

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

**BENJAMIN MOORE & CO.'S MOTION TO COMPEL
INTERROGATORY RESPONSES AND PRODUCTION
OF DOCUMENTS BY THE LIQUIDATOR**

2005 APR 11 A 9:16
MERRIMACK COUNTY
CLERK OF SUPERIOR COURT

Benjamin Moore & Co. (BMC"), through its undersigned counsel, moves pursuant to N.H. Super. Ct. R. 36 for an Order that the Liquidator be compelled to respond to BMC's Interrogatories and Requests for Production of Documents, and overruling the Liquidator's objections thereto. The grounds for this Motion are as follows:

I. Background and Introduction.

1. On October 13, 2004, BMC served its First Set of Interrogatories to Liquidator and First Set of Requests to Produce to Liquidator. BMC served a total of eight interrogatories, and three requests for production of documents.

2. The Liquidator objected to four of the eight interrogatories served by BMC, primarily because the allegedly objectionable interrogatories, in the Liquidator's view, sought information not relevant to the necessity, reasonableness, and fairness of the Agreement before the Court for review.¹

3. The Liquidator also objected to two of the three document requests made by BMC. Again, the Liquidator objected primarily on grounds that the information sought is not relevant to the necessity, reasonableness, and fairness of the Agreement.²

¹ The Liquidator's Responses and Objections to BMC's First Set of Interrogatories are attached hereto as Exhibit A.

² The Liquidator's Responses and Objections to BMC's First Set of Document Requests are attached hereto as Exhibit B.

4. The Liquidator also made boilerplate objections to BMC's Interrogatories and Requests to Produce on grounds that they are unduly burdensome, but has not supported this contention with any specifics.

5. Counsel for the parties exchanged correspondence in an effort to resolve their disputes over the scope of permissible discovery, but were unsuccessful in doing so, with the Liquidator refusing to reconsider his objections and provide any additional information in response to BMC's discovery requests.³

6. BMC brings this motion to compel the Liquidator to respond to its limited Interrogatories and Requests to Produce, which are focused specifically on obtaining information directly relevant to the issues now before the Court.

7. The Court's Order on Remand dated October 8, 2004, permits the parties to "conduct discovery limited to the necessity, reasonableness, and fairness of the Agreement." Since the Order on Remand was entered, the Supreme Court has denied interlocutory review of the administrative expense issue, and this Court has decided to conduct an evidentiary hearing on all the issues before the Court bearing upon approval of the Agreement, and the objections raised by ACE Companies and BMC. At the evidentiary hearing, it is the Liquidator's burden to prove facts establishing that the standard for approval of the Agreement have been met. Despite the fact that both the Supreme Court and this Court have ruled that fact-finding proceedings are necessary in connection with approval of the Agreement, the Liquidator continues to withhold relevant information so as to frustrate the fact-finding process.

8. As part of the fact-finding process, BMC served discovery requests aimed specifically at the issues of the necessity, reasonableness, and fairness of the Agreement. In his

³ Copies of correspondence between counsel on the disputed issues are attached hereto as Exhibits C and D.

objections to BMC's discovery requests, the Liquidator asserts a cramped interpretation of the issues of necessity, reasonableness, and fairness. As this is an equitable proceeding in which the Court has concluded that a full evidentiary hearing is warranted to assess the necessity, reasonableness, and fairness of the Agreement, discovery should be permitted as to all factors bearing upon those broad concepts. In order to conduct a "full and fair assessment of the wisdom of the compromise," Matter of Boston & Providence R. Corp., 673 F.2d 11, 12 (1st Cir. 1982), the parties must be permitted to explore fully all facts that may be relevant to approval of the Agreement.

9. In its discovery requests, BMC has focused on obtaining information relevant to the justifications for the Agreement asserted by the Liquidator in his Motion for Approval. Since its initial filing in opposition to the Liquidator's Motion, BMC has consistently taken the position that the Liquidator has not provided sufficient information for creditors to evaluate the necessity, reasonableness, and fairness of the Agreement. Through its discovery requests, BMC seeks information concerning the assumptions and assertions made by the Liquidator as a basis for the decision to enter into the Agreement with the AFIA Cedents, to wit:

- a. That the AFIA Cedents, because they would be classified as Class V creditors, have little or no incentive to file and prosecute significant claims against the Home estate.
- b. That the Agreement is necessary to avoid the potential risk and costs of complex international litigation the Liquidator would be forced to initiate to challenge potential efforts by AFIA Cedents to circumvent the Home liquidation by making their own agreements with reinsurers.

- c. That the Agreement is a reasonable and necessary means of recovering reinsurance assets.

Implicit in the Liquidator's Motion for Approval of the Agreement is the premise that there are no other reasonable alternatives to the Agreement that would achieve a similar or superior result, without giving special treatment to one subclass of Class V creditors, and reordering the statutory priority scheme. BMC seeks to discover the factual underpinnings of this premise as well.

10. The Liquidator's discovery responses and objections largely repeat the positions taken by Home before the Court, but do not provide the information sought by BMC to determine if those positions are factually supportable. The Liquidator must be compelled to produce this information so that the factual underpinnings for his contentions can be examined and policyholder creditors—and ultimately the Court—can be satisfied that the Agreement is in the best interest of the estate and its policyholder creditors.

II. Requests For Relief

11. Interrogatory No. 3 asked the Liquidator to identify all persons involved in the consideration of any alternatives to the Agreement, and the preparation of any estimates for recovering under any alternative scenarios. The Liquidator responded by identifying five persons who he characterizes as the "principal persons" involved in these matters. The Liquidator has refused to identify any other individuals, while at the same time acknowledging that other persons were involved. The Liquidator's only justification for refusing to identify all persons involved is that it "would serve no purpose." (Exhibit D, p. 1). There is no legitimate reason why the Liquidator cannot identify all persons involved in the limited matters that are the subject of Interrogatory 3. Doing so would create no significant burden, and is necessary to

allow BMC to identify potential witnesses on these issues. This is a clear example of the Liquidator making arbitrary decisions as to what information should be discoverable, and what should not. That is not the Liquidator's prerogative: he is required to produce the requested information unless there is some justification for not doing so, which is lacking here, so long as the information is reasonably calculated to lead to the discovery of admissible evidence. N.H. Super. Ct. R. 35(b)(1). See also Ingram v. Boston & Maine R.R., 197 A. 822, 823 (N.H. 1938)(production of documents will be ordered "if the court can fairly find that [the evidence sought] *may in any way* be material to the [party's] cause")(emphasis added). The fundamental purpose of the liberal rules of discovery would be defeated if one party could unilaterally decide to conceal the identity of potential witnesses, as the Liquidator attempts to do here.

12. Interrogatory No. 4 asks the Liquidator to identify and describe all estimates of reinsurance recoverable by Home with respect to claims made under the AFIA Treaties, in the absence of the Agreement. In his response, the Liquidator makes reference to work done by the Liquidator's office reviewing and evaluating estimates of potential gross liabilities of Home under the AFIA Treaties, as part of the Liquidator's consideration of the best way to handle "the AFIA situation." (Exhibit B, ¶ 4). Although the Liquidator admits this analysis was done in connection with his consideration of the Agreement and any alternatives, the Liquidator refuses to produce it, on grounds that it is beyond the scope of permissible discovery. For obvious reasons, whether the Agreement with the AFIA Cedents is necessary, reasonable, and fair can only be determined with reference to other possible alternatives. The Liquidator's analysis of Home's exposure to claims by AFIA Cedents was done as part of the Liquidator's consideration of options for addressing those claims and pursuing reinsurance covering those claims, and must therefore be produced.

13. Interrogatory No. 5 asks the Liquidator to identify “all persons” involved in the preparation of any estimates identified in response to Interrogatory No. 4. The Liquidator responded by incorporating his response to Interrogatory No. 3, in which he listed five “principal persons involved.” In addition to compelling the Liquidator to respond fully and completely to Interrogatory No. 4, for the reasons stated above, the Court should require disclosure of “all persons” involved, not just those persons the Liquidator deems as “principal.”

14. Request to Produce No. 2 seeks production of the documents that are the subject of Interrogatory No. 4. For the same reasons the Liquidator must be compelled to respond fully to Interrogatory No. 4, he must be compelled to produce responsive documents.

15. Interrogatory No. 6 asks the Liquidator to state the amount of professional fees and related costs incurred to date by Home in connection with the negotiation, approval, and litigation concerning the Agreement. The Liquidator objects on grounds this information is beyond the scope of permissible discovery. These professional expenses, of course, will dilute the assets available to pay policyholder creditors, as they will be paid as administrative expenses. Thus, the Court must consider this “cost” of the Agreement in determining its reasonableness and fairness to other creditors. Moreover, the Liquidator has put the question of litigation expenses in issue by asserting in support of the Agreement that it will benefit the estate by avoiding costly and potentially protracted litigation with AFIA Cedents and ACE that would ensue in the absence of the Agreement. Liquidator’s Reply In Support Of Motion For Approval (4/2/04), pp. 11-12. The Liquidator has never provided an estimate of those litigation expenses, nor his assessment of the likelihood of prevailing in such litigation. Nevertheless, the extensive costs of negotiating, drafting, and obtaining approval of the Agreement must be considered by

the Court in evaluating its reasonableness, in comparison with potential alternatives. As such, it is clearly discoverable.

16. Interrogatory No. 7 asks the Liquidator to identify reinsurance contracts of Home that the Liquidator has commuted where the contract covers Home's exposure as a reinsurer, as is the case with the ACE-INA reinsurance for the AFIA business ceded to Home. BMC asks only that the Liquidator identify the reinsurers on such commuted contracts and the face amount of coverage commuted. The Liquidator contends this information is beyond the scope of discovery allowed by the Order on Remand. But if the Liquidator has been able to achieve favorable settlements with other reinsurers on coverage for Class V claims such as the AFIA claims, without sharing half of the recovery with the claimants, it is fair to ask why that is not possible here. Moreover, if other reinsurance has been commuted where the underlying claims are held by Class V reinsureds of Home, this calls into question the Liquidator's assertion that Class V creditors have no incentive to file and prosecute claims. There must have been commutation with other reinsurers in these circumstances; otherwise the Liquidator would have so responded. BMC is entitled to discover basic information about these transactions, so it can assess whether the Liquidator's settlement with the AFIA Cedents is fair and reasonable in relation to other settlements he has reached, which may not dilute the recovery to policyholder creditors.

17. Interrogatory No. 8 asks the Liquidator to identify proofs of claim filed by reinsureds of Home that fall into Class V (like the AFIA Cedent's claims), other than claims filed for offset purposes only, and claims filed by AFIA Cedents. BMC seeks this information to find out how many Class V creditors in the position of the AFIA Cedents have actually filed claims against the Home estate, to identify those creditors, and to find out the face amount of

their claims. BMC has also requested production of copies of those proofs of claim in its Request to Produce No. 3. The Liquidator has stated that there are over 500 non-AFIA proofs of claim that may potentially involve assumed business. He refuses to produce the records or provide the requested information on grounds the information is “beyond the scope of reasonable discovery contemplated by the Order on Remand,” (Ex. D, p. 3), and doing so would be unduly burdensome. Any burden on the Liquidator can be eliminated by requiring him to provide BMC with access to the 500 or so proofs of claim within the scope of the request, for its own review. The information, however, is squarely within the scope of permissible discovery, as it goes directly to the Liquidator’s repeated contention that Class V reinsureds of Home have little incentive to file and prosecute claims.

18. Finally, the Liquidator has objected generally to the production of any documents created after February 11, 2004, the date of filing of the Liquidator’s Motion for Approval of the Agreement, on the basis that such records are beyond the scope of permissible discovery. This is a baseless objection, as some proofs of claim BMC seeks to review are likely dated after 2/11/04. Any documents within the scope of BMC’s document requests, determined by the Court to be subject to production, must be provided regardless of their date of creation.

WHEREFORE, BMC respectfully requests that the Court enter an Order:

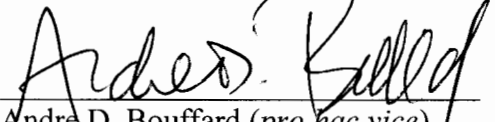
- A. Requiring the Liquidator to respond fully and completely to BMC Interrogatories No. 3, 4, 5, 7, and 8; and
- B. Requiring the Liquidator to produce documents responsive to BMC Request to Produce Nos. 2 and 3, either by providing copies thereof or allowing BMC to inspect and copy originals; and
- C. Granting such other and further relief as the Court deems just and proper, including, but not limited to, fees and costs incurred by BMC in filing and prosecuting this Motion.

April 8, 2005

Respectfully submitted,

DOWNS RACHLIN MARTIN PLLC

By:



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CERTIFICATE OF SERVICE

I hereby certify that on this day 8th of April, 2005, a copy of Benjamin Moore & Co.'s

Motion To Compel Interrogatory Responses And Production Of Documents By The Liquidator
was served by first class mail, postage prepaid to the following:

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April 8, 2005

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