

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

2004 MAY 12 A 10:44

NEW HAMPSHIRE SUPERIOR COURT
MERRIMACK COUNTY

MOTION FOR STAY OF ORDER PENDING MANDATORY APPEAL
PURSUANT TO RULE 7

Defendants, Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, "the ACE Companies"), by their attorneys, Orr & Reno P.A., move this Court, for a stay of the order dated April 29, 2004 (the "Order") on the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents pending the mandatory appeal by Benjamin Moore & Co. ("Benjamin Moore") to the New Hampshire Supreme Court. In support of this Motion, the ACE Companies respectfully state:

(1) In the Order, the Court approved of an agreement (the "Proposed Agreement") that Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator (the "Liquidator" of Home Insurance Company ("Home")), entered into with representatives of certain insurers who had ceded insurance risk to Home as a participating member of the American Foreign Insurance Association ("AFIA") reinsurance pool. (Those insurers will be referred to herein as the "AFIA Cedents" and the reinsurance contracts issued by Home to the AFIA Cedents will be referred to as the "AFIA Treaties.")

(2) In the motion for approval of the Proposed Agreement, the Liquidator alleged that the AFIA Cedents would have no reason to submit their claims in the Home liquidation because their claims are Class V claims under N.H. Rev. Stat. Ann. § 402-C:44, and Class V claimants are unlikely to receive a distribution in Home's liquidation. The Liquidator sought to justify the Proposed Agreement as a "compromise" or "settlement" of alleged threats by the AFIA cedents to seek to satisfy their claims against Home through separate proceedings in England or otherwise outside the New Hampshire liquidation. Although the Liquidator acknowledged that such attempts would be without legal basis and could be defeated, the Proposed Agreement purports to provide an "incentive" to the AFIA Cedents to file their claims in the Home liquidation by setting into motion a "scheme of arrangement" under English law which would pay the AFIA Cedents half of the net proceeds that are recovered from companies who reinsured the liabilities under the AFIA Treaties.

(3) The ACE Companies, which are reinsurers of Home's AFIA liabilities and Class V creditors, objected to the Liquidator's motion. The ACE Companies alleged that the Proposed Agreement directly violates the mandatory order of distribution provisions in N.H. Rev. Stat. Ann. § 402-C:44 because the AFIA Cedents would receive a distribution before the claims of higher classes of creditors had been paid in full and in an amount different from other Class V creditors. The ACE Companies further alleged that the Liquidator has no authority to enter into a "compromise" with certain creditors in violation of the order of distribution established by the Legislature. The ACE Companies also requested (in the event that the Court held that the Liquidator had the discretion to effect such a settlement) an opportunity to conduct limited discovery and present

evidence on the issue of whether the Proposed Agreement was a reasonable exercise of the Liquidator's authority.

(4) Without allowing any discovery and without holding an evidentiary hearing, the Court approved the Proposed Agreement in the Order and found that the Liquidator had the power to enter into the agreement "to protect the interests of the insureds and creditors" of Home. (*See* Order, a copy of which is annexed as Exhibit A hereto, at 2.)

(5) On May 6, 2004, shortly after receiving the Order, the ACE Companies filed a Motion to Transfer Question of Law for Interlocutory Appeal, and had also planned to file a motion to stay with this Court pending the interlocutory appeal.

(6) On May 7, 2004, Benjamin Moore filed, pursuant to Rule 7 of the Supreme Court Rules, a Notice of Mandatory Appeal directly with the New Hampshire Supreme Court.¹

(7) Also on May 7, 2004, the Liquidator filed its Opposition to Motion to Transfer Question of Law For Interlocutory Appeal and, in the opposition, agreed that the Order was final and appealable as of right. The Liquidator expressly stated in the opposition that he intended to begin to implement the Proposed Agreement approved by the Court pending any appeal. (*See* Liquidator's Opposition to Motion to Transfer, a copy of which is attached hereto as Exhibit B, at 2.)

(8) Believing that the Benjamin Moore appeal divested this Court of jurisdiction, on May 11, 2004, the ACE Companies filed a motion to stay with the New Hampshire Supreme Court and a motion to waive the requirement, in Rule 7-A of the

¹ Pursuant to Rule 7, the ACE Companies are a party to the appeal by virtue of the Notice of Mandatory Appeal filed by Benjamin Moore.

Supreme Court Rules, that motions for a stay be filed with the Superior Court in the first instance. The Supreme Court informed counsel for the ACE Companies yesterday afternoon that the motion to waive filing of the motion to stay had been denied, and that the case is remanded to this Court for the limited purpose of ruling on any motion to stay filed by the ACE Companies.

(9) A stay of the Order would preserve the status quo and the ultimate relief that the ACE Companies and Benjamin Moore seek on appeal, which is the reversal of the Court's decision that the AFIA Cedents may receive a multi-million distribution in violation of N.H. Rev. Stat. Ann. § 402-C:44. In the absence of a stay, the ACE Companies would suffer irreparable injury because the Liquidator (as he has already stated) will begin to implement the U.K. scheme of arrangement contemplated in the Proposed Agreement. That would include the initiation of proceedings in a court in England for approval of the scheme of arrangement, which, as noted above, would ultimately result in a payment to the AFIA cedents in violation of New Hampshire's mandatory order of distribution. The English court, in deciding whether to approve the scheme, would likely take into account the Court's conclusion that the Liquidator's plan does not violate New Hampshire law. If, however, the Supreme Court agrees with the ACE Companies that the Proposed Agreement violates New Hampshire law, then the proceedings in the U.K. will have been unnecessary and wasteful. In order to avoid such a result, this Court should stay the Order while the appeal is heard.

(10) The ACE Companies will also be filing a motion shortly with the Supreme Court for expedited consideration of the Order. However, in order to prevent the

Liquidator from implementing the Proposed Agreement before even an expedited appeal may be heard, this Court should stay the Order pending appeal.

(11) The Liquidator will not be prejudiced by any stay entered by this Court as it can seek to move the June 2004 bar date for the filing of claims by the AFIA Cedents in the Home liquidation, thereby obviating any need to immediately implement the Proposed Agreement.

(12) Also, in accordance with the Order, the parties have met and will continue to meet over the next few weeks in an effort to resolve the issues between them.

WHEREFORE, the ACE Companies respectfully request that this Court enter an order:

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


Respectfully submitted,

ACE Companies

By Their Attorneys

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Dated: May 14, 2004

By: 
Ronald L. Snow

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

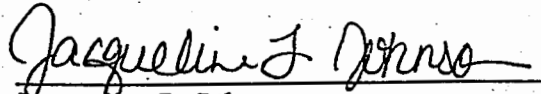
SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 03-E-0106

CERTIFICATE OF SERVICE

I, Jacqueline L. Johnson, do hereby certify that on May 7, 2004, I served a true copy of the foregoing upon parties identified on the attached Service List, by first class mail, postage prepaid.

Dated: May 7, 2004


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