracts of reinsurance that Home

issued to various insurance companies through its U.K. branch office (the "AFIA Cedents").<sup>1</sup> (Durkin Aff. ¶¶ 6-10) The Assumption Agreement also vested Century with corresponding obligations and rights to investigate, adjust, and settle claims by AFIA Cedents against Home. (Durkin Aff. Ex. A ¶ 3) The Assumption Agreement is governed by New York law, and disputes between Home and Century must be resolved by arbitration in New York. (*Id.* ¶ 7, 10)

## **II. The Liquidator's Proposed Agreement Violates the Order of Distribution Scheme in the New Hampshire Insurers Rehabilitation and Liquidation Act**

3. Section 402-C:44 of the New Hampshire Insurers Rehabilitation and Liquidation Act (the "Act") provides that:

The order of distribution of claims from the insurer's estate shall be as stated in this section. . . .[E]very claim in each class shall be paid in full or adequate funds retained for the payment before the members or the next class receive any payment. No subclasses shall be established within any class.

N.H. REV. STAT. ANN. § 402-C:44 (emphasis added). Section 402-C:44 defines the relevant classes as follows: Class I - expenses of administering the liquidation; Class II - policyholder claims; Class III - federal government claims; Class IV - wages; and Class V - a "residual classification," which includes unsecured creditors under reinsurance agreements such as the ACE Companies. (*Id.*)

4. Like the ACE Companies, the AFIA Cedents also are reinsurance creditors of Home and thus are Class V creditors. The Liquidator's proposed agreement with the AFIA Cedents (the "Agreement") at issue in the Motion guarantees the AFIA Cedents a distribution equal to 50 percent of the reinsurance recoveries attributable to their proofs of claim (less expenses of collection), an amount the Liquidator estimates at \$50 million (Motion ¶ 14).

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<sup>1</sup> The Assumption Agreement is between Home and Insurance Company of North America ("INA"). As explained more fully in the ACE Companies' Memorandum, Century is the successor to INA with respect to the Assumption Agreement by virtue of a corporate restructuring under Pennsylvania law. Century subsequently was acquired by the ACE Group in 1999.

However, the Liquidator acknowledges that creditors in classes above Class V are unlikely to receive payment of their claims in full and indeed that other Class V creditors are unlikely to receive any distribution from the Home estate. (Motion ¶ 6) Therefore, if approved, the Agreement would violate the mandatory provisions of § 402-C:44 by elevating the claims of a small group of Class V creditors (the AFIA Cedents) over the higher classes of creditors whose claims will not be paid in full (according to the Liquidator's Motion). Moreover, in direct contravention of § 402-C:44, the Liquidator's proposal creates a subclass of Class V (the AFIA Cedents) creditors who will receive preferential treatment over other Class V creditors such as the ACE Companies.

5. The Liquidator's proposal also violates ¶ (w) of the Court's Order of Liquidation dated June 13, 2003, which directs the Liquidator to administer the claims of residents of foreign countries in accordance with New Hampshire's priority statute.

### **III. The Liquidator's Proposal Violates the Provisions of § 402-C:61 Relating to Ancillary Receiverships in Foreign Countries**

6. Section 402-C:61 of the Act provides:

If an ancillary receiver in another state or foreign country, whether called by that name or not, fails to transfer to the domiciliary liquidator in [New Hampshire] any assets within his [or her] control other than special deposits, diminished only by the expenses of the ancillary receivership, if any, the claims filed in the ancillary receivership, other than special deposit claims or secured claims, shall be placed in the class of claims under § 402-C:44, VIII.

N.H. REV. STAT. ANN. § 402-C:61 (emphasis added). The Liquidator's proposal violates this section because it would allow an ancillary foreign receiver to distribute assets other than "special deposits" to certain Class V creditors rather than relinquishing control of such assets to the Liquidator for distribution pursuant to the priority scheme in the Act, § 402-C:44.

#### **IV. The Liquidator's Efforts to Justify His Violation of the Act are Meritless**

##### **A. The Liquidator Has Nono Authority to Violate the Act on the Basis of an Alleged "Compromise"**

7. The Liquidator attempts to justify his violation of § 402-C:44 by characterizing the Agreement as a "compromise" of an alleged dispute with the AFIA Cedents with regard to their rights to "wall off" Home's "U.K. assets." The provisions of § 402-C:44, however, are mandatory. The order of distribution statute was established by the New Hampshire legislature and embodies clear policy judgments that neither the Court nor the Liquidator has discretion to compromise, negotiate, ignore or override. The case law leaves no question that the Liquidator lacks authority to "compromise" this core aspect of the governing liquidation statute.

##### **B. There Is No Credible "Threat" or "Dispute" Purportedly Justifying the Liquidator's "Compromise"**

8. The core of the Liquidator's argument is that some (unidentified) AFIA Cedents allegedly have threatened to petition the U.K. courts to establish a separate U.K. liquidation for Home pursuant to which any existing "U.K. Assets" of Home would be "walled off" and distributed exclusively to the U.K. creditors of Home. Although the Liquidator states that this threat lacks "any legal merit," he nonetheless asserts that the purported dispute must be "compromised" to avoid "complex, protracted and costly litigation." (Motion ¶¶ 7-8)

9. As established in the Hacker Affidavit, the Liquidator's claimed concern over complex or protracted litigation arising out of an effort by some AFIA Cedents to "wall off" English assets for their exclusive benefit is wholly unfounded. Such an action would fly in the face of well established case law prohibiting such a proposal, and would be summarily dismissed by an English Court, with the Liquidator entitled to reimbursement of most of its fees and costs. (Hacker Aff. ¶¶ 42-44.) The alleged dispute that justifies the Liquidator's motion is thus illusory and merely a pretext for seeking to circumvent the priority scheme in the Act.

10. Moreover, the Liquidator's "concerns" are founded on the false proposition that the proceeds from recoveries against Century pursuant to the Assumption Agreement constitute "U.K. Assets." To the contrary, by any definition, such recoveries are U.S. assets given that they are claims to be asserted by the Liquidator against a U.S. insurer under a contract governed by New York law with New York arbitration provisions.

**C. The Liquidator's Attempt to Justify His Unlawful "Incentives" to AFIA Cedents Does Not Withstand Scrutiny**

11. The Liquidator argues that it is permissible to give the AFIA Cedents a \$50 million "incentive" to file and pursue proofs of claims because they otherwise might not do so (and if they do not file, the Liquidator has no right to submit a reinsurance claim to Century). The Liquidator cannot justify the unlawful "incentive" to certain Class V creditors and ignore the priorities established in § 402-C:44 merely because doing so theoretically might bring additional assets into the estate. Otherwise, any action that might lead to the collection of funds by the Liquidator, no matter how contrary to the statute, would be allowable because the "end justifies the means."

12. The Liquidator's professed concern that the AFIA Cedents will not file proofs of claim absent the Liquidator's proposed "incentive" need not be taken at face value. Class V creditors generally do not simply abandon potential recoveries in a liquidation, particularly where a claim is sizable, even when the prospects of a satisfactory distribution may be limited. Rather, creditors under reinsurance agreements typically file proofs of claims in liquidation proceedings as a matter of routine practice. Class V creditors who are reinsured by an insolvent company frequently file proofs of claim to protect offset rights they might have as a reinsurer of the company in liquidation (which is a very common occurrence). The fact that not all AFIA Cedents have submitted filings to date is meaningless -- proofs of claim are not even due until June 2004.

13. The Liquidator likewise cannot justify the proposal by his suggestion that certain AFIA Cedents might seek “side agreements” with Century to receive payment directly from Century outside of the liquidation. (Motion ¶ 7.) The Liquidator has provided no evidence of any such “side agreements,” and the question of whether such agreements would be permissible is not before the Court. The mere theoretical possibility of a future dispute over that question cannot justify a wholesale violation of the priority scheme in the Act.

**D. The Liquidator Cannot Pass Off His Improper Distribution Scheme as an Administrative Cost of the Estate**

14. The Liquidator suggests that the \$50 million “incentive” to be paid to the AFIA Cedents can be justified as “a cost of obtaining and collecting an asset of the Home estate.” (Motion ¶ 21.) This remarkable suggestion has no support in the definition of “administrative expenses” contained in § 402C:44(I) and is wholly without basis in law.

**V. The Liquidator’s Proposal Violates Well Established Principles Governing Cross Border Insolvencies and Ancillary Proceedings**

15. The Liquidator’s proposal is entirely unprecedented. If approved, it would violate the well-established principles of cross border ancillary receiverships that have developed in both the U.S. and the U.K. The Court should not sanction a wholesale abandonment of those principles, particularly where the proposal violates New Hampshire law.

**VI. The Liquidator’s Motion is Procedurally Defective, and Its Approval Would Violate the Fifth and Fourteenth Amendments to the United States Constitution and Part I, Article XV of the New Hampshire Constitution**

16. The Liquidator has provided grossly inadequate notice of his Motion. Despite the fact that the Liquidator’s \$50 million proposal affects the interests of all creditors of Home, the Liquidator has provided notice only to five parties or groups of parties. (Notice of Motion) Due process requires actual notice to the affected parties in such circumstances.

17. Due process requires a meaningful hearing and right to be heard on the Liquidator' Motion. Given that the Motion rests on numerous factual assertions, Century is entitled to reasonable discovery and an evidentiary hearing before the Motion can fairly be determined.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that he served a copy of the foregoing on the following counsel via electronic mail and overnight mail on March 19, 2004.

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