Exhibit B

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

INTERLOCUTORY APPEAL STATEMENT

I. Statement of the Case

This interlocutory appeal is taken by Century Indemnity Company ("Century"), ACE Property and Casualty Insurance Company ("ACE P & C"), Pacific Employers Insurance Company ("PEIC"), and ACE American Reinsurance Company ("AARe") (collectively, the "ACE Companies"), and Benjamin Moore & Co. ("Benjamin Moore") from a ruling in the Order on Remand issued on October 8, 2004 by the Merrimack County Superior Court (McGuire, J.) (the "Order on Remand"). The appellee is Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home").

The background to the interlocutory appeal is set forth in the Order on Remand:

> The Home Insurance Company, a New Hampshire domestic insurer with a substantial, historic business presence in the United Kingdom, through an unincorporated branch office, was ordered into liquidation by the Merrimack County Superior Court on June 9 [sic – 11], 2003. While Joint Provisional Liquidators have been appointed by the High Court of England and Wales with respect to the branch office business liabilities generated by the Home's presence in the United Kingdom, the provisional liquidation proceeding in the United Kingdom is ancillary to the proceedings in this Court. This Court understands that the primary purpose of the proceeding in the United Kingdom is to protect and preserve assets as efforts are made by the Liquidator to achieve an efficient and fair distribution of those assets to claimants in the liquidation estate. Regardless of the domicile of the claimant, or where the coverage was written, all claims will be filed in the proceeding overseen by this Court and consistent with procedures approved by it.
>
> In February 2004, the Liquidator endorsed a compromise reached in the United Kingdom between the Joint Provisional Liquidators and an Informal Creditors'

Committee of certain reinsureds of the Home, known collectively as the AFIA Cedents. The agreement and compromise provided that the Liquidator would first "seek approval of the supervising New Hampshire Court" for purposes of securing a "New Hampshire Order"; the Joint Provisional Liquidators would then "seek sanction of the English Court in respect of the Scheme" and; finally, the Joint Provisional Liquidators would seek an order from the English court for remission of the assets to the New Hampshire Liquidator for administration and distribution. See Letter of Agreement dated January 22, 2004 at paragraph 1.1.2. In accord with the sequence of events as anticipated by the parties to the agreement and compromise, the Liquidator filed a motion with attachments and supporting documents on February 22, 2004 seeking review and approval of the agreement in Merrimack County Superior Court.

The ACE Companies and Benjamin Moore & Co. sought to intervene, with the former filing an Assented-To Petition to Intervene and the latter, a Motion to Intervene. No objections were filed and this Court granted both parties' requests on April 5, 2004. Both ACE Companies and Benjamin Moore & Co. filed pleadings and memoranda objecting to the agreement and compromise with the AFIA Cedents. In response, the Court scheduled a status conference on April 9, 2004.

At the conference, the parties agreed that the issues to be determined were: whether an evidentiary hearing was necessary to determine whether the Court should grant or deny the Liquidator's motion for approval of the agreement; what the scope of any evidentiary hearing should be; and what discovery the parties needed to complete prior to any further hearing. See April 9, 2004 hearing transcript at pages 3-5. The parties agreed with the Court's assessment that whether or not the Liquidator had the statutory authority under RSA chapter 402-C to enter such an agreement with the AFIA Cedents was a matter of law which could be decided without conducting further discovery. See April 9, 2004 transcript at pages 7-10 and pages 19-20. The parties also agreed that whether the Liquidator had abused his discretion in endorsing the agreement, i.e., whether the agreement was reasonable, would be determined only if the first question was decided in favor of the Liquidator. (Id.)

After the April 23, 2004 hearing, the Court issued an order finding that "under the circumstances of this liquidation as explained below, the agreement proposed by the Liquidator is authorized under the broad array of powers granted the Liquidator under RSA 402-C:25 and is consistent with the goals and purposes of the statute to protect the interests of the insureds and creditors." See Order of April 29, 2004. ACE Companies and Benjamin Moore & Co. appealed this ruling.

Order on Remand at 1-3.

Subsequent to the Order of April 29, 2004 ("April 29 Order"), the Superior Court issued an Addendum to Order of April 29, 2004 dated June 1, 2004 (the "June 1 Addendum") stating

that a "further evidentiary hearing into whether the Liquidator has reasonably exercised his authority in endorsing the agreement would not be helpful." June 1 Addendum at 2.

After briefing and oral argument, the New Hampshire Supreme Court, in an Order dated September 13, 2004 (the "September 13 Order"), vacated the April 29 Order and remanded the case to the Superior Court. In the September 13 Order, the Supreme Court set forth five questions upon which it requested specific discussion and findings:

(1) whether the New Hampshire liquidation proceedings should be stayed pending the completion of the regulatory and judicial proceedings in the United Kingdom;

(2) whether the New Hampshire court has an independent obligation to assess the fairness of the agreement with the AFIA Cedents;

(3) whether the intervenors have standing to contest the agreement;

(4) whether the 'Necessity of Payment Doctrine' or some other equitable doctrine authorizes the Liquidator or court to vary the mandatory priorities set forth in RSA 402-C:44 (Supp. 2003); and

(5) whether the payment to the AFIA Cedents qualifies as an administrative expense under RSA 402-C:44, I.

September 13 Order at 2.

Following conferences with counsel and the submission of papers regarding a draft order, the Superior Court issued the Order on Remand addressing the five questions. It ruled, *inter alia,* that (1) the ACE Companies and Benjamin Moore have standing to contest the agreement with AFIA Cedents; (2) a stay of the New Hampshire liquidation proceeding is not appropriate in the circumstances; and (3) equitable doctrines such as the "Necessity of Payment" doctrine do not override a statute enacted upon a particular topic. Order on Remand at 4-6, 10-11, 13-14.

With respect to the issue of an independent obligation to assess the fairness of the agreement with AFIA Cedents (the "Agreement"), the Superior Court stated that it "recognizes an independent obligation to assess the fairness of the agreement with AFIA Cedents." Order on

Remand at 11. After quoting from the June 1 Addendum, the Superior Court stated that "[g]iven these circumstances, the Court was satisfied that the agreement was fair and reasonable." Order of Remand at 12.

The Superior Court added that it was "unsure whether the Supreme Court remand order finds that there are inadequate bases to find that the agreement is fair and reasonable. For this reason, the Court asks the parties to request clarification on this point when the case returns to the Supreme Court." Order of Remand at 13. The Superior Court concluded that it "will hold a further hearing on the matter if its ruling that the payment to AFIA Cedents qualifies as an administrative expense is upheld by the Supreme Court and the Supreme Court finds that a further hearing is necessary to determine the fairness and reasonableness of the agreement." Id.

In response to the Supreme Court's question whether the payment to the AFIA Cedents qualifies as an administrative expenses under RSA 402-C:44, I, the Superior Court clarified that in its previous ruling "the Court necessarily found that the payments to AFIA Cedents are administrative expenses. They are 'actual and necessary costs of preserving or recovering the assets of the insurer' under RSA 402-C:44, I.'" Order on Remand at 10. See id. at 14 ("[T]he Court rules that the payments are an administrative expense authorized under RSA 402-C: 1, III and IV; 402-C:25, IV, VI, and XXII; and RSA 402-C:44, I."). The Court explained that:

> Consistent with the understanding of the parties reached at the April 9, 2004 status conference, the Court first considered and determined whether, as a matter of law, RSA chapter 402-C authorizes the Liquidator to enter into an agreement such as the one at issue. In its analysis the Court considered that the provisions of RSA chapter 402-C are to be liberally construed and that the purpose of the statute is to protect insureds, creditors and the general public. RSA 402-C:1, III and IV. The Court also considered the nature and complexity of The Home Insurance Company's insurance and reinsurance business, and that its substantial involvement in the London market posed significant challenges to the Liquidator. As the periodic reports of the Liquidator have been filed, and various matters have been presented to the Court for review, it has been made clear that the largest single asset of the Home, apparently not an uncommon situation for companies in its category, is the reinsurance asset.

> The Court also recognized the circumstances which put collection of the asset at risk, particularly the fact that AFIA Cedents would have little reason to file and prosecute claims if neither setoff nor actual distribution were likely. The Court's concern in this regard was supported by affidavits submitted by the Liquidator: See affidavits of: Gareth Howard Hughes, Joint Provisional Liquidator, at Paragraphs 12-15; Rhydian Williams, Head of Pools, Security, and Insolvency at Equitas, at Paragraphs 7-10 and 12-13; and Gernot Warmuth, Counsel for Zurich Versicherung, at Paragraphs 6-10. Additionally, the Court gave weight to the Liquidator's representation that the AFIA Cedents "presented a problem that nobody else could present" (See April 23, 2004 transcript at page 17) and that the structure of the agreement was necessary to preserve and recover assets. RSA 402-C:44, I.
>
> In ruling in favor of the legality of the agreement, the Court found that the Liquidator's endorsement of the agreement sought to maximize asset recovery and was consistent with the broad purposes and goals of the statute to protect the interests of insureds and creditors. RSA 402-C: 1, III and IV. The Court also considered the various and more specific provisions upon which the Liquidator relied in endorsing the agreement. RSA 402-C:25, IV, VI, XXII. The Court found that "the agreement proposed by the Liquidator was authorized under the broad array of powers granted the Liquidator under RSA 402-C:25" and that with the agreement the Liquidator would be able "to marshal substantial assets to be distributed to creditors which would otherwise be unavailable." See Order dated April 29, 2004.
>
> In making the determination, Court again considered the situation which the Liquidator sought to address through the endorsement of the agreement and compromise; the fact that payments to the AFIA Cedents would result in substantial economic benefit to Class II claimants; and the undisputed fact that Class V claimants would "receive nothing with or without the agreement". See Order dated April 29, 2004 and April 23, 2004 transcript at 54. Finally, the Court considered that under the agreement and compromise no greater liability was imposed on the Ace Companies than existed prior to this dispute.

Order on Remand at 8-9.

Finally, the Superior Court granted the ACE Companies and Benjamin Moore leave to appeal "the Court's finding that payments to AFIA Cedents are administrative expenses." Order on Remand at 14.

II. Statement of Facts

The facts necessary to an understanding of the question of law are as follows. Since the facts were summarized in the Superior Court's orders, this statement draws on those orders.

1. "The Agreement involves non-novated AFIA treaty exposures which are reinsured or indemnified by the Ace Companies." April 29 Order at 1. The relationships underlying the Agreement may be more fully described as follows: The Home's branch operation in the United Kingdom ("Home UK Branch") wrote insurance and reinsurance business in the United Kingdom as a participating member of the American Foreign Insurance Association, an unincorporated association of American insurers ("AFIA"), and then reinsured that business with the AFIA members as well as a number of other third party reinsurers. Among other things, the Home UK Branch entered certain reinsurance treaties (the "AFIA Treaties") under which a number of insurers (the "AFIA Cedents") ceded insurance risk to Home. See Joint Appendix to the Briefs of the ACE Companies and Benjamin Moore ("J.A.") 28-29.

In an Insurance and Reinsurance Assumption Agreement dated January 31, 1984 (the "Assumption Agreement"), Insurance Company of North America ("INA") agreed to assume the insurance and reinsurance liabilities with respect to the Home UK Branch business, administer that business, and bear the related costs and expenses. The AFIA Treaties, however, were never formally transferred (or "novated") under English law. They accordingly remain an obligation of Home subject to the protections afforded by the Assumption Agreement. Century has succeeded to INA's obligations under the Assumption Agreement. Since 1984, claims submitted by the AFIA Cedents under the AFIA Treaties have been handled and paid on Home's behalf by INA or later Century or other members of the ACE group pursuant to the Assumption Agreement. J.A. 28-29.

As a result of the liquidation of Home, claims against Home – including those of the AFIA Cedents – were required to be filed with the Liquidator in the New Hampshire domiciliary

liquidation proceeding. *See* RSA 402-C:37; RSA 402-C:57. J.A. 29. Further, under the insolvency clause in the Assumption Agreement, Century was required to make payments under the Assumption Agreement to the Liquidator, not the AFIA Cedents. J.A. 29; Assumption Agreement § 6, J.A. 84.

2. The ACE Companies' liabilities under the Assumption Agreement "are substantial assets, estimated at $231 million, of the Home Insurance Company Liquidation." April 29 Order at 1. "The parties may have disagreed as to the exact value of ACE Companies' indemnification of Home liabilities, however it was carried on the ACE Company books as a liability in excess of $200 million. See April 9, 2004 transcript at page 50." Order on Remand at 9-10.

These assets "are collectible by the Liquidator only if and when the AFIA Cedents file and prosecute claims with the Liquidator. Because the AFIA Cedents' claims are in Class V under the statute, however, they will not be reached and paid. Thus, it is uncertain at best whether the AFIA Cedents will file their claims since they have no apparent reason to expend the resources necessary to do so except to the extent that they may have setoff opportunities. If the AFIA Cedents fail to file their claims, the Liquidator will not be able to access the substantial assets of the Ace Companies." April 29 Order at 1-2.

The Court recognized that these circumstances "put collection of the asset at risk, particularly the fact that AFIA Cedents would have little reason to file and prosecute claims if neither setoff nor actual distribution were likely. The Court's concern in this regard was supported by affidavits submitted by the Liquidator: See affidavits of Gareth Howard Hughes, Joint Provisional Liquidator, at Paragraphs 12-15; Rhydian Williams, Head of Pools, Security, and Insolvency at Equitas, at Paragraphs 7-10 and 12-13; and Gernot Warmuth, Counsel for

Zurich Versicherung, at Paragraphs 6-10." Order on Remand at 8.

3. The Court described how the Agreement addressed this situation as follows:

> With the purposes of addressing the uncertainty as to whether AFIA Cedents will file and prosecute their claims to trigger access to Ace Companies' assets, and of providing an incentive to do so, the Liquidator has endorsed the pending agreement between the provisional liquidators in the United Kingdom and the Informal Creditors' Committee. Neither the Financial Services Authority (FSA) nor the National Conference of Insurance Guaranty Funds Reinsurance Commutation Subcommittee on the Home Insurance Company in Liquidation has objected to the proposed agreement and compromise. Pursuant to the agreement, the AFIA Cedents will receive approximately $72.5 of the estimated $231 million the Liquidator will receive from the Ace Companies when the AFIA Cedents' Claims are filed and prosecuted.
>
> . . . As a result of the agreement, the Liquidator will be able to marshall substantial assets to be distributed to creditors which would otherwise be unavailable. Also, although under the agreement AFIA Cedents will receive payments which, as Class V claimants, they would not otherwise receive, these payments are not to the detriment of other Class V claimants who will receive nothing with or without the agreement. Moreover, the agreement benefits Class II claimants, including Benjamin Moore, because the amount to be distributed to members of this class will increase. Finally, while the agreement assures that the Ace Companies will not receive a windfall of $213 [sic – $231] million, it imposes no additional liability upon them than those they have already assumed.

April 29 Order at 2-3.

The Agreement provides for a "scheme of arrangement" between Home and all AFIA Cedents under English law ("Scheme"). J.A. 32, 54. The Agreement provides for a portion of the net proceeds received from the ACE Companies with respect to the AFIA Cedents' claims to be paid to the AFIA Cedents through the Scheme, with the remainder to vest with the Liquidator. Agreement § 1.9; J.A. 57-58. The proceeds actually received from the ACE Companies (*i.e.*, after application of offsets) with respect to claims under the AFIA Treaties that are allowed in the liquidation will be reduced by deductions reflecting costs incurred by Home and other amounts. Assumption Agreement § 1.3; J.A. 55. See J.A. 350. The amounts deducted will be retained by Home. Generally, fifty percent of the amounts remaining after the deductions will be paid to the AFIA Cedents through the Scheme (and allocated among them pari passu based on

the value of their claims), and the other 50% will be retained by Home. Agreement § 1.2. See J.A. 33-34.

As summarized by the Superior Court,

> In endorsing the agreement, the Liquidator moved to marshal assets and secure access to an estimated $231 million of ACE Companies reinsurance and indemnification obligations. The ACE Companies' interest is directly contrary to the liquidation's interest which is to maximize opportunity to access this asset.
>
> In the absence of the agreement, AFIA Cedents whose filing and prosecution of claims triggers the reinsurance and indemnification obligations of ACE Companies, have little incentive to file claims. Under the specific financial realities of this liquidation, Class V claimants would bear the expense of filing and prosecuting claims without realistic prospect of any distribution. Under the agreement and in conjunction with their filing and prosecution of claims, AFIA Cedents in the aggregate will retain approximately $50 million for distribution to approximately 200 member companies under a formula governed by the terms negotiated. The remainder will be largely available for distribution to policyholder claimants with approximately $10 (million) to be retained for administrative expenses in the United Kingdom Provisional Liquidation.

Order on Remand at 11-12, quoting June 1 Addendum at 1-2.

III. Question of Law

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

> Whether the payments to AFIA Cedents under the Agreement qualify as an administrative expense under RSA 402-C:44, I.

See Order on Remand at 13, 14.

IV. Statement of Reasons for Interlocutory Transfer

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

of general importance in the administration of justice." N.H. Sup. Ct. R. 8(l)(d). The requirements of Rule 8 are met here.

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

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

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

Accordingly, a substantial basis exists for a difference of opinion on the controlling question of law identified above. The questions posed by the Supreme Court at the July 15, 2004 oral argument on the prior appeal further indicate that a difference of opinion exists.

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

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

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

C. Opportunity to Decide Issue of Importance

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

V. Counsel

The name, address and telephone number of the lawyers involved in this appeal and the names of their respective clients are as follows:

Liquidator:	Suzanne M. Gorman, Esquire Civil Bureau NH Department of Justice 33 Capitol Street Concord, NH 03301-6397 J. David Leslie, Esquire Eric A. Smith, Esquire Rackemann, Sawyer & Brewster One Financial Center Boston, MA 02111
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VI. Record

Copies of the applicable statutes, pleadings, affidavits, transcripts, and orders are contained in the Joint Appendix to the Briefs of the ACE Companies and Benjamin Moore and in the Appendix to Brief for the Commissioner of Insurance as Liquidator of The Home Insurance Company previously submitted to the New Hampshire Supreme Court. In addition, the following exhibit is annexed hereto: Exhibit 1: Order on Remand.

Transfer Ordered:

Honorable Kathleen A. McGuire

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

TABLE OF CONTENTS OF EXHIBITS
TO INTERLOCUTORY APPEAL STATEMENT
FILED ON OCTOBER 21, 2004

1. Merrimack County Superior Court Order on Remand, dated October 8, 2004*

* The Joint Appendix to the Briefs of the ACE Companies and Benjamin Moore and the Liquidator's Appendix previously submitted to the New Hampshire Supreme Court are incorporated by reference.

Exhibit C

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In the Matter of the Liquidation of
The Home Insurance Company

No. 2004-0319

TRANSCRIPT OF JULY 15, 2004 ORAL ARGUMENT

The first case this morning is 2004-319, *In the Matter of the Liquidation of Home Insurance Company.*

GAIL GOERING:

May it please the Court. My name is Gail Goering and I represent the Ace Companies. We are one of the appellants in this matter.

The proposed Agreement that is at issue in this appeal was entered into because §44 of the New Hampshire Insurers Rehabilitation and Liquidation Act provides a disincentive to certain creditors that the Liquidator doesn't like. He therefore seeks to make an end-run around §44 of that Act to pay a subclass of creditors that are not entitled to receive a distribution of assets for their claims before the claims of higher priority creditors are paid in full. The assets that the Liquidator seeks to distribute to this subclass of classified creditors are assets that they intend to collect from companies that are members of the Ace Group, my client. To get around §44, the Liquidator has made various arguments why his payments either don't violate §44 or even if they do, nonetheless should be approved. The original justification was that the Agreement was a compromise of a dispute and that therefore it should be approved on that basis. Later the argument was, well, these are an administrative expense and can be justified therefore to be paid as a Class 1 expense of the estate before any creditor claim is paid. That seems to be the lead argument that is being made on this appeal. Finally, and also the basis adopted by the

Superior Court in its order, the payments were, the Liquidator said, justified even if they contravened §44 of the statute because the Liquidator has a broad power to collect assets of the estate, the Agreement would enable them to do that, and that the collecting of the assets was consistent with the general purposes of the Rehabilitation and Liquidation Act, regardless whether the distributions were in violation of §44 of that same Act.

All of these justifications, the Ace Companies submit, are wrong. First of all, §44 is mandatory, not permissive. The word "shall" is used no less than three times in this section that was drafted and enacted by the New Hampshire Legislature. No payment *shall* be made until every other creditor in the class before lower creditor classes are paid. No subclasses *shall* be created. The decisions of this Court make clear that the judgment of the legislature should not be substituted. The legislature's own judgment should control. And the *Blackthorne* decision of this Court recently made that clear.

JUSTICE (?) ♂

The trial court said the payments were not to the detriment of the other Class II claimants and also said the agreement benefits the Class II claimants. Was she correct in that ruling?

[totally inaudible, Judge is too far away from microphone.]

GAIL GOERING:

If the Agreement would be approved, the argument is that the monies that are collected would then enable a greater distribution to be made to Class 2 creditors. That is assuming that those claims are valid and collectible against the Ace Companies as reinsurance. The Ace Companies have indicated in their brief that they believe that this type of a solicitation of a claim against Home is a claim that has been a collusive claim in violation of obligations that the Home owes to Ace as its reinsurer and, therefore, it is questionable whether those claims are recoverable under the reinsurance contract.

JUSTICE (?):

As a matter of fact, does the [inaudible] support a finding?

GAIL GOERING:

Does the record support the finding that?

JUSTICE (?):

[inaudible]

GAIL GOERING:

If you assume . . . I'm sorry, I would submit that it is not because of the questionability of the recovery of those assets from the Ace Companies.

JUSTICE (?):

How are Class 2, 3, and 4 creditors harmed by this arrangement?

GAIL GOERING:

Class 2, 3 and 4 creditors are harmed by this arrangement because assets that might otherwise have been recovered, had the claims been validly filed against the estate, not collusively obtained. Assets recovered on those claims could be jeopardized and, therefore, assets will not be available to be made to Class 2, 3, and 4 claimants.

JUSTICE (?):

I'm not sure I follow that. In this case, there is going to be about $72 million made available.

GAIL GOERING:

If you assume that that amount is properly recoverable from the Ace Companies under the Reinsurance contract some monies would be paid to the estate, that is true, half of which under the Agreement would be distributed to the AFIA Cedents and half would be made

available to the remainder of the estate to pay administrative expenses and then the next level classes of creditors until the assets are exhausted.

JUSTICE (?):

So without this Agreement, would Class 2, 3, and 4 creditors receive less money?

GAIL GOERING:

It is the Ace Companies' position that they will, because it jeopardizes the reinsurance recovery to collude to try to collect it.

I have just one minute remaining because I'm splitting my time with Mr. Bouffard but I would like to point out that the consequence of the Superior Court's Order is that it makes every claim that is backed by an asset, whether held by a Class 5 creditor or even a Class 2 creditor, the subject of negotiation with the Liquidator.

JUSTICE (?):

Why aren't these expenses? Why isn't the $72 million properly characterized as an expense, an administrative expense, associated with marshalling assets? What's wrong with that argument?

GAIL GOERING:

Well, first of all, administrative expenses historically in all insolvency proceedings and not insurance ones, are things like attorneys' fees, rent, investigative expenses, and so forth. This is not in that form or character. And it's very difficult to call this an administrative expense when what it is, is actually, it's based on a claim that has to be made against the estate. It's based on a recovery that has to be made on those claims from a reinsurer, and 50% of the amount of a claim that gets filed in the estate gets paid to the class creditor. That doesn't look like an administrative expense, it looks like a distribution of assets and in fact, I submit it is.

JUSTICE DALIANIS:

One question, counsel. Your red light is on, but I'm curious about why you think you have standing.

GAIL GOERING:

There are a number of reasons why. First of all, the standing issue was not raised by the Liquidator, the trial court. I will leave that to one side and concentrate on the person aggrieved aspect.

First of all, the Ace Companies are otherwise Class 5 creditors of the Home. They only become debtors, and even only some of them become debtors, on a contingent basis. If the Agreement is approved, then some of the companies become debtors. But even that set to one side, if you look at the Agreement itself that is proposed to be approved, the Ace Group Companies are the actual target of that Agreement. They are mentioned in the Agreement no less than 10 times. For them to not be able to come in and challenge the validity of the Agreement of which they are a target is wrong, and they are aggrieved by that Agreement. The Agreement involves, the Ace Companies submit, collusive claims that would not have occurred in the ordinary course. No insurer would go out and collude with a policyholder to have a claim made against it. But that is what's happening here, and that's in violation of Home's duty of utmost good faith to the Ace Companies to minimize the claims against its reinsurer. On that basis, it's also aggrieved.

And finally, we've seen the claims now. Some of them have been filed. We've looked at the proofs, and they involve claims that have previously been denied or are time-barred and there are other aspects of them so they're claims that the Ace Companies would have to handle and

analyze and deal with that they would not otherwise have to, and that also makes them a person aggrieved in this situation.

JUSTICE DALIANIS:

Thank you.

ANDRE BOUFFARD:

May it please the Court. My name is Andre Bouffard. I represent Benjamin Moore, a Class 2 creditor in this case. The core issue before the Court, Benjamin & Moore thinks, is whether or not the Legislature will establish the order of priority of distribution in insurance insolvencies or whether a liquidator will determine the order of priority in insurance insolvencies. That is the core issue before the Court. The reason that issue is presented in this appeal is because this Liquidator has entered into an Agreement that turns the priority scheme on its head.

JUSTICE ?:

If you win, don't you lose. I thought Benjamin & Moore was making out fine with this agreement here

ANDRE BOUFFARD:

Well, that's what it looks like on the surface, Your Honor, and it is sort of like that saying "when it is too good to be true, maybe it is". I don't know as a Class 2 creditor whether or not Benjamin Moore would have been better off. There is a very big premise that underlies all of the Liquidator's arguments here and that is that these claims would not have been filed by the AFIA Cedents. That is an assumption, that is a huge assumption and the only basis for that in the record in this case is affidavits submitted by self-interested AFIA Cedents. These are insurance companies that have ceded risk to the Home and who have every incentive to try to come up with

a scheme that will enable them to make some recovery when in the ordinary course, based upon estimates that have been made in this case, there would be no recovery.

JUSTICE ?:

If the scheme, so-called, goes through, doesn't that still leave a lot of money for Class 2 creditors like Benjamin & Moore?

ANDRE BOUFFARD:

Well, assuming that the reinsurance hasn't been voided by this collusive scheme, I suppose it would, but you also have to consider, Your Honor, had the scheme not been entered into these claims may very well have been filed. I am not an expert in insurance insolvency but my understanding is that it is ordinarily the practice of insurance companies to file claims in these cases. It takes ten minutes to file a claim in one of these cases. It is not a big, costly exercise. You file a claim and you see what happens. We don't know whether that would have happened in this case because the scheme was concocted to incite these creditors to file claims. You have to keep in mind that in insolvency proceedings the norm is that trustees and liquidators wish to minimize claims against the estate. That is why there is an entire statutory construct here enabling the liquidator to object to claims that are not valid. The liquidator's duty is to examine claims and keep claims down for the benefit of those who have valid claims. Here, the liquidator is doing the opposite. The liquidator has entered into an Agreement that is intended to cause people to file claims.

JUSTICE DALIANIS:

Is there any statutory provision, counsel, that you know of or can point to, that would trump 402:C-44? In other words, does the Liquidator have a statutory leg to stand on here?

ANDRE BOUFFARD:

He does not, your Honor. §44 is the heart and soul of this statute. The order of distribution provision is the heart and soul of any insolvency statute. It is the heart and soul of the Federal Bankruptcy Code, as well. That is where the rubber meets the road. That is the centerpiece of the statutory scheme and because it is so important, it is a carefully crafted scheme that the legislature ~~enacted~~. If you look at the Wisconsin statute and the history of the Wisconsin statute that is the basis for the New Hampshire statute, you will see that there is commentary to the effect that this is part of the statute that was perhaps the most carefully crafted because it is so important, and it is specific, it is mandatory, ~~and~~ there is not a single authority that the Liquidator has cited for the proposition that you can get around it and all that the Liquidator has to stand on here is general statutory powers which really, under this Court's decisions, cannot trump the specifics of §44.

JUSTICE ?:

Why is it that the National.....

JUSTICE ? (totally inaudible) What about section 25 that says that the Liquidator can collect all debts et cetera upon such terms and conditions as he deems best? It seems an awfully broad grant of authority

ANDRE BOUFFARD:

Well, this Liquidator is not collecting debts, Your Honor.

JUSTICE ? (totally inaudible) Well, I think the language is do other acts such as necessary, expedient to collect, preserve, the assets and it's a pretty broad grant of authority.

ANDRE BOUFFARD:

Well, granted it is a pretty broad grant of authority. I would suggest that it is pretty general and nonspecific because it is intended to deal with a myriad of possible circumstances that may come up.

JUSTICE ?: You say §44 trumps it?

~~What about §25?~~

ANDRE BOUFFARD:

Well, no. I say that §25 is not specific enough to provide a basis for an exception to §44.

JUSTICE ?:

You can't give the liquidator broad powers that will allow the Liquidator, for instance, to create subclasses.

ANDRE BOUFFARD:

§44 specifically says that, Your Honor.

JUSTICE ?:

Nationally, Insurance Commissioners Association, in state, has filed an *amicus* in this case in support of the Liquidator. Is that correct?

ANDRE BOUFFARD:

That is correct, Your Honor.

JUSTICE ?:

What is there --

Is there a fallacy in their argument?

ANDRE BOUFFARD:

That is, The Association of Insurance Commissioners?

JUSTICE ?:

Yup.

ANDRE BOUFFARD:

Well, as I read their brief, they are relying almost exclusively on the administrative expense aspect of §44 and the fallacy in that argument is that the administrative expense aspect

of that statute is intended to be a narrow window within which certain expenses can be paid that are necessary for the operation of the estate. If you look at the commentary on the Wisconsin statute, the commentary on the Wisconsin statute . . .

JUSTICE ?:

What I am looking for is, I read the definition of administrative expenses in the statute but what I am trying to find out from you is, they have taken the position that they are in favor of the Liquidator's position. Is this a problem dealing with the statute? Is this a problem dealing with the theory of marshalling assets to the estate? What position have they taken that is wrong?

ANDRE BOUFFARD:

Well, I think what is motivating their position is that insurance commissioners have difficulty accessing reinsurance in some instances because claimants with low priority have less than a significant incentive to file claims and this is a way for them – they are attempting to stretch the administrative expense part out of the statute as a way to address that problem which is a statutory problem that should be debated in the legislature, not this Court.

JUSTICE ?:

Thank you.

ANDRE BOUFFARD:

Thank you.

PETER ROTH:

May it please the Court, I am Peter Roth from the Office of the Attorney General, counsel to Roger Sevigny, Commissioner of Insurance, and the Liquidator in this case of the Home Insurance Company. We are here today on the dispute or interpretation of a remedial statute which by its terms is to be liberally construed. It is a dispute about whether a Liquidator of an

insurance company can use the statute consistently with the purpose of protecting the interests of policyholders by collecting a debt from the ACE Appellants for the benefit of policy- holders like the Appellant, Benjamin & Moore. The Liquidator has the support of the liquidation's largest body of creditors, the guarantee funds that filed a *amicus* brief here, the National Conference of Insurance Guarantee Funds who best represent the interests of the Class 2 policyholder/creditors. They are something like 90% of the overall policy holder debt in this case, and the National Association of Insurance Commissioners whose Act it is we're operating under and whose Order we interpret here today

JUSTICE DALIANIS:

Well, the fact that everybody likes it doesn't necessarily mean that it is legal. I wish you would sort of go right to the heart of the situation and tell me how you get around the mandatory language of §44.

PETER ROTH:

The mandatory language of §44 prohibits the Liquidator from making a distribution on a claim that would be in violation of the waterfall of money that flows down. The payment that is being made to the AFIA Cedents in this case is not on account of their claim as a Class 5 creditor. It is a contingent payment that is made to induce them to file and prove their claims in the liquidation. Their Class 5 remains in line with other Class 5 creditors to be satisfied at a later date if there is ever any money to get them.

JUSTICE ?:

Is that the $72 million, is that what they are going to get?

PETER ROTH:

That is correct.

JUSTICE ?:

Is that an administrative expense, or what is that?

PETER ROTH:

We are treating that as an administrative expense.

JUSTICE ?:

It is not an administrative expense. Your move.

PETER ROTH:

I submit that if it is not an administrative expense there remains the equitable doctrines that were discussed in the brief, the new value corollary to the absolute priority rule, as well as the necessity doctrine.

JUSTICE ?:

How do you apply general equitable principles that violate the statute? In other words, the statute says, for instance, for Class 5 creditors, there will be no subclasses. If it is not an administrative expense bumped into Class 1, then you have created a subclass, haven't you? What am I missing?

PETER ROTH:

It really has to be an administrative expense.

JUSTICE ?:

It is not, if you create a subclass in violation of the statute.

PETER ROTH:

The equitable doctrines that we cite in the brief have been treated by bankruptcy courts and receivership courts since really the later part of the 19th century. They have operated under similar statutory setups such as this, where there was an absolute priority of distribution

(including the current bankruptcy code), and yet the bankruptcy courts -- including the bankruptcy court in New Hampshire as recently as 1997 -- have followed this doctrine because they recognize the practical necessity to bring in an asset and the way you bring in an asset, sometimes the best people to bring in an asset are people who have low-lying junior claims and those doctrines are still alive and well today.

JUSTICE ?:

This is my problem. But can you bring in an asset that will violate the distribution formula of the statute? It appears pretty mandatory on its face and with respect to Class 5 creditors it says "thou shall not create subclasses", so if this is not an administrative expense and bumped up to Class 1, then it seems to me ~~that~~ you have created a subclass in violation of the statute. , haven't you?

PETER ROTH:

Well, we submit the argument that it is not an administrative expense and that this can't be done essentially turns the entire statute inside out and says that we are no longer going to operate the statute for the benefit of policyholders, we are going to operate the statute to punish people on the bottom of the waterfall. As Justice Duggan pointed out in a decision in a defense, he said "the object of a remedial statute is to protect the people that are targeted, not to punish those who are their antagonists".

JUSTICE ?:

If it is not an administrative expense, ~~it~~ is a distribution to a Class 5 creditor before a distribution to a Class, 2, 3 or 4 creditor? there

PETER ROTH:

We submit that there is just not a distribution to Class 5 creditors in respect of their Class 5 claims. It just doesn't happen and the Agreement is not set up to work that way.

JUSTICE ?:

Let me see if I understand. If this is not an administrative expense, but a payment of a claim to a Class 5 creditor, is that being paid before all the claimants in Class 2,3 or 4 are paid?

PETER ROTH:

That is correct.

JUSTICE ?:

That violates the statute.

PETER ROTH:

We are sort of going around in circles, I understand. But it is an administrative expense because it is not in satisfaction of their Class 5 claim.

JUSTICE ?:

Understood. Go back to my original question. If it is not an administrative expense, you lose.

PETER ROTH:

I disagree because the equitable doctrines that we spoke of, the doctrine of necessity and the doctrine of the new value corollary to the absolute priority rule which is really this situation.

JUSTICE?

Why is it an expense? It doesn't look or sound ~~much~~ like an expense.

PETER ROTH:

Well, the statute was written very broadly and the statute - excuse me a minute. §44(1) doesn't speak of how you can parse it out and say well, it's too big or it's to the wrong people. All it says is "including, but not limited to, the actual necessary costs of preserving or recovering the assets of the insurer" and the courts around the country that have interpreted administrative expenses have looked at that language in similar circumstances in bankruptcy contexts because it is very similar to what is the treatment in bankruptcy courts that finders fees, a percentage of the action, or a contingent fee for a lawyer also can be an administrative claim. Sometimes these claims can be very large - so the size and the nature of the payee doesn't determine whether it is an administrative expense or not.

JUSTICE ?:

Well, it looks to me like you are paying and distributing an asset to a claimant that doesn't look and sound like an expense of collecting assets.

PETER ROTH:

Well, we have a situation, and I think it is undisputed in the Superior Court, that without the claims being made by the AFIA Cedents, there would be no assets. There would be nothing to distribute to the Class 2 creditors or anybody else.

JUSTICE ?:

That doesn't necessarily make it an expense, does it?

PETER ROTH:

Oh, absolutely. It does. In order to induce, and this was again not disputed in the Superior Court, to induce the claimants to file their proofs of claim and I think it was also undisputed that they were unwilling to file their claims. And because they were unwilling to file

their claims they needed to be induced and this inducement is what was negotiated by the Liquidator to get them to do it. Those issues were really not disputed below and I can point to sections in the record where it is evident that those were not disputed. So we have a situation ---I am sorry.....

JUSTICE ? (inaudible) Is there a factual dispute as to whether or not the agreement benefits class 2 claimants ?

PETER ROTH:

JUSTICE : what in the record supports that ?

No. I don't believe there was any factual dispute. What in the record supports that? I would call the Court's attention to the discovery materials that were filed by the Ace Group at the Liquidator's Appendix, pages 46-66; Ace's Memorandum of Law and Discovery Issues which is the Liquidator's Appendix, at 88; and then the transcript of April 23rd; the Joint Appendix at 267 where counsel to Ace discussed the disincentive problem as a given and all of the papers that were filed here discussed the disincentive problem as a given. I don't think there is any serious dispute that the AFIA Cedents were not incentivized to file and that the Agreement was an inducement to them.

JUSTICE ? (totally inaudible) What about the benefit to class 2 claimants? Does what you cite in the record support that finding? It says the agreement benefits class 2 claimants and says that ...

PETER ROTH:

I don't have that handy. I am sorry. But I don't think again there was really any dispute about that. The dispute that was raised by the Ace counsel this morning suggests that there is no benefit to Class 2 because they are going to fight it tooth and nail all the way to the end of the earth and that they are going to make sure that we never get any money out of it, but I think the assumption – we have to go under the assumption – that this is going to succeed and that it is going to benefit Class 2 creditors because that is the way it is supposed to work.

JUSTICE ?:

Will you tell me how this becomes an expense? How do you say this is an expense?

PETER ROTH:

We say that it is an expense because there is an asset worth some $231,000,000. That asset will not come into the estate unless the money is spent to induce the filing of the claims to parties who have made it clear that they wouldn't file claims otherwise. It is like a finder's fee or a contingent payment to the AFIA Cedents to induce them to file the claims without which there would be no asset brought in. So it is priming the pump. You've got to prime the pump to bring in this asset and that is what the AFIA Cedent payments are intended to do.

JUSTICE ?:

Without this Agreement, ~~what would you do without this Agreement~~, in all probability?

PETER ROTH:

Without this Agreement we would have some of the AFIA Cedents would file claims to cover their setoff position so they wouldn't be liable and exposed to the liquidation.

JUSTICE ?:

Would they recover any money?

PETER ROTH:

They would not recover any money. I think it is uncontested that Class 5, either way, gets nothing. The other Class 5 creditors, like the Ace Companies, they get nothing out of this whether there is an Agreement or whether there is not an Agreement and despite what was said earlier and in the briefs the Ace Companies conceded at the hearing at the Superior Court that the Agreement doesn't harm them; that if you assume ...

JUSTICE ?:

Oh, but it does ~~It does~~ harm them substantially if the Court ~~puts the assets~~ into a pot . . .

PETER ROTH:

That is a harm that they were paid for 20 some years ago.

JUSTICE ?:

But, I know, you are inducing the harm, is what you are saying. You are incentivising the harm, is what you ~~said before~~.

PETER ROTH:

We are incentivising the claim-holders to file their claims so that the Ace Companies can be made to perform on the Agreements that they were compensated for and that the policyholders relied on implicitly when they did business with the Home Insurance Company over the past 20 years. The safety of the insurance was based in part on the reinsurance and indemnities that the Home had and in addition in the Agreement, is the insolvency clause which says the Ace Companies will pay to the Liquidator notwithstanding the insolvency. So what they are trying to do now is say well that doesn't really matter. We don't care about the insolvency clause. We want to get out of this and we have a right to get out of it, and I think the Superior Court hit it right on the head -- this is a windfall to them. They are going to get out of this Agreement that they were already paid for and without having to respond to the policyholders' needs.

JUSTICE ? (totally inaudible)

PETER ROTH:

What will happen from here is that there will be a scheme approved in England and the operation of the scheme will then provide for the payments to the AFIA Cedents and for the repatriation of the rest of the money which is $145,000,000 to the estate.

JUSTICE ?:

then What happens after that?

PETER ROTH:

What happens after that? The process of that happening is that the AFIA Cedents' claim will be looked at by the Liquidator and by the Ace Companies who will be invited to the claims dispute process and that it will be determined as I put it "under the jaundice eye and the scowling mean" of the referee, the Superior Court, and the Ace Companies, who obviously are not going to sit still for inflated or bogus claims. Once the AFIA Cedents claim is allowed, it will sit and it will wait for any Class 5 distribution, but at the same time the scheme will be activated to provide them, if after deductions for setoffs, and the deduction for the expenses of the fight and then ~~you~~ any fight with Ace over recoveries. If after all those things, there is anything left to give to the AFIA Cedents, they will get their 50%. And it is not a given that there is going to be money in it for the AFIA Cedents because obviously Ace has made it clear that they are going to engage us in protracted and costly litigation every step of the way.

JUSTICE ? (inaudible) What happens to the other classes of claimants against Home? Are their claims still pending awaiting the outcome of this?

PETER ROTH:

Yeah, well the Class 2 creditors is really where all the business is here and the Class 2 claimants will await distributions from the liquidation.

JUSTICE ? (inaudible) Right. And then do you have to go back to court and have to seek approval of those distributions?

PETER ROTH:

Yes, we will.

JUSTICE ?:

Is it likely that Class 3 or Class 4 creditors will see any money?

PETER ROTH:

That we really don't know at this point. It is too soon to tell. It is a long process and we don't know how successful Class 2 creditors will be in proving their claims and we have an enormous amount of asset recovery to do, including this one. This is a very large asset for the Home estate.

JUSTICE ?:

There is an issue here of standing. Why do you say they don't have standing?

PETER ROTH:

Well, the insolvency courts and bankruptcy courts, in particular the First Circuit, and then this Court in dealing with the Cedents' estates have applied the person aggrieved standard. I think it is fairly clear that the Ace Companies are not aggrieved. They have stated on the record below that the Order approving the Agreement – the Agreement doesn't harm them. If they are not harmed, they are hardly a party aggrieved.

JUSTICE ?:

The parties below? The don't have standing?

PETER ROTH:

The parties below – they are parties in interest and I think the courts have made clear, including this court a long time ago, that just because you have a reason to intervene or you are a party in interest in the proceedings below doesn't give you appellate party aggrieved – person

aggrieved standing. Bankruptcy courts run into this all the time. They have hundreds of people who show up for hearings. I have been to Delaware where you have a crowd of attorneys sitting there waiting to be heard, but not everyone is not going to be a person aggrieved with respect to any given issue on a given day.

JUSTICE ?:

This is not an administrative expense. Why can't the Ace Companies, ~~the Ace Companies have said~~, we're a Class 5 creditor and we are being treated differently than other Class 5 creditors, so we are aggrieved.

PETER ROTH:

Because either way they get nothing. If they get nothing without the Agreement, they are not harmed; and if they get nothing with the Agreement, they are not harmed.

JUSTICE ?:

The statute doesn't say you can have subclasses when it doesn't really matter. It says you can't have subclasses "period".

PETER ROTH:

We submit that there is no subclass made here Your Honor. We have the authority under a liberal reinterpreted remedial statute to do the best we can to provide a payout to policy-holders. We submit that the asset is being brought in legitimately under the broad powers that are afforded to the Liquidator under the statute. The administrative expense statute is not so narrow and shouldn't be interpreted so narrowly as to prevent what is really good for policy-holders. I see that my light is on. We ask the Court to affirm. Thank you very much.

JUSTICE ?:

Thank you very much.

GAIL GOERING:

Just a few quick points. May it please the Court. There has been a number of characterizations as to what or wasn't said by the Ace Companies below, rather than point by point dispute Mr. Roth's characterization. I would refer the Court to the transcript of the hearing of April 23 and also to the briefs which I believe will refute all of the points that Mr. Roth say have been conceded. Secondly, it is not known at this time whether or not there will be any recoveries by Class 5 creditors. The insolvency process is a lengthy one. This is the reason why most Class 5 creditors will go ahead and submit the paper for their claims on the chance that they will receive something so it will not be known for some time whether any recoveries will be made by them. As to the point that policyholders were relying on the reinusrance provided by the Ace Companies to the Home in this circumstance, we don't provide reinsurance on any policyholder claims, only on reinsured creditor claims, so only in the very broadest sense that they thought there was a pool of assets backing this company somewhere can it be stated that they have relied upon them. Finally, the Court asked about whether there was any indication in the statute that as to whether the general powers in §25 could trump the specific powers of §44. I submit that subpart 21 of §25 provides that that cannot happen. It refers to the Liquidator exercising discretionary powers only if they are not inconsistent with the provisions of this statute, meaning the Act.

JUSTICE ?:

What section?

GAIL GOERING:

Subpart 21 of §25. There is also another subpart of that which refers to a transfer being able to be affected only if it doesn't contravene the priorities established in §44. I think that I have probably gone to two minutes now and I will let Mr. Bouffard make his rebuttal remarks. Thank you.

ANDRE BOUFFARD:

May it please the Court. Just very briefly, to get to the point that Justice Duggan raised a number of times, the answer to the question whether my client benefits from this is we don't know. There was no record created below that would enable any fact finder to make any determination whether or not Class 2 policyholder creditors are better with this deal or with what would have happened if this deal had not been done. We asked the Trial Court for the opportunity to create a factual record. We were denied that opportunity. With respect to administrative expenses, in terms of interpreting the language of §44, the most useful authority is federal bankruptcy authority. The reason that authority is germane is because the Wisconsin statutory language, which is in the New Hampshire statute, was taken from the Federal Bankruptcy Act. The Federal Bankruptcy Act has now been superceded by the Federal Bankruptcy Code, but the legislative history of the Code makes it very clear that the Code incorporated the language from the Act, so the language that is in the New Hampshire statute was derived from the language that is now in the Federal Bankruptcy Code and there is a wealth of authority in the federal bankruptcy arena that says that in order for something to be an administrative expense . . .

JUSTICE ?:

You can cut it short because the red light is on.

ANDRE BOUFFARD:

Okay. I've got 30 seconds, Your Honor. You have to have two things. You have to have an expense that arises following the insolvency and the claimant has to be able to demonstrate the reasonable value of what was given to the estate. Neither of those elements can be shown here. Thank you.

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