

THE STATE OF NEW HAMPSHIRE

MERRIMACK, S.S.

SUPERIOR COURT

03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

**EXPEDITED MOTION FOR STAY, OR ALTERNATIVELY
FOR DECLARATION THAT SEPTEMBER 22, 2005 ORDER IS STAYED
PURSUANT TO RULE 74**

Appellants Century Indemnity Company (“CIC”), 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 move this Court for an order declaring that the Court’s Order dated September 22, 2005 (the “September 22 Order”), on the Liquidator’s Motion for Approval of Agreement and Compromise with AFIA Cedents is stayed by operation of New Hampshire law pending the appeal by the ACE Companies (and co-appellant Benjamin Moore & Company (“Benjamin Moore”)).

In support of this Motion, the ACE Companies respectfully state as follows:

I. Summary

1. This Motion arises out of the effort by Roger A. Sevigny, as the liquidator (“Liquidator”) of Home Insurance Company (“Home”), to characterize the September 22 Order as a final and enforceable judgment in connection with proceedings before the High Court of Justice in England (the “High Court”), when, under clear-cut New Hampshire law, any enforcement of the September 22 Order is stayed pending appeal.

2. Today, November 3, 2005, the Liquidator, through the English Joint Provisional Liquidators for Home (“JPLs”), is requesting that the High Court “sanction” (*i.e.*, approve) an English scheme of arrangement (the “Scheme”) that is expressly conditioned

upon the approval by the Superior Court of the agreement and compromise (the “Proposed Agreement”) between the JPLs and the AFIA Cedents. As this Court is well-aware, the U.K. provisional liquidation is ancillary to Home’s liquidation in New Hampshire. The JPLs exercise their powers at the request and direction of the Liquidator. (See trial testimony of Gareth Hughes, annexed hereto as Ex. A.)

3. After this Court approved the Proposed Agreement in the September 22 Order, the ACE Companies and Benjamin Moore filed timely appeals. Under Rule 74 of the Superior Court Rules, a decision on the merits, such as the September 22 Order, is stayed and does not take effect as a final judgment if any party files an appeal within the requisite time period set forth in Rule 7.

4. The ACE Companies have pointed out to the Liquidator’s counsel that the September 22 Order is stayed by the operation of New Hampshire law, but the Liquidator refused to withdraw the petition to the High Court for approval of the Scheme. To the contrary, counsel for the JPLs have indicated that (a) they consider the September 22 Order to be “fully enforceable;” (b) they will be moving forward with the petition for Scheme approval; and (c) they will bring any approval of the Scheme to this Court’s attention.

5. Having exhausted their efforts to achieve a withdrawal of the petition for approval of the Scheme, the ACE Companies filed a Motion to Waive Filing of Stay in Superior Court along with an Expedited Motion to Stay in the New Hampshire Supreme Court on November 1, 2005 given the impending hearing before the High Court. ACE Companies learned this morning (November 3, 2005) that the Supreme Court has denied the motion to waive the requirement that it first file the motion to stay in this Court. It further ruled that the motion to stay was moot given its disposition of the motion to waive filing. Hence, no substantive ruling was made by the Supreme Court on this present request for confirmation that Rule 74 stays the effect of the September 22 Order, or alternatively for a stay.

6. Given that the Supreme Court has made clear that relief must first be sought in this forum, the ACE Companies respectfully request that this Court enter an order declaring that pursuant to Super. Ct. R. 74 the September 22 Order is stayed and may not be relied upon by the Liquidator or his representatives in the High Court proceedings during the pendency of the appeal.

7. Even if Rule 74 did not apply here, a stay is appropriate. The Liquidator cannot show that he would suffer any prejudice if the Court were to issue a stay. As shown below, there is no reason why the Scheme must be approved now. The Scheme is for distribution purposes only, but it is unlikely that there will be any reinsurance recoveries to distribute to the U.K. AFIA Cedents before the Court decides this appeal.

II. Background

8. The Proposed Agreement, which is the subject of the pending appeal provides for the implementation of a Scheme under Section 425 of the Companies Act 1985. (Ex. B annexed hereto at ¶ 1.1.2.) The purpose of the Scheme is to distribute reinsurance recoveries under the Proposed Agreement to the AFIA Cedents in the U.K. (Third Witness Statement of Gareth Hughes, annexed hereto as Ex. C, at ¶ 17.2.)

9. The parties expressly conditioned the existence of the Scheme upon the “approval of the supervising New Hampshire Court” of the Proposed Agreement. (*See* Ex. B at ¶¶ 1.1.2-1.1.3.)

10. The September 22 Order is a “decision on the merits” under Rule 3 of the Supreme Court Rules, which means that it may be appealed under the mandatory appeal provisions in Rule 7 of the Supreme Court Rules. Pursuant to Rule 7, the ACE Companies and Benjamin Moore filed timely Notices of Appeal from the September 22 Order on October 20 and 21, respectively. (*See* Exs. D and E annexed hereto, without attachments.)

11. Notwithstanding the automatic stay under New Hampshire law triggered by the appeal, counsel for the JPLs recently informed U.K. counsel for the ACE Companies that they

would seek the High Court's approval of the Scheme based on the September 22 Order. One of the JPLs, in a draft witness statement to be submitted to the High Court, has described the September 22 Order as "final," (*see* Ex. C at ¶ 31), and U.K. counsel for the JPLs similarly claimed that the September 22 Order is "fully enforceable" despite the pending appeals.

12. U.K. counsel for the ACE Companies requested, in a letter dated October 28, 2005, that U.K. counsel for the JPLs explain why the request for approval of the Scheme cannot, and should not, be delayed. (*See* Ex. F.) The response from the JPLs' counsel (which is attached as Ex. G) was unsatisfactory and did not address the ACE Companies' legitimate concerns. In fact, counsel for the JPLs confirmed that in the High Court proceeding they will be portraying the September 22 Order as "fully enforceable" and will bring any approval of the Scheme to the Supreme Court's attention. (*See* Ex. G.)

13. On October 31, 2005, U.S. counsel for the ACE Companies also approached counsel for the Liquidator, and requested that he instruct the JPLs to withdraw the petition for Scheme approval in the High Court on the ground that the effect of the September 22 Order is automatically stayed by the appeals. Even though Gareth Hughes (one of the JPLs) has conceded in his witness statement to the High Court that a stay prevents the Scheme from becoming effective, (*see* Ex. C annexed hereto at ¶ 23), counsel for the Liquidator did not respond to the ACE Companies' request to withdraw the petition. Accordingly, the ACE Companies sought a stay, initially before the Supreme Court, but now from this Court.

III. Basis for Relief

A. Under New Hampshire Law, A Timely Appeal Results In An Automatic Stay Of The Appealed Order

14. New Hampshire law is clear. Rule 74 of the Superior Court Rules states that following a decision on the merits "final judgment shall be entered ... unless a notice of appeal has then been filed with the Supreme Court pursuant to its Rule 7." Super. Ct. R. 74 (emphasis added). Therefore, "[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 (emphasis added); see also *Rollins v. Rollins*, 122 N.H. 6, 10 (1982) (“Normally, by timely appealing the trial court’s final decree, the defendant would prevent it from going to judgment . . .”).

15. The September 22 Order, which is a decision on the merits, does not state that it shall remain in effect during appellate review. When the ACE Companies and Benjamin Moore filed timely notices of appeal under Rule 7, the September 22 Order was stayed under Rule 74 and it may not be relied upon as a final judgment.

16. In objecting to the Expedited Motion to Stay filed in the Supreme Court, the Liquidator has asserted that Rule 74 does not apply here because this case involves an insolvency.

17. Neither Rule 74 itself, nor New Hampshire law interpreting it, limits the application of the automatic stay provisions as the Liquidator suggests. See Wiebusch, § 59.07, at 451; *Rollins*, 122 N.H. at 10 (1982). Indeed, the Liquidator’s assertion that there should be a special exemption is squarely contradicted by the Liquidator’s frequent and consistent invocation of other rules of procedure in this matter.

18. The Liquidator also argued in its objection filed with the Supreme Court that the ACE Companies’ request for a stay is not new and that it was denied in connection with a prior appeal. He is wrong, and, in their High Court submissions, the ACE Companies already pointed out to the Liquidator’s representatives the distinction between this stay request and the prior applications. (See Witness Statement of Gary S. Lee, annexed hereto, at ¶ 26.)

19. As noted in the Lee Witness Statement, the ACE Companies originally appealed the April 29, 2004 Order of the Superior Court under Rule 8 of the Supreme Court Rules, which applies to interlocutory appeals. (*Id.*) Benjamin Moore and Company filed a mandatory appeal shortly thereafter, but the ACE Companies continued to seek a

discretionary stay under Supreme Court Rule 7-A in the event the April 29, 2004 was deemed to be interlocutory. (*Id.*)¹

20. Thus, the stay motions on the prior appeal of the interlocutory April 29, 2004 Order have nothing to do with this Motion, which relates to a final decision on the merits under Rule 3 of the Supreme Court Rules (thereby invoking Rule 74). The ACE Companies had no reason to rely on Rule 74 in the prior stay applications and have been forced to do so here (rather than relying on the clear statement of the law) because the Liquidator is attempting to violate New Hampshire law in the High Court proceedings.

21. The Liquidator further maintains that the Motion is untimely and that the ACE Companies somehow sat on their rights. The Liquidator's attempt to shift the blame for his own wrongdoing to the ACE Companies should be ignored. The ACE Companies had assumed that, pursuant to Rule 74, the September 22 Order was automatically stayed and would not serve as the basis for an application to the High Court for approval of Home's U.K. scheme of arrangement (the "Scheme"). However, as soon as the ACE Companies saw that one of Home's Joint Provisional Liquidators ("JPLs"), Gareth Hughes, was mischaracterizing the September 22 Order as "final," they instructed their U.K. counsel to seek clarification from U.K. counsel for the JPLs. The response, however, confirmed that the JPLs would be representing to the High Court that the September 22 Order was "fully enforceable." When counsel for the Liquidator refused to withdraw the petition in the High Court for Scheme approval, the ACE Companies were forced to seek an order from this Court confirming that, under Rule 74, the Liquidator and his representatives may not enforce the September 22 Order.

B. Even if Rule 74 did not Apply, A Stay Is Also Warranted

¹ The Supreme Court, in its order dated June 11, 2004, confirmed that the April 29, 2004 Order is interlocutory because it stated that the appeal had been "accepted." Of course, there was no need to "accept" the appeal if it was a mandatory appeal rather than an interlocutory one.

22. In the event this Court finds that the September 22 Order was not automatically stayed under Rule 74, the ACE Companies respectfully request that the Court enter a stay.

23. Without question, the approval of the Proposed Agreement has significant consequences for ACE Companies, but also sets in motion the distribution scheme contemplated by the Proposed Agreement with its attendant expense for the Home Liquidation estate.

24. The issuance of a stay to preserve the *status quo* would not result in any harm to the Liquidator. The Liquidator may argue that a stay would prevent it from obtaining the approval of the Scheme until after the appeal is decided, but there is no reason why the Scheme must be approved now. The JPLs have admitted that the sole function of the Scheme is to distribute payments to the U.K.-based AFIA Cedents under the Proposed Agreement. However, the Liquidator has not yet recovered any reinsurance assets from the ACE Companies, so there is nothing to distribute.

25. Moreover, one of the ACE Companies, CIC, is owed money by Home and it has asserted set-off rights in the tens of millions of dollars. Under New Hampshire law (as recently clarified by the Referee in a related proceeding), the right to assert set-off arises as soon as an amount is claimed as due and owing. Therefore, the ACE Companies will not be required to make payments to Home under the applicable reinsurance until the claims allowed by Home (and the Superior Court) exceed the offset asserted against Home. It is very unlikely that those claims will exceed the offset before the Supreme Court decides the pending appeal.

26. In short, the approval of the Scheme currently sought by the JPLs is unnecessary and may be obtained later. Indeed, the High Court's approval of the Scheme before the appeal is decided could result in wasted effort and resources if the Supreme Court reverses the September 22 Order.

27. The Liquidator may also claim (as he has in the past) that a stay would affect his ability to put the Scheme into effect before the December 31, 2005 expiration date for the

Proposed Agreement. The Liquidator, however, has extended the deadline three times before, and should be able to obtain another extension. Given that an appeal is pending and will probably not be decided before December 31, 2005, it stands to reason that the Liquidator would have to seek an extension (whether or not a stay issues) in order to ensure that the Scheme is not approved and then rendered ineffective by the Supreme Court's decision on the appeal.

28. Thus, the potential impact to ACE Companies, the lack of prejudice to the Liquidator, and principals of judicial economy demonstrate that a stay should be issued.

C. Expedited Consideration Of This Motion Is Warranted

29. The ACE Companies respectfully request that the Court rule on this Motion on an expedited basis.

30. As discussed above, the hearing in England at which the JPLs will seek to rely on the September 22 Order as "fully enforceable" is taking place today, November 3. The ACE Companies have worked diligently, albeit unsuccessfully, to persuade the Liquidator and JPLs to withdraw the petition for approval of the Scheme. To prevent the Liquidator (through the JPLs) from mischaracterizing and attempting to enforce the stayed September 22 Order, the ACE Companies request that the Court enter an order on this Motion so it may be presented to the High Court as it considers the approval of the Scheme.

31. Given the nature of this Motion and the Liquidator's objection to it in the Supreme Court, the ACE Companies have not sought the assent of the Liquidator.

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

- A. Granting the ACE Companies' request for expedited consideration of this Motion;
- B. Declaring that the September 22 Order is automatically stayed by operation of New Hampshire law or alternatively, by order of this Court, and until further order, may not

be relied upon by the Liquidator or his representatives in the High Court proceedings relating to the request for approval of the Scheme; and

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

Respectfully submitted,

ACE Companies

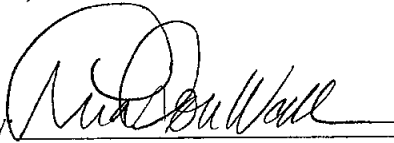
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Dated: November 3, 2005

By 

Ronald L. Snow
Lisa Snow Wade

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing *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 3, 2005:

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