

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

2004 MAY 25 A 11: 48

Docket No. 03-E-0106

In the Matter of the Liquidation of  
The Home Insurance Company

NH SUPERIOR COURT  
MERRIMACK COUNTY

**LIQUIDATOR'S OBJECTION TO  
ACE COMPANIES' MOTION FOR STAY**

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator of The Home Insurance Company, by his attorneys, the Office of the Attorney General, hereby objects to the ACE Companies' motion for stay of the Court's April 29, 2004 order ("Order") pending the mandatory appeal filed by BMC.<sup>1</sup> A stay should be denied because the ACE Companies will not suffer any irreparable injury in the absence of a stay. Indeed, the ACE Companies will not suffer any harm at all because the Agreement does not increase their obligations, which arise under pre-existing contracts. Further, as a practical matter, it will take time for claims to be determined before the Liquidator can seek payment from the ACE Companies, and if they refuse there will be collection proceedings. A stay would thus only serve to further delay commencement of the steps necessary to collect the obligations of the ACE Companies to the detriment of the Home estate and its policyholders and other creditors. The request for stay should be denied.

**Background**

In the Liquidator's Motion for Approval of Agreement and Compromise With AFIA Cedents, dated February 11, 2004, the Liquidator sought approval from this Court

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<sup>1</sup> The Liquidator uses the terms defined in the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents and the Liquidator's Reply with respect to that motion.

in its supervisory capacity under RSA 402-C:25 of the Liquidator's endorsement of a compromise, reflected in the Agreement between the Joint Provisional Liquidators appointed in the English provisional liquidation proceeding for Home's United Kingdom Branch and members of the Informal Creditors Committee established in that proceeding. In the April 29, 2004 Order, the Court granted the Liquidator's motion. The Court concluded that the Agreement is authorized under the "broad array of powers" granted by RSA 402-C:25 and is consistent with the purposes of the liquidation statute "to protect the interests of the insureds and creditors." *See* RSA 402-C:1, IV. Order at 2. The Court found that as a result of the Agreement the Liquidator will be able to marshal substantial assets (the ACE Companies' obligations) "which would otherwise be unavailable." *Id.* Most significantly for purposes of the motion to stay, the Court found that "while the agreement assures that the Ace Companies will not receive a windfall of \$[231] million, it imposes no additional liability upon them than those they have already assumed." *Id.* at 3.

On May 6, 2004, the ACE Companies moved to transfer a question of law for interlocutory appeal. The Liquidator opposed that motion on May 7, 2004, in part because the Order was final and appealable. On May 10, 2004, BMC filed a notice of mandatory appeal with the New Hampshire Supreme Court. On May 11, 2004, the ACE Companies filed a motion for stay of the Order with the Supreme Court in the mandatory appeal, together with a motion for waiver of the requirement of Supreme Court Rule 7-A that stays be initially sought in the trial court. On that same day, the Supreme Court denied the motion for waiver and, to the extent necessary, remanded the matter to this

Court for consideration of a motion to stay in the event the ACE Companies chose to file one. The ACE Companies filed the present motion to stay on May 12, 2004.<sup>2</sup>

**I. THE MOTION TO STAY SHOULD BE DENIED.**

A party seeking a stay pending appeal must meet all of the criteria for the issuance of injunctive relief. See Acevedo-Garcia v. Vera-Monroig, 296 F.3d 13, 16-17 (1<sup>st</sup> Cir. 2002) (per curiam). Accordingly, the ACE Companies are required to show likelihood of success on the merits, irreparable harm without a stay and a balance of the equities in their favor. See Kukene v. Genualdo, 145 N.H. 1, 4 (2000) (to obtain a preliminary injunction, a party “must show that it would likely succeed on the merits”); Smith v. New Hampshire Bd. of Psychologists, 138 N.H. 548, 554 (1994) (“Absent an immediate danger of irreparable harm, an injunction will not issue.”); Vigitron, Inc. v. Ferguson, 120 N.H. 626, 632 (1980) (in considering injunctive relief, “the court must balance all of the equities, including the relative hardship to the parties”). The ACE Companies can demonstrate none of these elements. They do not have a likelihood of success on the merits. They fail to show the irreparable injury necessary to support an order preventing implementation of the Agreement during the appeal. Finally, issuance of a stay would harm the liquidation and its policyholder creditors so the balance of harms weighs against a stay.

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<sup>2</sup> The ACE Companies note that they are a party to BMC’s mandatory appeal pursuant to Supreme Court Rule 7. ACE Motion to Stay at 3 n.1. Their motion to transfer question for interlocutory appeal accordingly should be denied as moot.

**A. The ACE Companies Fail To Show Irreparable Harm  
And Are Not Likely To Prevail On Appeal.**

As the Court concluded in the Order, the Agreement will enable the Liquidator to collect an asset (the ACE Companies' obligations) that would otherwise be unavailable for the benefit of policyholders. Order at 2. The ACE Companies' motion is an attempt to delay steps necessary to the collection of this asset. They seek to do so without establishing that they will suffer any irreparable harm. The burden of proving that harm is particularly heavy here because – unlike the situation in most requests for injunctive relief – the Court has already determined the merits of the issue adversely to the moving party. *See* Order at 2-3. For all the reasons set forth in the Order and in the Liquidator's prior submissions, the ACE Companies are not likely to prevail on appeal.

The ACE Companies claim that without a stay they will suffer “irreparable injury,” but they fail to identify any actual harm to themselves. *See* ACE Motion to Stay ¶ 9. The reason for this is clear: while the Agreement ensures that the ACE Companies will not receive a windfall, it imposes “no additional liability” on them beyond what they have already assumed. Order at 3. The Agreement merely continues the ACE Companies' pre-existing obligations, and the ACE Companies suffer no harm at all.

The ACE Companies initially assert that a stay would preserve the status quo and their ability to obtain ultimate relief. But the mere possibility of mootness does not by itself constitute irreparable harm. *E.g. In re Convenience USA, Inc.*, 290 B.R. 558, 563 (Bankr. M.D.N.C. 2003) (collecting cases). Irreparable harm must be actual and imminent. To demonstrate irreparable harm by mootness, the ACE Companies would need to have shown how beginning to implement the Agreement would extinguish or

modify their rights to such an extent that effective judicial relief is no longer practically available.

The ACE Companies fail to articulate how this could occur. They actually claim only that (a) proceedings for approval of the Scheme in the English courts would be “unnecessary and wasteful” if ACE were to prevail in the Supreme Court, and (b) the Scheme will “ultimately” result in a payment to AFIA Cedents that would be unlawful if ACE were to prevail. *See* ACE Motion to Stay ¶ 9. These assertions do not show any irreparable harm to the ACE Companies. Neither the costs of English proceedings nor payments to AFIA Cedents will affect Class V claimants such as the ACE Companies. As the Court found, those claimants will receive nothing in any event. Order at 2-3. These expenses will, however, benefit the Class II claimants by increasing amounts to be distributed to that class. *Id.* at 3.

In addition, the approval proceedings in the English Court do not support a stay because they should not be expensive unless the ACE Companies make them so. *See State v. Tallman*, 139 N.H. 223, 225 (1994) (“Self-created hardships hold little weight in a balancing of the equities.”). The proceedings (an application for permission to convene a meeting of the AFIA Cedents to approve the Scheme, a petition for the Court’s sanction of the Scheme and an application for the Global Liquidation Order) are not expected to be complex and should take approximately four months. The ACE Companies have stated that they intend to “pursue all available remedies” in England and on appeal so that “complex, protracted and costly litigation is assured,” ACE Mem. at 15 (March 19, 2004), but they should not be permitted to bootstrap claims of injury by injecting themselves into the English proceedings. Their intention to oppose and delay the English

proceedings only harms Home's policyholder claimants, and it warrants starting those proceedings earlier, not later.

Finally, the prospect of payments to AFIA Cedents depends on intervening steps such that, as a practical matter, no payment is likely to be made before the appeal is determined. Payments can follow (a) determination of claims under the claim determination process, and (b) collection of proceeds based on allowed claims. *See* Agreement § 1.9.1 (providing for sharing of Net Recoveries). The AFIA Cedents must file and prosecute their claims arising under the AFIA Treaties with the liquidation proceeding to establish Home's obligations. It will take time for any significant claims to be determined (the Liquidator expects to address only claims that may be subject to offset or that involve other insolvent estates within the first year), and the ACE Companies have the opportunity to be involved.<sup>3</sup> The Liquidator will then need to seek recovery from the ACE Companies on any claim that is allowed. If the ACE Companies refuse to pay, the Liquidator will need to commence collection proceedings. These steps will take time – almost certainly longer than the time required to resolve the appeal – and should not be delayed.

In sum, the ACE Companies fail to demonstrate either the irreparable harm or the likelihood of success on the merits essential to support their motion for a stay.

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<sup>3</sup> The Liquidator has sought to reach agreement with Century with respect to its role in the claim determination process, see *Rosen Aff.* ¶ 10, Ex. B (March 26, 2004), and Century may also participate in disputed claim proceedings, see *Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company In Liquidation* ¶ 9(b) (December 19, 2003).

**B. A Stay Would Harm Home's Policyholder Creditors.**

In deciding whether to grant a stay, the Court should also consider the harm that would flow from the proposed stay. *See Vigitron*, 120 N.H. at 632. If a stay were granted, it would create confusion and uncertainty among the AFIA Cedents over the filing of their claims in the liquidation as contemplated by the Agreement and delay the commencement of the steps necessary to collect the estate asset for approximately a year (the likely time required for the appeal). This would harm the policyholder creditors of Home, contrary to the purposes of the insurer liquidation statutes and the public interest. *See Order at 2; Thompson v. New Hampshire Bd. of Medicine*, 143 N.H. 107, 108 (1998) (noting Superior Court's evaluation of public interest in considering injunctive relief). Further, as of December 31, 2003, Century's Annual Statement reflected a statutory surplus (net worth) of only \$25 million. At the April 23, 2004 hearing, counsel for the ACE Companies acknowledged that the ACE Companies have reserves of \$231 million for AFIA obligations. As noted by counsel for the Liquidator, the AFIA Cedents had indicated that the obligations were much higher. Given its relatively thin capitalization, delay may adversely affect the Liquidator's ability to collect from Century when its obligations are ultimately determined. These harms alone warrant denial of a stay.

The ACE Companies' motion should be denied without qualification in light of the Court's ruling on the merits, the lack of irreparable harm to the ACE Companies and the clear harm to the Home estate resulting from any delay. Nevertheless, if the Court were to grant a stay, which the Liquidator respectfully submits is highly inappropriate in the circumstances, the Liquidator would request that the ACE Companies be required to

post security in the sum of \$231 million to cover the risk that the stay pending appeal could cause the AFIA Cedents to withdraw from the Agreement, at great cost to the Liquidator, as well as the risk that at the conclusion of the appeal the Liquidator may be unable to collect the indemnity obligations of the ACE Companies and that any collection will be delayed by the period of the appeal. *See* RSA 491:18 (court can condition stay pending appeal on such terms as may be just); Superior Court Rules 161 & 163 (bond as a condition to injunctive relief is the norm and it is movants' burden to show why no bond should be required).

**II. THE ACE COMPANIES' SUGGESTION THAT THE CLAIM FILING DEADLINE BE EXTENDED HAS NO MERIT.**

The ACE Companies suggest that the question of a stay could be avoided by extending the June 13, 2004 claim filing deadline for AFIA Cedents. ACE Motion to Stay ¶ 11. An extension, however, would not be appropriate. The insurer liquidation statutes specify that the claim filing deadline “shall be no less than 6 months nor more than one year after entry of the [liquidation] order.” RSA 402-C:26, II (emphasis added). Further, the circumstances do not support extension here. The filing of claims does not harm the ACE Companies, while changing the filing deadline set in the notices sent to potential claimants and the Order of Liquidation would have significant ramifications and would prejudice the liquidation by causing confusion and expense and diluting and delaying distributions to Home's timely filing creditors. The Liquidator has determined not to seek an extension for several reasons: *First*, if the existing June 13, 2004 claim filing deadline were to be extended voluntarily, it should be extended for all potential claimants, not just the AFIA Cedents. To avoid uncertainty and treat all potential



claimants alike, mail and publication notice of the new deadline would need to be given at significant cost to the estate. *See* Averill Aff. ¶¶ 2-4 (April 1, 2004). *Second*, a longer deadline would result in additional claims being made against the Home. To the extent those claims were at the policy related claims (Class II) priority level, they would likely reduce the payments to Class II claimants who file claims by the existing deadline. *Third*, the submission of additional claims would extend the claim determination process and delay the time when distribution percentages can be determined and payments to creditors on allowed claims made. *Fourth*, changing the deadline would affect guaranty funds and claimants against them because the guaranty fund statutes in over forty states incorporate the claim-filing deadline established in the domiciliary liquidation proceeding as a bar to claims against the guaranty fund. *See* National Conf. of Ins. Guar. Funds (visited May 19, 2004) <http://www.ncigf.org> (guaranty fund laws section, summaries by state dropdown menu) (listing states with statutory definitions of “covered claim” that are tied to the liquidation bar date); *e.g.* Me. Rev. Stat. Ann. tit. 24-A, § 4438(1)(A); R.I. Gen. Laws § 27-34-8(a)(1)(iii); Vt. Stat. Ann. tit. 8, § 3615(a)(1). In these circumstances, the ACE Companies’ suggestion overlooks both the statute and the costs and adverse effects of an extension on policyholders and other creditors and should be disregarded.

Significantly, despite the assertion of the ACE Companies that the parties have met and will continue to meet in an effort to resolve issues between them, ACE Motion to Stay ¶ 12, the Court should note that extension of the filing deadline would effectively defer meaningful discussions with the ACE Companies because the predicate for such discussions is the submission of proofs of claim by AFIA Cedents.

**CONCLUSION**

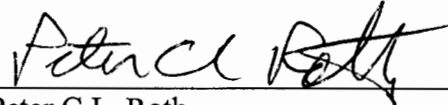
For the foregoing reasons, the ACE Companies' motion for stay should be denied.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE  
COMMISSIONER OF THE STATE OF NEW  
HAMPSHIRE, SOLELY IN HIS CAPACITY AS  
LIQUIDATOR OF THE HOME INSURANCE  
COMPANY,

By his attorneys

PETER W. HEED, ATTORNEY GENERAL



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May 25, 2004

STATE OF NEW HAMPSHIRE

MERRIMACK, SS

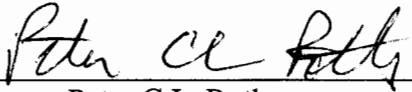
SUPERIOR COURT

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**CERTIFICATE OF SERVICE**

I, Peter C.L. Roth, do hereby certify that on May 25, 2004, I served a true copy of the foregoing upon the parties named on the Service List, by first class mail, postage prepaid.

Dated: May 25, 2004

  
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Peter C.L. Roth

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