

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

2003 FEB 11 9 06

In The Matter Of The Liquidation Of  
The Home Insurance Company

**BENJAMIN MOORE & CO.'S OBJECTION TO THE LIQUIDATOR'S MOTION FOR  
A SCHEDULING ORDER OR CONFERENCE TO ADDRESS REMAND ORDER**

Policyholder claimant Benjamin Moore & Co. ("Benjamin Moore"), through its counsel Downs Rachlin Martin PLLC, objects to the Liquidator's Motion For Scheduling Order Or Conference To Address Remand Order ("Liquidator's Motion"), except to the extent that the Liquidator's Motion requests a conference with the court to discuss further proceedings on remand. In support of this Objection, Benjamin Moore states as follows:

1. After the Liquidator filed his Motion For Approval of Agreement and Compromise With AFIA Cedents, dated February 11, 2004 (the motion that gave rise to these proceedings), Benjamin Moore – a Class II policy-holder creditor of the Home Estate – objected on the grounds that (1) the Liquidator's proposed distribution of substantial estate assets to junior creditors before senior creditors were paid in full violated the clear and strict statutory order of distribution set forth in R.S.A. 402-C:44, and (2) the Liquidator failed to proffer sufficient facts to explain why the proposed agreement was in the best interest of the estate and was fair and equitable. (See Response And Objection Of Benjamin Moore & Co. To Liquidator's Motion For Approval Of Agreement And Compromise With AFIA Cedents, dated March 18, 2004).

Benjamin Moore further requested a full evidentiary hearing on the matter to permit the

development of a complete and adequate record. Benjamin Moore sought an evidentiary hearing in part to test the Liquidator's conclusory and unfounded factual assertions through cross-examination and to dispute the Liquidator's underlying factual assertions. A central issue Benjamin Moore sought to explore was why the Liquidator was prepared to pay a full 50% of proceeds to lower priority creditors.

2. In addition, the other objecting parties sought discovery of important information that is essential to a full and fair hearing on the central legal issues presented to this court.

3. The Liquidator objected to providing information through discovery and he objected to an evidentiary hearing. Rather, the Liquidator asked this Court to rely upon the affidavits that the Liquidator had submitted.

4. By Order dated April 29, 2004, this Court granted the Liquidator's motion and approved the agreement with the AFIA Cedents. By a Addendum dated June 1, 2004, this Court clarified that it did not believe an evidentiary hearing was required to determine that the Liquidator's proposed agreement with the AFIA cedents was permissible as a matter of law.

5. Benjamin Moore appealed the April 29, 2004 Order. On appeal, the factual record was essentially the affidavits submitted by the parties.

6. By Order dated September 13, 2004, the New Hampshire Supreme Court vacated this Court's April 29, 2004 Order. In its Order, the New Hampshire Supreme Court noted that "the trial court reached its conclusion without conducting an evidentiary hearing." The Supreme Court then stated that it would not rule on the legal issues "absent a sufficient evidentiary record." The Supreme Court also observed that this court "did not consider whether it had an independent obligation to assess the agreement's fairness through fact-finding proceedings." In

remanding the case, the Supreme Court asked this Court address five specific legal questions, and to support its decision on each issue with factual findings.

7. It is clear from the Supreme Court's Order that it found the evidentiary record insufficient. A principal purpose of these remand proceedings is thus to permit the parties the opportunity to develop a full and complete factual record.

8. Despite the New Hampshire Supreme Court's disapproval of the state of the record on appeal (which consisted only of affidavits), the Liquidator now proposes to proceed summarily on remand relying only on affidavits. The Liquidator's prior insistence that this case be decided summarily on affidavits alone has already resulted in a remand. This Court should not accept the Liquidator's current proposal, because the Liquidator's proposal, if accepted, would once again create an inherently inadequate record. Rather, as the objecting parties requested during the first proceedings, this Court should hold a full evidentiary hearing.

9. Moreover, in order to have a meaningful evidentiary hearing on the complex and disputed factual issues involved in these proceedings, it is essential that the parties be permitted to obtain information through discovery.


WHEREFORE, Benjamin Moore requests that this Court grant the following relief:

- A. Deny the Liquidator's request for a scheduling order;
- B. Schedule a status conference to address and determine the nature of proceedings on remand, and;
- C. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

September 17, 2004

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CERTIFICATE OF SERVICE

I hereby certify that on this day <sup>20<sup>th</sup></sup>~~17<sup>th</sup>~~ of September, 2004, Benjamin Moore & Co.'s

OBJECTION TO THE LIQUIDATOR'S MOTION FOR A SCHEDULING ORDER OR  
CONFERENCE TO ADDRESS REMAND ORDER was served by first class mail, postage  
prepaid to the following:

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<sup>20</sup>  
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