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

REPLY BRIEF IN FURTHER SUPPORT OF EXPEDITED MOTION FOR STAY, OR ALTERNATIVELY FOR DECLARATION THAT SEPTEMBER 22, 2005 ORDER IS STAYED PURSUANT TO RULE 74

Appellants 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. and Lovells, respectfully submit this reply brief in further support of their motion (the "Motion") for an order (a) declaring that the order dated September 22, 2004 (the "September 22 Order") on the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents (the "Proposed Agreement") in *In the Matter of the Liquidation of the Home Insurance Company*, Superior Court No. 03-E-0106, is stayed by operation of New Hampshire law pending resolution of the appeal; or (b) in the alternative, staying the September 22 Order, pursuant to Rule 7-A of the Supreme Court Rules.

Summary

1. The Liquidator has now submitted briefs in this Court, the Supreme Court and the High Court of Justice in England regarding a stay of the September 22 Order, but has failed to cite a single authority for the proposition that Rule 74 does not apply in the context of a liquidation. That is because there are no exceptions to Rule 74. The rule itself sets forth no limitations on its applicability, the leading treatise on New Hampshire practice refers to the

rule as one of general application and the case law shows that it has been applied in different contexts.

2. Nevertheless, the Liquidator requests that the Court – without any authority – disregard the plain language of Rule 74 and carve out an exception for liquidations. All the parties in this case have operated on the understanding that the New Hampshire rules of procedure and evidence apply. There is no reason why Rule 74 should be treated differently, and it is telling that the Liquidator has not provided such a reason.

3. Having no defense to the application of Rule 74, the Liquidator tries to divert the Court's attention by referring to the prior appeal or by focusing on the discretionary stay under Rule 7-A. As discussed below, the prior appeal is irrelevant for purposes of this Motion and has no effect on Rule 74. Moreover, the ACE Companies have moved for a discretionary stay in the alterative only, and they meet the criteria for such stay under the standard set forth in the Comment to Rule 7-A.

Argument

I. Rule 74 Of The Superior Court Rules Mandates An Automatic Stay Of The Appealed September 22 Order

4. It cannot be disputed that Rule 74 stays the effect of a decision on the merits that has been timely appealed. The rule states that it applies to "all actions at law or in equity." New Hampshire Superior Court Rule 74. Moreover, the Courts have applied Rule 74 under difference circumstances, without any limitation as to the type of matter covered by Rule 74. *See Tommy Hilfiger Retail, Inc. v. North Conway Outlets LLC, No.*, CIV. 99-C-147-B, 2000 WL 1480450, * 3 (D.N.H. February 14, 2000); *Rollins v. Rollins*, 122 N.H. 6, 10 (1982). The definitive treatise on New Hampshire practice states without qualification that "[i]f an appeal or review is claimed, the decree or verdict of the lower court is automatically stayed unless the trial court has specifically ordered that all or a portion of it shall remain in

effect during the process of appellate review." 5 R. Wiebusch, *New Hampshire Practice, Civil Practice & Procedure*, § 59.07, at 451.

5. Indeed, the Liquidator does not challenge Rule 74's general application. He instead argues that the Court should ignore Rule 74 in the context of liquidations. As discussed below, there is no authority for such a proposition and it is directly contradictory to the parties' practice in this case and the Liquidator's own arguments.

6. The parties' practice and directives in this matter have been to adhere to the New Hampshire Court Rules. The Restated and Revised Order Establishing Procedures Regarding Claims Filed with the Home Insurance Company in Liquidation, dated January 19, 2005 (the "Claims Procedures Order"), is replete with references to the New Hampshire Court Rules, not least of which is the section on discovery, which instructs the parties to refer wholly to New Hampshire Superior Court Rules 35-45-A. (Claims Procedures Order at 14(c).)

7. In addition, while the Liquidator now contends that "the Court should not adopt a strained construction of Superior Court Rule 74 that would call for entry of final judgments on the many approval orders entered in the liquidation proceeding," (Objection at ¶ 13), the Liquidator previously took the position (albeit incorrectly) that the Court's April 29, 2004 Order was a final order within Supreme Court Rule 3, and thus properly subject to appeal under Supreme Court Rule 7. (Opposition to the ACE Companies' Motion to Transfer Question of Law for Interlocutory Appeal, dated May 7, 2004 (the "Opposition to Motion to Transfer"), at 2-3.) The Liquidator further explained that:

> '[f]inal' orders in receiverships and bankruptcy proceedings are not limited to the order entered at the end of the proceeding. *See, e.g., Tringali v. Hathaway Machinery Co., Inc.*, 796 F.2d 553, 558 (1st Cir. 1986) (citing cases). Insolvency proceedings involve many applications and individual controversies which need to be finally resolved long before the proceeding itself ends. In this context, 'an order which disposes of a 'discrete dispute within a larger case' will be considered final and appealable.' *Id.*

(quoting *In re American Colonial Broadcasting Corp.*, 758 F.2d 794, 801 (1st Cir. 1985)).

(Opposition to Motion to Transfer at 3.)

8. It is illogical for the Liquidator to have argued that the April 29, 2004 Order was an order governed by the New Hampshire Court Rules applicable to insurance liquidations regarding final orders, but to argue now that the September 22 Order is not. Rule 3 defines a "mandatory appeal" as "an appeal from a final decision on the merits issued by a superior court...." The Rule in turn defines a "decision on the merits" as an "order, verdict, opinion, decree, or sentence following a hearing on the merits or trial on the merits...." It cannot be denied that the September 22 Order is a decision on the merits and that Rule 74 applies.

9. The Liquidator tries to rely on the April 29, 2004 Order as a reason for the Court to ignore the mandatory provisions of Rule 74 with respect to the September 22 Order. There is no reason why the earlier appeal should have any bearing on the September 22 Order, which is clearly governed by Rule 74. In any event, the April 29, 2004 Order presented a different – and confusing – set of facts. The ACE Companies believed that the April 29, 2004 Order was interlocutory, and to that end, they asked the Supreme Court for permission to appeal. It was only when Benjamin Moore & Co. filed a mandatory appeal that the ACE Companies joined in the application.

10. No clear rule or lesson can be drawn from the earlier appeal, and certainly it should not be used by the Liquidator as a reason to disregard Rule 74. Moreover, the Supreme Court gave indications that the April 29, 2004 Order was interlocutory, particularly in the May 12, 2004 Order when it remanded the matter for a consideration of a stay by the Superior Court. If, as the Liquidator argues, the earlier appeal had been mandatory, there would have been no remand and the Supreme Court would have applied Rule 74. Instead, the

matter proceeded along the path of a discretionary stay, illustrating that the April 29, 2004 Order was interlocutory.

11. However, this Court does not have to resolve the issue of whether the April 29, 2004 Order was mandatory or interlocutory. This is a red herring raised by the Liquidator to distract attention from the real issue, and it cannot be argued that the ACE Companies waived any rights in connection with the earlier appeal or that the appeal has any relevance to whether Rule 74 applies here.

12. The Liquidator requests, too late, that the Court now direct that the September 22 Order be effective during the appeal. Such instruction by the Court could only have taken place during the 30-day appeal period prescribed by Rule 74. *See also Scheidegg v. Dept. of the Air Force*, No. 90-1127, 1990 U.S. App. LEXIS 17624, * 8-* 9 (1st Cir. Sept. 28 1990) (Superior Court directing that order would remain in effect pending appeal period at the commencement of such period); *Nicolazzi v. Nicolazzi*, 131 N.H. 694, 695 (N.H. 1989) (same); *Rollins*, 122 N.H. 6, at 10 (same); *Hille v. Hille*, 116 N.H. 109, 111 (N.H. 1976) ("In future cases involving modification of custody orders the trial court may well consider entry of a stay of the effective date of the order, *if it appears* that appellate review *will be sought and pursued.*") (emphasis added). Because the Court did not rule within the 30-day appeal period that the September 22 Order should be effective pending the appeal period, the September 22 Order is automatically stayed in accordance with Rule 74.

II. A Stay Is Also Warranted Under the Standard in Supreme Court Rule 7-A

13. Rule 7-A provides the Court with authority to "preserve the status quo" pending appeal. Rule 7-A. The comments to Rule 7-A expressly refer to *Rautenberg v. Munnis*, 107 N.H. 446 (1966), in which the Supreme Court balanced the merits of the appeal against the "delay and inconvenience" to the opposing party in determining whether a stay

should be issued. *Id.* at 448. This explicit reference compels the Court to utilize the standard set forth in *Rautenberg*, and not the standard urged by the Liquidator.

14. The merits of the appeal are as obvious as they are compelling, as the Court has recognized (and the Liquidator agrees) that the Proposed Agreement presents a question of first impression in New Hampshire. (*See* April 29, 2004 Order, at 1; Liquidator's Response to the Motion to Expedite Appeal, dated May 21, 2004, at 4.) The appeal raises important issues relating to the violation of a New Hampshire statute. Resolution of the appeal will have an effect on liquidations in New Hampshire and elsewhere, as many other states have similar provisions.

15. The argument posited by the Liquidator that the Court has already determined the merits of the issue adversely to the movants misses the point entirely, and would have the effect of rendering all orders unappealable, as they have already been ruled upon.

16. Further, the merits of the appeal outweigh any prejudice to the Liquidator. The Liquidator asserts that a stay would "cause confusion among the AFIA Cedents over the filing of their claims in the liquidation as contemplated by the Agreement and delay the commencement of steps necessary to collect the estate asset for the time required for the appeal." (Response at 11.) This alleged "confusion" would arise even if the stay were denied because the AFIA Cedents cannot be sure whether the Proposed Agreement will survive the appellate process. Even notwithstanding this, the Liquidator could mitigate any confusion by extending the standstill with the AFIA Cedents, as he has done previously on three occasions. In addition, any alleged "delay" posited by the Liquidator is outweighed by the certainty that will be attained by the appellate process's determination of whether the Proposed Agreement is lawful or not.

17. Finally, even if there were any inconvenience to the liquidation, such inconvenience is outweighed by the harm the ACE Companies will suffer if a stay is not issued, as they will need to expend significant resources in the process of determining whether the AFIA Cedents' claims should be paid. The Liquidator suggests that such expense cannot be considered harm, since it is a cost created by the ACE Companies. Here, too, the Liquidator misses the point entirely. This Court has already determined that the ACE Companies have a legitimate interest in being involved in, and challenging, the U.K. proceeding. In its Order dated October 8, 2004, the Superior Court made a specific finding that:

> ...the direct interests of ACE Companies and Benjamin Moore & Co. are interests that would be prejudiced absent an opportunity to respond and demonstrate the potential harm that might be posed by the Liquidator's endorsement of the agreement at issue... Accordingly, the ACE Companies and Benjamin Moore & Co. have standing to challenge the agreement.

18. The ACE Companies would be remiss if they were simply to allow the Liquidator to have his way in the U.K. proceeding. If the stay is not granted, and the scheme is implemented, the ACE Companies will have to incur significant expense in the U.K. proceeding. These efforts will be wasted if the Supreme Court were to find that the Proposed Agreement violates New Hampshire law. Similarly, the Liquidator's efforts in the U.K. proceeding, the expenses for which are borne by Home's creditors including the ACE Companies, will be wasted if the Supreme Court were to find that the Proposed Agreement violates New Hampshire law.

Conclusion

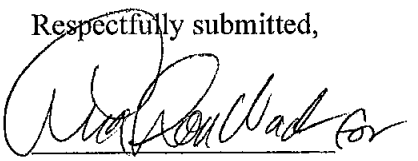
Accordingly, the ACE Companies respectfully request that the Court enter an Order:

A. Declaring that the September 22 Order is automatically stayed by operation of New Hampshire law;

B. Or, alternatively declaring that the September 22 Order is stayed pursuant to Rule 74; and

C. Granting such other and further relief as this Court deems just and proper.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing ACE Companies' Reply Brief In Further Support Of Expedited Motion For Stay, Or Alternatively, For Declaration That September 22, 2005 Order Is Stayed Pursuant to Rule 74 has been served on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on November 8, 2005:

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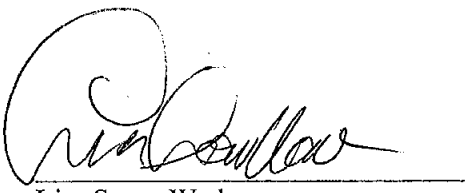

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