

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS**

**SUPERIOR COURT**

**03-E-0106**

**In the Matter of the Liquidation of  
The Home Insurance Company**

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

The appellee Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company (Home"), hereby objects to the ACE Companies' expedited motion for stay or declaration that the Court's September 22, 2005 Order (the "September 2005 Order") is stayed pursuant to Superior Court Rule 74 ("Motion"). The ACE Companies' late request for a stay or declaration should be denied because their new argument under Superior Court Rule 74 (not raised under identical circumstances in their motion to stay the Court's April 29, 2004 Order (the "April 2004 Order")) would misapply the rule. A stay should be denied under the applicable standard 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 approved by the Order 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 Home's policyholders and other creditors. As additional reasons, the Liquidator states:

## **Background**

1. The Liquidator's motion and the April 2004 Order. In the Liquidator's Motion for Approval of Agreement and Compromise With AFIA Cedents, dated February 11, 2004, the Liquidator sought approval from the Superior Court 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. The Court granted the Liquidator's motion on April 29, 2004. April 2004 Order at 3 ("For the above reasons, the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents is GRANTED.") (Exhibit 1).<sup>1</sup>

2. The previous motions for stay. With the exception of the argument concerning Superior Court Rule 74, the issues raised in the ACE Companies' present motion are not new. However, as the ACE Companies attempt to distinguish their prior motion on the theory that it concerned an interlocutory order and appeal (Motion ¶¶ 18-20, Lee Statement ¶ 26), it is necessary to trace the procedural history after the April 2004 Order in some detail. That history demonstrates that the prior motions to stay arose in the context of a mandatory appeal. Indeed, this Court ruled that the ACE Companies' request to transfer the matter as an interlocutory appeal was "moot and/or denied." Order Relative to Stay of April 29, 2004 Order at 1 (June 1, 2004) (Exhibit 2).

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<sup>1</sup> Contrary to the ACE Companies' assertion, the April 2004 Order was not "interlocutory, because it only touched upon the threshold legality of the Proposed Agreement." Witness Statement of Gary S. Lee ("Lee Statement") ¶ 26. (The Lee Statement is included in the exhibits to the Motion at 54.) The April 2004 Order granted the Liquidator's motion without qualification. Indeed, on June 1, 2004, the Court issued an Addendum to Order of April 29, 2004 to clarify the April 2004 Order that began: "The Court's Order of April 29, 2004 granted the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents."

- On May 6, 2004, the ACE Companies filed a “Motion to Transfer Question of Law for Interlocutory Appeal” with this Court seeking to transfer a question of law decided in the April 2004 Order pursuant to Supreme Court Rule 8. Exhibit 3.
- On May 7, the Liquidator filed an opposition to that motion on the ground, among others, that the April 2004 Order was final and appealable as of right by a mandatory appeal under Supreme Court Rule 7. Exhibit 4.
- Also on May 7, Benjamin Moore & Co. (“BMC”) filed a “Notice of Mandatory Appeal” from the April 2004 Order with the Supreme Court under Supreme Court Rule 7. Exhibit 5.
- On May 11, the ACE Companies filed two motions with the Supreme Court in the BMC mandatory appeal: a “Motion to Waive Filing of Motion to Stay in the Superior Court”, and a “Motion for Stay of Order Pending Mandatory Appeal Pursuant to Rule 7” (emphasis added). Exhibits 6, 7. At page 3 note 1 of the stay motion, the ACE Companies specifically stated that “Pursuant to Rule 7, the ACE Companies are a party to this appeal by virtue of the Notice of Mandatory Appeal filed by Benjamin Moore.”
- Also on May 11, the Supreme Court denied the motion to waive filing in the Superior Court and, to the extent necessary, remanded to this Court for the purpose of ruling on any motion to stay the ACE Companies might file. Exhibit 8.
- On May 12, the ACE Companies returned to the Superior Court and filed a “Motion for Stay of Order Pending Mandatory Appeal Pursuant to Rule 7” (emphasis added). Exhibit 9. At page 3 note 1 of that motion, they referred to BMC’s mandatory appeal and again stated that “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.”
- On May 13, the ACE Companies filed with the Supreme Court a “Motion to Expedite Consideration of Appeal and to Suspend Rules” seeking (at page 1) “to expedite consideration of the appeal filed pursuant to Supreme Court Rule 7 by Benjamin Moore & Co.” Exhibit 10.
- On May 28, the ACE Companies filed “Reply Brief in Further Support for Stay of Order Pending Mandatory Appeal Pursuant to Rule 7” (emphasis added). Exhibit 11.
- This Court denied the motion for stay on June 1, 2004. Exhibit 2. In its order, the Court expressly addressed the procedural context of its ruling by noting that the ACE Companies had “assumed active participation as parties in Supreme Court Case No. 2004-0139, a Rule 7 Notice of Mandatory Appeal filed by Benjamin Moore and Co.” and filed their Supreme Court motion to waive filing with the Superior Court “[a]s parties to the Benjamin Moore & Co. Rule 7 Notice of Mandatory Appeal.” Order Relative to Stay of April 29, 2004 Order at 1. Most significantly, the Court noted that the BMC appeal “seeks review of matters identical to those raised in the ACE Companies’ Interlocutory Appeal Statement.” Id. “Accordingly, the Motion to Transfer Question of Law for Interlocutory Appeal is moot and/or denied.” Id. (emphasis added).
- On June 9, 2004, the ACE Companies returned to the Supreme Court by filing a “Motion for Stay of Order Pending Mandatory Appeal Pursuant to Rule 7” (emphasis added) that stated at page 1 that the ACE Companies seek to stay the April 2004 Order “pending the mandatory appeal by Benjamin Moore & Co. (‘Benjamin Moore’) to this Court.” Exhibit 12.

- On June 11, 2004, the Supreme Court denied the motion to stay and granted, in part, the motion to expedite appeal. Exhibit 13.<sup>2</sup>

In sum, the ACE Companies, the Superior Court and the Supreme Court considered the prior motions to stay in the context of the then pending mandatory appeal by BMC, not the ACE Companies' request for interlocutory transfer (which was in fact denied).

3. In its June 1, 2004 order denying the ACE Companies' request for stay of the April 2004 Order, the Court applied the standards outlined in In re: Public Service Co. of New Hampshire, 116 B.R. 347 (Bkr. D. N.H. 1990), and concluded:

ACE Companies must demonstrate that absent a stay they will suffer irreparable harm and that harm to them will be greater than any harm imposed on the liquidation by a stay. The Court does not find that the ACE Companies have met their burden in demonstrating irreparable harm. Indeed, the Court fails to see any significant harm. On balance and to the contrary, the Court discerns significant potential for harm to the liquidation and to policyholder creditors should a stay be granted, as such a stay is likely to create uncertainty and unnecessary delay.

Order Relative to Stay of April 29, 2004 Order at 2 (emphasis added) (Exhibit 2).

4. On appeal, the Supreme Court vacated the April 2004 Order and remanded for further proceedings. See Order entered September 13, 2004 (No. 2004-0319).

5. The September 2005 Order. The Court issued an Order on Remand on October 8, 2004 addressing several legal issues. After the ACE Companies' application for interlocutory appeal was denied by the Supreme Court on December 27, 2004 (No. 2004-0729), the Court oversaw extensive discovery proceedings. The Court held a five day evidentiary hearing

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<sup>2</sup> Nowhere in their motions to stay did the ACE Companies assert that they "continued to seek a discretionary stay under Supreme Court Rule 7-A in the event the April 29, 2004 [Order] was deemed to be interlocutory." Motion ¶ 19. The ACE Companies contend (Motion ¶ 19 n. 1) that the Supreme Court's June 11, 2004 order "confirmed that the April 29, 2004 Order is interlocutory because it stated that the appeal had been 'accepted.'" However, this usage is standard in all appeals. See Supreme Court Rule 7(1)(B) ("The Supreme Court may, in its discretion, decline to accept an appeal, other than a mandatory appeal."); see also, e.g., Gonya v. Sevigny, No. 2005-0170 (N.H. April 7, 2005) (in a mandatory appeal: "Case is accepted.") (Exhibit 14). Further, the Supreme Court's June 11, 2004 order itself begins by stating that "Motion for stay of order pending mandatory appeal pursuant to Rule 7 is denied." Exhibit 13.

involving 11 witnesses and over 90 exhibits from July 25-29, 2005. The Court then issued the September 22 Order.

6. The September 2005 Order granted the Liquidators' motion and approved the agreement with the AFIA Cedents. In the September 2005 Order and the earlier Order on Remand, the Superior Court concluded that "the Liquidator has the authority under Chapter 402-C to endorse the proposed agreement and compromise," and it further determined that the expenses of the Agreement are "properly categorized as they are 'actual and necessary costs of preserving or recovering the assets of the insurer' under RSA 402-C:44, I." See September 2005 Order at 2, 26. The Court conducted a detailed consideration of the evidence at the hearing. See *id.* at 5-33. It found that "the Liquidator has met his burden of proving that a reasonable liquidator under the circumstances would have concluded that the agreement was necessary to preserve access to and marshal the AFIA reinsurances." *Id.* at 30. After considering the benefit to the estate of the Agreement, the negotiating position of the AFIA Cedents and Liquidator, and the history of the negotiations, the Court further found that the Agreement is "fair and reasonable." *Id.* at 33.

7. With respect to the ACE Companies, the Court found that:

Broadly considered, the financial fortunes of ACE are best served if the Liquidator's agreement is not upheld. In that case, ACE stands to reap a sizable windfall. If the agreement is upheld, however, ACE cannot argue that its liabilities as a substantial net debtor to the estate, are any greater than those reflected under the terms of the contracts governing the 1999 transaction with CIGNA.

September 2005 Order at 31 (emphasis added). In other words, the ACE Companies' obligations are the same with the Agreement as they would have been if Home had not been liquidated.

8. The English sanction hearing and ACE's motion to stay in the Supreme Court. In light of the approval granted in the September 2005 Order, the Joint Provisional Liquidators applied to the High Court of Justice in London (the "English Court") for sanction of the Scheme

to implement the Agreement with AFIA Cedents. The ACE Companies appeared at the November 3, 2005 hearing and contended that the English Court should not proceed because the September 2005 Order was purportedly automatically stayed by Superior Court Rule 74 and, in any event, because a motion for stay was pending in the New Hampshire Supreme Court. See Lee Statement ¶¶ 11, 19, 24. The ACE Companies had filed a motion to stay and a motion to waive filing of motion to stay in this Court with the New Hampshire Supreme Court on November 1, 2005. On November 2, 2005, the Supreme Court issued an order denying the motion to waive filing with the Superior Court and ruling that the motion for stay was therefore moot. No. 2005-0740 (Exhibit 15).

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

9. The ACE Companies' motion for stay should be denied for the same reasons that the Court denied their request in a procedurally identical situation over a year ago. The ACE Companies have failed to demonstrate irreparable harm, while the delay that would result from a stay would cause unnecessary delay to the prejudice of the policyholders and other priority creditors of Home. In addition, the ACE Companies' new argument based on Superior Court Rule 74 is without merit.

**A. The September 2005 Order Is Not "Automatically" Stayed.**

10. In their motion, the ACE Companies assert that the September 2005 Order approving the Agreement is not effective because, they contend, it is "automatically" stayed under Superior Court Rule 74. Motion ¶ 13. The ACE Companies made no mention of this argument in their papers seeking to stay the April 2004 Order. In any event, the new argument has no merit.

11. The plain language of Superior Court Rule 74 shows that it does not apply to an appeal from an order by the court supervising an insurer liquidation approving an action by the

Liquidator. As specified in language not quoted by the ACE Companies (Motion ¶ 14), the rule concerns the entry of final judgment in “actions at law or in equity, in which a verdict or decree is entered, or in which a motion for nonsuit or directed verdict is granted, or in which a bill in equity is dismissed, or in which any motion is acted upon after verdict or decree.” Superior Court Rule 74. The rule contemplates a “verdict or decree” that resolves an entire action. Contrary to the ACE Companies’ suggestion (Motion ¶¶ 3, 14, 20), Rule 74 does not refer to “decisions on the merits” so as to line up with Supreme Court Rule 7.<sup>3</sup>

12. There is no such “verdict or decree” here, and this matter does not present any of the situations described in the rule. The case and treatise cited by the ACE Companies do not suggest that Rule 74 has any bearing on orders addressing individual motions in receivership proceedings.<sup>4</sup> Indeed, the Order does not involve property rights of the ACE Companies subject to attachment or execution. Furthermore, application of the rule as advanced by the ACE Companies would have made the Court’s ruling in the Order Relative to Stay of April 29, 2004 Order unnecessary.

13. In these circumstances, 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, render the Court’s earlier consideration of stay motions unnecessary, and be inconsistent with the ACE Companies’ conduct in vigorously pursuing motions to stay the earlier approval order in both the Supreme Court and this Court.

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<sup>3</sup> Supreme Court Rule 3 defines “[d]ecision on the merits” as “[i]ncludes order, verdict, opinion, decree, or sentence following a hearing on the merits or trial on the merits and the decision on motions made after such order, verdict, opinion, decree or sentence.” This definition and the language of Superior Court Rule 74 do not correspond, so the application of Rule 74 to “decisions on the merits” must be addressed case by case.

<sup>4</sup> Rollins v. Rollins, 122 N.H. 6, 10-11 (1982), concerned the effect of an appeal of a final divorce decree between the marital parties. The passage from 5 R. Wiebusch, New Hampshire Practice, Civil Practice & Procedure § 59.07 at 451, is also addressed to the typical plaintiff v. defendant case.

14. As the ACE Companies' motions seeking to stay the previous approval order did not contend that the order was automatically stayed, the Liquidator reasonably expected the September 2005 Order to be effective unless stayed on motion. There was thus no reason for the Liquidator to ask the Court to order that the September 2005 Order remain in effect during appellate review. However, as the ACE Companies concede, the Court has the authority to direct that orders continue in effect pending appeal even where Rule 74 applies. Motion ¶¶ 14-15; Rollins v. Rollins, 122 N.H. 6, 9 (1982) (judge ordered that final decree was to be in effect pending appeal). If the Court were to conclude that Rule 74 had the effect of automatically staying the September 2005 Order pending appeal, the Court should exercise its authority to direct that the September 2005 Order be effective during the appeal for the reasons given below and in the Court's June 1, 2004 Order Relative To Stay Of April 29, 2004 Order (Exhibit 2).

**B. The ACE Companies Fail To Show Irreparable Harm And Are Not Likely To Prevail On Appeal, While Delay Will Harm The Policyholders and Other Creditors Of Home.**

15. The ACE Companies do not attempt to specify a standard for motions for stay, but – as the Court impliedly held by citing the Public Service of New Hampshire case in the Order Relative To Stay Of April 29 Order – a person seeking a stay pending appeal in these circumstances must meet the criteria for the issuance of preliminary injunctive relief. Public Service of New Hampshire, 116 B.R. at 348. See Acevedo-Garcia v. Vera-Monroig, 296 F.3d 13, 16-17 (1<sup>st</sup> Cir. 2002) (per curiam). Accordingly, the ACE Companies should be 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.”); Vigtron, 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”).<sup>5</sup> The ACE Companies can demonstrate none of these elements. They do not have a likelihood of success on the merits. They do not attempt 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 Home’s policyholder creditors so the balance of harms weighs against a stay.

16. As the Court has concluded, the Agreement is within the Liquidator’s broad statutory authority and consistent with the priority statute because the payments contemplated by the Agreement are administrative expenses of collecting an asset. September 2005 Order at 1-2, 26-27; Order on Remand at 6-10. The Agreement is necessary to enable the Liquidator to collect an asset (the ACE Companies’ obligations) that would otherwise be unavailable for the benefit of policyholders. September 2005 Order at 30, 34 (granting Liquidator’s proposed finding of fact 110 and conclusions of law 4-5). It is also fair and reasonable. September 2005 Order at 31-33, 34 (granting Liquidator’s proposed finding of fact 111 and conclusion of law 8). The ACE Companies’ motion is an attempt to cause further delay. 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 movants. See September 2005 Order at 26-35. For all the reasons set forth in the September 2005 Order and the Order on Remand, the ACE Companies are not likely to prevail on appeal.

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<sup>5</sup> This is consistent with Rautenberg v. Munnis, 107 N.H. 446 (1966), a case previously cited by the ACE Companies. The Court there addressed a motion to continue the appeal and remand to permit consideration of a motion for new trial. The Court denied the motion because “it cannot be determined that the probable merits of the plaintiffs’ motion outweigh the delay and inconvenience to defendants by a continuance and remand.” Id. at 448. The Court thus considered the likely merits of the plaintiffs’ arguments and the balance of the equities.

17. The ACE Companies do not even contend that without a stay they will suffer “irreparable injury.” The reason for this is clear. As the Court found:

The Agreement is fair and reasonable to ACE. ACE will be involved in the determination of the AFIA Cedents’ claims as provided in the negotiated Claims Protocol. The obligations of ACE are not increased over what they would have been had Home remained solvent and not been placed in liquidation. ACE offered no evidence to show that the Agreement harmed it. ACE would receive a windfall, compared to its obligations pre-liquidation, if AFIA Cedents did not file and prosecute their claims beyond offset.

September 2005 Order at 34 (granting the quoted Liquidator’s proposed finding of fact 115).

The absence of harm is further demonstrated by the ACE Companies’ own assertion that “it is unlikely that there will be any reinsurance recoveries to distribute to the U.K. AFIA Cedents before the Court decides this appeal.” Motion ¶ 7. Payments can only follow (a) determination of claims under the claim determination process—in which one of the ACE Companies (Century Indemnity Company) will participate under the Claims Protocol with the Liquidator, see September 2005 Order at 9-10, and (b) collection of proceeds based on allowed claims. *Id.* at 11. These steps will take time – longer than the likely time required to resolve the appeal – and should not be delayed.

18. The ACE Companies suggest only that (a) proceedings for approval of the Scheme in the English courts could “result in wasted effort” if ACE were to prevail in the Supreme Court, and (b) a stay would not harm the Liquidator. Motion ¶¶ 24, 26. This seeks to reverse the burden of proof, which should rest on the unsuccessful party below seeking a stay. In any event, the petition for sanction in the English Court has now been heard and is under advisement. Any future sanction proceedings 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 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 Memorandum of March 19, 2004 at 15. They have appeared in the English Court to argue that the Court should not consider the Joint Provisional Liquidators’ application for sanction of the Scheme. Their intention to oppose and delay the English proceedings only harms Home’s policyholder claimants, and it warrants starting those proceedings earlier, not later.

19. The Court should consider the harm that would flow from the proposed stay. See Vigitron, 120 N.H. at 632. As the Superior Court noted in its Order Relative to Stay of April 29, 2004 Order at 2, a stay is “likely to create uncertainty and unnecessary delay.” It 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. This would harm the policyholder creditors of Home, contrary to the purposes of the insurer liquidation statutes and the public interest. See Order at 27; 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).

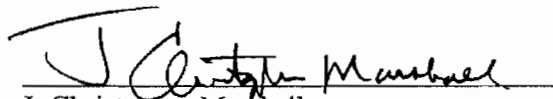
WHEREFORE, the ACE Companies' motion for stay should be denied.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER OF  
INSURANCE OF THE STATE OF NEW HAMPSHIRE  
SOLELY AS LIQUIDATOR OF THE HOME  
INSURANCE COMPANY AND US INTERNATIONAL  
REINSURANCE COMPANY,

By his attorneys,

KELLY A. AYOTTE  
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "J. Christopher Marshall", is written over a horizontal line.

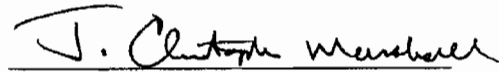
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November 7, 2005

### Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Objection to ACE Motion to Stay was sent, this 7th day of November, 2005, by email on counsel for the ACE Companies and first class mail, postage prepaid to all persons on the attached service list.

A handwritten signature in black ink that reads "J. Christopher Marshall". The signature is written in a cursive style with a horizontal line underneath the name.

J. Christopher Marshall

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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

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**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**

Before the Court is the Liquidator's Motion for Approval of Agreement and Compromise with the AFIA Cedents. The Ace Companies and Benjamin Moore & Co., interveners in this action, object to approval of this agreement. The Court has reviewed the pleadings and submissions of the parties and held a hearing on the motion on April 23, 2004.

The issue raised by this motion is whether the proposed agreement is consonant with RSA Chapter 402-C, and consistent with the powers of the Liquidator as contemplated by that statute. The Liquidator characterizes the agreement as marshalling assets as authorized by RSA 402-C:1, III and IV; and RSA 402-C: 25, V and XXII. The Ace Companies and Benjamin Moore argue that the agreement is in effect a distribution of assets in violation of the statutory distribution scheme of RSA 402-C:44. It appears that the concept formulated in the pending agreement is one of first impression.

By way of brief background, the agreement involves non-novated AFIA treaty exposures which are reinsured or indemnified by the Ace Companies. These Ace Companies' liabilities are substantial assets, estimated at \$231 million, of the Home Insurance Company Liquidation. They are collectible by the Liquidator only if and when the AFIA Cedents file and prosecute claims with the Liquidator. Because the AFIA Cedents' claims are in Class V under the statute, however, they will not be reached and



paid. Thus, it is uncertain at best whether the AFIA Cedents will file their claims since they have no apparent reason to expend the resources necessary to do so except to the extent that they may have setoff opportunities. If the AFIA Cedents fail to file their claims, the Liquidator will not be able to access the substantial assets of the Ace Companies. With the purposes of addressing the uncertainty as to whether AFIA Cedents will file and prosecute their claims to trigger access to Ace Companies' assets, and of providing an incentive to do so, the Liquidator has endorsed the pending agreement between the provisional liquidators in the United Kingdom and the Informal Creditors' Committee. Neither the Financial Services Authority (FSA) nor the National Conference of Insurance Guaranty Funds Reinsurance Commutation Subcommittee on the Home Insurance Company in Liquidation has objected to the proposed agreement and compromise. Pursuant to the agreement, the AFIA Cedents will receive approximately \$72.5 of the estimated \$231 million the Liquidator will receive from the Ace Companies when the AFIA Cedents' Claims are filed and prosecuted.

After reviewing the pleadings and statute, and considering the oral arguments of the parties, the Court is persuaded that, under the circumstances of this liquidation as explained below, the agreement proposed by the Liquidator is authorized under the broad array of powers granted the Liquidator under RSA 402-C:25 and is consistent with the goals and purposes of the statute to protect the interests of the insureds and creditors. RSA 405-C:1, IV. As a result of the agreement, the Liquidator will be able to marshal substantial assets to be distributed to creditors which would otherwise be unavailable. Also, although under the agreement AFIA Cedents will receive payments which, as Class V claimants, they would not otherwise receive, these payments are not to the detriment of

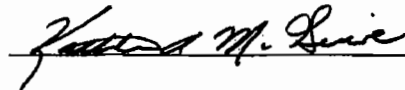
other Class V claimants who will receive nothing with or without the agreement.

Moreover, the agreement benefits Class II claimants, including Benjamin Moore, because the amount to be distributed to members of this class will increase. Finally, while the agreement assures that the Ace Companies will not receive a windfall of \$213 million, it imposes no additional liability upon them than those they have already assumed. For the above reasons, the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents is **GRANTED**.

While this matter has been decided favorably to the Liquidator, the Court is nevertheless concerned that the Ace Companies were not included in discussions whereby the proposed agreement was reached and that protracted litigation over this issue will ensue. Accordingly, the Court urges the parties to reach a global agreement on this issue. The Court schedules a further hearing on Friday, June 4, 2004 at 9 a.m. to discuss where the parties are at that time regarding any resolution of this matter.

So Ordered.

DATED: April 29, 2004



Kathleen A. McGuire  
Associate Justice

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

ORDER RELATIVE TO STAY OF APRIL 29, 2004 ORDER

The ACE Companies seek a stay of this Court's Order of April 29, 2004 which granted the Liquidator's Motion for Approval of Agreement and Compromise of AFIA Cedents.

In initial response to the Order of April 29, 2004, the ACE Companies filed a Motion to Transfer Question of Law for Interlocutory Appeal. Subsequently, pursuant to Supreme Court Rule 7 (4), ACE Companies assumed active participation as parties in Supreme Court Case No. 2004-0139, a Rule 7 Notice of Mandatory Appeal filed by Benjamin Moore & Co., which seeks review of matters identical to those raised in the ACE Companies' Interlocutory Appeal Statement. Accordingly, the Motion to Transfer Question of Law for Interlocutory Appeal is moot and/or denied.

As parties to the Benjamin Moore & Co. Rule 7 Notice of Mandatory Appeal, the ACE Companies filed a Motion to Waive Filing of Motion to Stay in Superior Court with the Supreme Court. That motion was denied by the Supreme Court and the case was remanded for the limited purpose of ruling upon any motion to stay filed by ACE Companies. ACE Companies filed the pending Motion for Stay of Order Pending Mandatory Appeal Pursuant to Rule 7 on May 12, 2004. The Liquidator's Objection to ACE Companies' Motion for Stay was filed on May 25, 2004. The Court notes that ACE

Companies have filed a motion to expedite the Supreme Court's consideration of the matter on appeal.

The ACE Companies argue that a stay in this Court will protect them from irreparable injury because the Liquidator, absent a stay, will be free to move forward with proceedings in the UK to effect the agreement. The Liquidator challenges the ACE Companies' assertions that they will suffer irreparable harm absent a stay, noting that ACE Companies' obligations to the liquidation estate arise under contracts pre-dating the liquidation, and that the agreement at issue imposes no additional liabilities beyond the \$231 million already assumed by the ACE Companies.

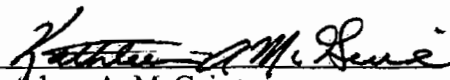
In pleadings related to this matter, the Court has been urged by both the Liquidator and ACE Companies to refer to bankruptcy principles and case law in the absence of insurance liquidation/rehabilitation case law specifically on point. For purposes of determining what standards must be met by a movant seeking a stay pending appeal, the Court relies upon the standards outlined in In Re: Public Service Co. of New Hampshire, 116 B.R. 347 (NH 1990). Therefore, ACE Companies must demonstrate that absent a stay they will suffer irreparable harm and that harm to them will be greater than any harm imposed on the liquidation by a stay. The Court does not find that the ACE Companies have met their burden in demonstrating irreparable harm. Indeed, the Court fails to see any significant harm. On balance and to the contrary, the Court discerns significant potential for harm to the liquidation and to policyholder creditors should a stay be granted, as such a stay is likely to create uncertainty and unnecessary delay.

The ACE Companies have also argued that a stay will preserve the *status quo* pending appeal, avoiding the possibility that actions of the Liquidator to implement the scheme of arrangement will be rendered “unnecessary and wasteful” should the ACE Companies be successful on appeal. In that regard, the Court notes that an uncertainty relating to the outcome of the pending appeal is borne by the ACE Companies and the Liquidator alike. Prior to the agreement becoming operative, there are additional applications and regulatory approvals to be addressed within the context of the Provisional Liquidation in the United Kingdom, making it unlikely that the ACE Companies will be at actual risk for performance of their obligations in the near future. Moreover, actions that may be taken by the Liquidator or Ace Companies regarding the agreement in the context of the proceeding in the UK are matters that would be entirely within the control and discretion of each.

The ACE Companies Motion for Stay of Order Pending Mandatory Appeal to Rule 7 is DENIED.

SO ORDERED:

DATED: 6/1/04

  
Kathleen A. McGuire  
Associate Justice

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

**MOTION TO TRANSFER QUESTION OF  
LAW FOR INTERLOCUTORY APPEAL**

Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company, and ACE American Reinsurance Company (collectively, the "ACE Companies") respectfully move this Court to transfer, for interlocutory appeal pursuant to Rule 8 of the New Hampshire Supreme Court Rules, the question of law identified in the annexed Interlocutory Appeal Statement. In support of this Motion, the ACE Companies state as follows:

1. For the reasons set forth in the Interlocutory Appeal Statement, there is a substantial basis for a difference of opinion on the issue decided in this Court's Order of April 29, 2004 (the "Order"), in which the Court granted a motion (the "Motion") by the Liquidator of Home Insurance Company (the "Liquidator") for approval of a proposed agreement (the "Proposed Agreement") that the Liquidator had entered into with the AFIA Cedents (as that term is defined in the Motion). The Court held that the Proposed Agreement is authorized under § 402-C:25 of the New Hampshire Insurers Rehabilitation and Liquidator Act, N.H. Rev. Stat. Ann. § 402-C:1, *et seq.* (the "Act"), and is consistent with the goals and purposes of the Act. (Order at 2.) The Proposed Agreement, however, directly contravenes the mandatory order of distribution established by the Legislature in § 402-C:44 of the Act. Moreover, the Court's approval of the Proposed Agreement is based on an overly broad interpretation of the

Liquidator's discretion that finds no support in the Act or in any applicable case law. The Court also approved the Proposed Agreement in the absence of any discovery or an evidentiary hearing on the complex factual issues involved, which were critical to the determination of whether the Liquidator exercised his authority reasonably in entering into the Proposed Agreement.

2. In addition, granting an interlocutory appeal from the Order (a) would materially advance the termination of the litigation and clarify further proceedings because it would determine the rights and obligations of the ACE Companies with respect to the claims of the AFIA Cedents against Home; (b) would afford the ACE Companies an opportunity to prevent the substantial and irreparable injury that they would suffer if an appeal of the Order were delayed until the conclusion of the liquidation; and (c) would allow the Supreme Court to decide an issue of great importance in the area of insurance company liquidations. Indeed, the Court noted that the issue presented by the Motion "is one of first impression." (Order at 1.)

3. The ACE Companies respectfully request an expedited consideration of this motion, given that the bar date for the filing of claims is rapidly approaching. The Liquidator has similarly recognized the importance of an early resolution of the issues presented by the Proposed Agreement. Indeed, at the last hearing, counsel for the Liquidator indicated that he planned to appeal immediately any adverse ruling.

4. Because of the nature of this motion, it is reasonably assumed by counsel for the ACE Companies that it would be futile to obtain the concurrence of the Liquidator to the relief sought.

5. No memorandum of law has been filed with this motion as the grant or denial of the relief sought is within the discretion of this Court.

Date: May 6, 2004

Respectfully submitted,

*Ronald L. Snow*

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-and-

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Facsimile (212) 909-0666

Attorneys for Respondents Century  
Indemnity Company, ACE Property and  
Casualty Insurance Company, Pacific  
Employers Insurance Company, and ACE  
American Reinsurance Company



**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**

**LIQUIDATOR'S OPPOSITION TO MOTION TO TRANSFER  
QUESTION OF LAW FOR INTERLOCUTORY APPEAL**

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 opposes the Motion to Transfer Question of Law for Interlocutory Appeal filed by the ACE Companies (the "ACE Motion") in response to the Court's April 29, 2004 Order (the "Order") granting the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents.<sup>1</sup> The Liquidator disagrees that the standards for interlocutory appeal in Rule 8 of the New Hampshire Supreme Court Rules ("Supreme Court Rules") are met. More importantly, the ACE Motion should be denied because the Order is final and appealable as of right.

**A. The Motion Is Unnecessary Because The Order  
Is Final and Appealable As Of Right.**

The underlying premise of the ACE Motion is that the Court's April 29, 2004 Order is interlocutory and therefore not subject to the usual appeal process, although they expressly "reserve their right to argue that the [Order] is final and may be appealed as a matter of right." ACE Companies' Interlocutory Appeal Statement

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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.

("ACE Appeal Statement") at 1 n. 1. The Order, however, is final and appealable, and treating it as interlocutory would create uncertainty in the administration of the liquidation.

The Order finally resolved the question whether the Court would approve the proposed Agreement with the AFIA Cedents. The Court held that "the agreement proposed by the Liquidator is authorized under the broad array of powers granted the Liquidator under RSA 402-C:25 and is consistent with the goals and purposes of the statute to protect the interests of the insureds and creditors. RSA 40[2]-C:1, IV." Order at 2. Indeed, the ACE Companies acknowledge that the Court "granted the motion in its entirety." ACE Appeal Statement at 4. In light of the Order, the Liquidator will proceed to implement that Agreement, and there will be no further proceedings in this Court on the merits of the Agreement.<sup>2</sup> Accordingly, the Order is a final "decision on the merits" within Supreme Court Rule 3, and it is properly subject to appeal under Supreme Court Rule 7.

The ACE Companies contend that without an interlocutory transfer "they would not be able to appeal the Order until the conclusion of the liquidation." ACE Appeal Statement at 7. This is wrong because the Liquidator's motion for approval of the AFIA compromise addressed a discrete matter separate from the overall liquidation of Home. As the Liquidator would have responded if consulted under Superior Court Rule 57-A, rulings on the Liquidator's applications for approval of

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<sup>2</sup> The hearing scheduled for June 4, 2004 is to discuss the status of negotiations between the ACE Companies and the Liquidator, not the AFIA compromise, as that matter "has been decided favorably to the Liquidator." Order at 3.

agreements and other transactions are final and subject to appeal. A contrary position would mean that the Court's decisions could be subject to challenge years later, after the transactions at issue have been fully implemented. The need for the Liquidator and other parties to the agreements to be able to act on the Court's approvals and their reliance interests when they have so acted require that the Court's decisions be final and subject to appeal only within the thirty day period allowed by Supreme Court Rule 7.

"Final" 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 (1<sup>st</sup> 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 (1<sup>st</sup> Cir. 1985)). The ACE Motion should be denied as unnecessary because they may appeal as of right from the April 29, 2004 Order.

**B. The ACE Companies' Proposed Interlocutory Appeal Statement Is Flawed.**

As the motion is unnecessary, and to provide an expedited response, the Liquidator does not address all of his many disagreements with the ACE Appeal Statement. Should the Court choose to consider the merits of the motion to transfer, however, the Liquidator notes three points:

1. The ACE Companies' proposed statement of the question inaccurately assumes facts and answers to the very legal issues to be decided. See ACE Appeal Statement at 5. The question presented assumes that the Agreement provides for a distribution to a subclass of Class V creditors as such and ignores the fact that the Agreement facilitates the collection of a significant asset that otherwise would be lost. If the Court were to endorse a statement of the issue, it should do so in a manner consistent with the Order, for instance:

Does the New Hampshire Insurer Rehabilitation and Liquidation Act, RSA 402-C:1, et seq., authorize the liquidator of an insolvent insurer to enter an agreement which enables the liquidator to marshall otherwise unavailable assets for distribution to creditors by providing for payments to certain creditors at no detriment to other creditors in the same class?

2. The "substantial basis for a difference of opinion" over the issue presented that is required by Supreme Court Rule 8(1) is lacking in this case. For the reasons set forth in the Liquidator's prior submissions, the Liquidator has clear statutory power to take necessary and expedient steps to collect debts and maximize the estate, including entry of the Agreement. See, e.g., RSA 402-C:25, VI, XXII. Further, the arrangement provided for in the Agreement is consistent with RSA 402-C:44 because the payments contemplated are administration costs within RSA 402-C:44, I.

3. Finally, the Liquidator has established that the Agreement benefits the liquidation and furthers the purposes of the statutes as described in the Order at pages 2-3. There is no substance to the ACE Companies' claims concerning discovery or an evidentiary hearing, and their assertion that the Court stated that it would permit them to conduct discovery and present evidence (ACE Appeal Statement at 3) is false. See

Transcript of April 9, 2004 Hearing at 19-20; April 9, 2004 Order ("If [the authority] issue is answered affirmatively, the Court will consider the agreement and whether further hearing on its approval is necessary.")

### CONCLUSION

The Court should deny the ACE Companies' motion.

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



---

Peter C.L. Roth  
Senior Assistant Attorney General  
Environmental Protection Bureau  
NEW HAMPSHIRE DEPARTMENT OF  
JUSTICE  
33 Capitol Street  
Concord, N.H. 03301-6397  
(603) 271-3679

Of Counsel:

J. David Leslie  
Eric A. Smith  
Rackemann, Sawyer & Brewster  
One Financial Center  
Boston, MA 02111  
(617) 542-2300

May 7, 2004

NEW HAMPSHIRE SUPREME COURT  
RULE 7 NOTICE OF MANDATORY APPEAL

Exhibit 5

This form should be used for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court except for a decision from: (1) a post-conviction review proceeding; (2) a proceeding involving the collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; or (6) a probation revocation proceeding.

1. COMPLETE CASE TITLE AND DOCKET NUMBERS IN TRIAL COURT

In The Matter Of The Liquidation Of The Home Insurance Company  
Docket No. 03-E-0106, Merrimack Superior Court

2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

Merrimack Superior Court  
Judge McGuire

3A. NAME AND ADDRESS OF APPEALING PARTY. IF REPRESENTING SELF, PROVIDE TELEPHONE NUMBER

Benjamin Moore & Co.  
51 Chestnut Ridge Road  
Montvale, NJ 07645

3B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF APPEALING PARTY'S COUNSEL

Andre D. Bouffard  
Eric D. Jones  
Downs Rachlin Martin PLLC  
P.O. Box 190  
199 Main Street  
Burlington, VT 05402  
(802) 863-2375

4A. NAME AND ADDRESS OF OPPOSING PARTY

Roger A. Sevigny  
Insurance Commissioner of the  
State of  
New Hampshire, solely in his  
capacity as liquidator of The Home  
Insurance Company

(11/03)

4B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF OPPOSING PARTY'S COUNSEL

Peter C.L. Roth  
Senior Assistant Attorney General  
Environmental Protection Bureau  
New Hampshire Department of  
Justice  
33 Capitol Street  
Concord, NH 03301-6397  
(603) 271-3679  
and  
J. David Leslie  
Rackemann, Sawyer & Brewster  
One Financial Center  
Boston, MA 02111  
617-542-2300

5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

Century Indemnity Company  
ACE Property and Casualty Insurance Company  
Pacific Employers Insurance Company  
ACE American Reinsurance Company

Counsel:

Ronald Snow  
ORR & RENO, PA  
One Eagle Square  
P.O. Box 3550  
Concord NH 03302-3550  
603-224-2381

and

Gary Lee  
LOVELLS  
900 Third Ave, 16<sup>th</sup> Fl.  
New York, New York 10022  
212-909-0600

6. DATE OF CLERK'S NOTICE OF DECISION OR SENTENCING. ATTACH COPY OF NOTICE AND DECISION.

**April 30, 2004**

DATE OF CLERK'S NOTICE OF DECISION ON POST-TRIAL MOTION, IF ANY. ATTACH COPY OF NOTICE AND DECISION.

**Not applicable.**

7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS

**Not applicable.**

8. APPELLATE DEFENDER REQUESTED? **Not applicable.**

IF SO, CITE STATUTE OR OTHER LEGAL AUTHORITY UPON WHICH CRIMINAL LIABILITY WAS BASED AND ATTACH FINANCIAL AFFIDAVIT (OCC FORM 4)

9. IS ANY PART OF CASE CONFIDENTIAL? IF SO, IDENTIFY WHICH PART AND CITE AUTHORITY FOR CONFIDENTIALITY. SEE SUPREME COURT RULE 12.

**No.**

10. IF ANY PARTY IS A CORPORATION, LIST THE NAMES OF PARENTS, SUBSIDIARIES AND



AFFILIATES. Benjamin Moore & Co. is a wholly owned subsidiary of Berkshire Hathaway, Inc.

11. DO YOU KNOW OF ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES WOULD BE DISQUALIFIED FROM THIS CASE? \_\_\_\_YES X NO  
IF YOUR ANSWER IS YES, YOU MUST FILE A MOTION FOR RECUSAL IN ACCORDANCE WITH SUPREME COURT RULE 21A.

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY FOR THIS APPEAL?  
X YES \_\_\_\_NO  
IF YOUR ANSWER IS YES, YOU MUST COMPLETE THE TRANSCRIPT ORDER FORM ON PAGE 4 OF THIS FORM.

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE SUPREME COURT RULE 16(3)(b).

Appellant Benjamin Moore & Co. ("Benjamin Moore") is a policyholder claimant in the insurance liquidation proceedings below. Benjamin Moore enjoys Class II priority with respect to its claims. Benjamin Moore objected to the Liquidator's Motion for Approval of an Agreement and Compromise with certain Class V claimants. This Agreement would bind the liquidation estate to treat these Class V claimants as super-priority Class I administrative claims. The Liquidator's Motion for Approval is based on unsupported assertions regarding future potentialities. In addition, even if the Liquidator could establish the requisite factual support for the assertions, the proposed settlement is impermissible as a matter of New Hampshire law.

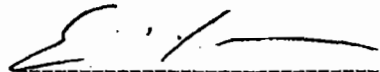
In the course of the hearing on this issue, the trial court concluded that it would bifurcate consideration of this matter. Specifically, the trial court indicated that it would first consider whether the proposed agreement was allowable under New Hampshire law. In the event that it concluded that the agreement was allowable, the trial court stated that it would consider the factual assertions made by the Liquidator, giving ample opportunity to Benjamin Moore for inquiry and discovery (if needed). Instead, the trial court issued a ruling on April 30, 2004, that granted the Liquidator's Motion in full, without taking evidence or allowing inquiry into the factual assertions relied upon by the Liquidator.

Benjamin Moore appeals from that ruling. The trial court's order is appealable pursuant to N.H. Supreme Court Rules 3 and 7, or alternatively, the collateral order doctrine. The trial court's order is a final decision on the merits with respect to the approval of the liquidator's proposed agreement. The core questions presented for review are:

- (1) Whether the trial court erred in concluding that the proposed settlement complies with New Hampshire's statutory insurance liquidation order of distribution.
- (2) Whether the trial court erred by summarily approving the agreement without exercising any independent review of whether the agreement is in the best interest of the estate and fair and equitable, or giving the opposing parties a fair opportunity to examine the factual underpinnings of the proposed agreement.
- (3) Whether the trial court should have approved the agreement based solely upon the factual assertions made in support of the Liquidator's Motion, even though the Motion failed to present sufficient evidence to support the factual assertions, and without making any findings on the disputed factual issues raised by the objections to the motion.

14. CERTIFICATIONS.

I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.



\_\_\_\_\_  
Appealing Party or Counsel

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

5/7/04

\_\_\_\_\_  
Date



\_\_\_\_\_  
Appealing Party or Counsel

## TRANSCRIPT ORDER FORM

**INSTRUCTIONS:**

1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Superior Court Administrative Rule 3-1), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the trial court. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.

LIST EACH PORTION OF CASE PROCEEDINGS TO BE TRANSCRIBED.						
DATE OF PROCEEDING	TYPE OF PROCEEDING	LENGTH OF PROCEEDING	NAME OF JUDGE(S)	NAME OF COURT REPORTER (IF PROCEEDING WAS RECORDED SO INDICATE)	PORTIONS PREVIOUSLY PREPARED **	DEPOSIT (SEE SCHEDULE BELOW)
4/9/04	Status conf.	1 hr.	McGuire	M. McGirr	1	\$450
4/23/04	Hearing	2 hr.	McGuire	M. McGirr	1	\$450
						\$
						\$
						\$
						\$
DO NOT SEND DEPOSIT AT THIS TIME.						TOTAL DEPOSIT: \$900

### SCHEDULE OF DEPOSITS

Length of Proceeding

- Hearing or trial of one hour or less
- Hearing or trial up to ½ day
- Hearing or trial of more than ½ day
- Previously prepared portions

Deposit Amount

- \$ 175
- \$ 450
- \$ 900/day
- Number of pages x \$.50 per page per copy  
If additional copies are needed

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you may be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

\*\* For portions of the transcript that have been previously prepared, indicate number of copies that were prepared.

BTV.266204.2

THE STATE OF NEW HAMPSHIRE  
Merrimack County Superior Court  
163 N. Main Street  
P. O. Box 2880  
Concord, NH 03301 2880  
603 225-5501

RECEIVED

MAY 13 2004

DOWNNS, RACHLIN & MARTIN  
BURLINGTON

NOTICE OF DECISION

ANDRE BOUFFARD ESQ  
DOWNNS RACHLIN MARTIN PLLC  
199 MAIN STREET PO BOX 190  
BURLINGTON VT 05402-0190

03-E-0106 In the Matter of Rehabilitation of TheHome Insurance Company

Please be advised that on 4/29/2004 Judge MCGUIRE made the following order relative to:

Court Order ;

ORDER ESTABLISHING PROCEDURES FOR REVIEW OF CERTAIN AGREEMENTS TO ASSUME OBLIGATIONS OR DISPOSE OF ASSETS

Court Order ; Granted

RE; LIQUIDATOR'S MOTION FOR APPROVAL OF AGREEMENT & COMPROMISE WITH THE AFIA CEDENTS

Court Order ;

ORDER RELATIVE TO SERVICE LIST & WEBSITE MATTERS

04/30/2004

William McGraw  
Clerk of Court

cc: Roger A. Sevigny, Commissioner of Ins.  
Martin P. Honigberg, Esq  
Peter C.L. Roth, Esq.  
Eric A. Smith, Esq.  
Richard V. Wiebusch, Esq.  
Michael D. Sandler, Esq.  
Paula Rogers, Esq.  
Ronald L. Snow, Esq.  
Pieter Van Tol, Esq.  
Adam Goodman, Esq.

Suzanne M. Gorman, Esq.  
Peter Bengelsdorf  
Sherilyn B. Young, Esq.  
J. David Leslie, Esq.  
Connie Rakowsky, Esq.  
Paula T. Rogers, Esq.  
Lucy J. Karl, Esq.  
Eric Jones, Esq.  
Gary S. Lee, Esq.  
Gail M. Goering, Esq.

Eric A. Haab, Esq.

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**

Before the Court is the Liquidator's Motion for Approval of Agreement and Compromise with the AFIA Cedents. The Ace Companies and Benjamin Moore & Co., interveners in this action, object to approval of this agreement. The Court has reviewed the pleadings and submissions of the parties and held a hearing on the motion on April 23, 2004.

The issue raised by this motion is whether the proposed agreement is consonant with RSA Chapter 402-C, and consistent with the powers of the Liquidator as contemplated by that statute. The Liquidator characterizes the agreement as marshalling assets as authorized by RSA 402-C:1, III and IV; and RSA 402-C: 25, V and XXII. The Ace Companies and Benjamin Moore argue that the agreement is in effect a distribution of assets in violation of the statutory distribution scheme of RSA 402-C:44. It appears that the concept formulated in the pending agreement is one of first impression.

By way of brief background, the agreement involves non-novated AFIA treaty exposures which are reinsured or indemnified by the Ace Companies. These Ace Companies' liabilities are substantial assets, estimated at \$231 million, of the Home Insurance Company Liquidation. They are collectible by the Liquidator only if and when the AFIA Cedents file and prosecute claims with the Liquidator. Because the AFIA Cedents' claims are in Class V under the statute, however, they will not be reached and

paid. Thus, it is uncertain at best whether the AFIA Cedents will file their claims since they have no apparent reason to expend the resources necessary to do so except to the extent that they may have setoff opportunities. If the AFIA Cedents fail to file their claims, the Liquidator will not be able to access the substantial assets of the Ace Companies. With the purposes of addressing the uncertainty as to whether AFIA Cedents will file and prosecute their claims to trigger access to Ace Companies' assets, and of providing an incentive to do so, the Liquidator has endorsed the pending agreement between the provisional liquidators in the United Kingdom and the Informal Creditors' Committee. Neither the Financial Services Authority (FSA) nor the National Conference of Insurance Guaranty Funds Reinsurance Commutation Subcommittee on the Home Insurance Company in Liquidation has objected to the proposed agreement and compromise. Pursuant to the agreement, the AFIA Cedents will receive approximately \$72.5 of the estimated \$231 million the Liquidator will receive from the Ace Companies when the AFIA Cedents' Claims are filed and prosecuted.

After reviewing the pleadings and statute, and considering the oral arguments of the parties, the Court is persuaded that, under the circumstances of this liquidation as explained below, the agreement proposed by the Liquidator is authorized under the broad array of powers granted the Liquidator under RSA 402-C:25 and is consistent with the goals and purposes of the statute to protect the interests of the insureds and creditors. RSA 405-C:1, IV. As a result of the agreement, the Liquidator will be able to marshal substantial assets to be distributed to creditors which would otherwise be unavailable. Also, although under the agreement AFIA Cedents will receive payments which, as Class V claimants, they would not otherwise receive, these payments are not to the detriment of

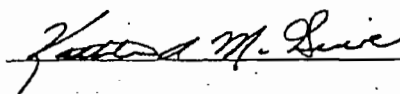
other Class V claimants who will receive nothing with or without the agreement.

Moreover, the agreement benefits Class II claimants, including Benjamin Moore, because the amount to be distributed to members of this class will increase. Finally, while the agreement assures that the Ace Companies will not receive a windfall of \$213 million, it imposes no additional liability upon them than those they have already assumed. For the above reasons, the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents is **GRANTED**.

While this matter has been decided favorably to the Liquidator, the Court is nevertheless concerned that the Ace Companies were not included in discussions whereby the proposed agreement was reached and that protracted litigation over this issue will ensue. Accordingly, the Court urges the parties to reach a global agreement on this issue. The Court schedules a further hearing on Friday, June 4, 2004 at 9 a.m. to discuss where the parties are at that time regarding any resolution of this matter.

So Ordered.

DATED: April 29, 2004



Kathleen A. McGuire  
Associate Justice



THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In the Matter of the Liquidation of  
The Home Insurance Company

Docket No.

**MOTION TO WAIVE FILING OF MOTION TO STAY  
IN THE SUPERIOR COURT**

Defendants, Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, "the ACE Companies") by its attorneys, Orr & Reno P.A., move this Court, pursuant to temporary Supreme Court Rule 7-A, to waive the requirement set forth in Supreme Court Rule 7-A to first file a motion to stay in the Superior Court. In support of this Motion, the ACE Companies respectfully state:

(1) Benjamin Moore & Co. ("Benjamin Moore") has filed a Rule 7 Notice of Mandatory Appeal from the decision of the Merrimack County Superior Court (McGuire, J.) approving the Liquidator's Motion For Approval of an Agreement and Compromise with AFIA Cedents. Pursuant to Rule 7, the ACE Companies are a party to this appeal.

(2) Benjamin Moore's appeal divests the Superior Court of jurisdiction to rule on a motion to stay. Accordingly, the ACE Companies have filed the motion to stay with this Court, and they respectfully request that the Court waive the requirement in Supreme Court Rule 7-A that a motion for stay must be filed with the Superior Court first.<sup>1</sup>

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<sup>1</sup> If this Court rules that the Benjamin Moore appeal does not divest the Superior Court of jurisdiction, the ACE Companies will promptly file a stay motion before Judge McGuire.

WHEREFORE, the ACE Companies respectfully request this Court:

- A. To waive the filing of a Motion to Stay with the Merrimack County Superior Court; and
- B. To grant the Motion to Stay; and
- C. To grant such other and further relief as this Court deems just and proper.

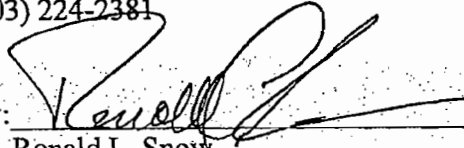
Respectfully submitted,

ACE Companies

By Their Attorneys

ORR & RENO, P.A.  
One Eagle Square  
P.O. Box 3550  
Concord, NH 03302-3550  
(603) 224-2381

Dated: May 11, 2004  
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By:   
Ronald L. Snow

## SUPREME COURT

In the Matter of the Liquidation of  
The Home Insurance Company

Docket No.

**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 to stay the order of the Merrimack County Superior Court (McGuire, J.), dated April 29, 2004 (the "Order"), on the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents in *In the Matter of the Liquidation of the Home Insurance Company*, Superior Court No. 03-E-0106, pending the mandatory appeal by Benjamin Moore & Co. ("Benjamin Moore") to this Court. (A copy of the Order is attached hereto as Exhibit A.) In support of this Motion, the ACE Companies respectfully state:

(1) In the Order, the Superior 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 Superior 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 Superior 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. (Order Exhibit A at 2.)

(5) On May 6, 2004, shortly after receiving the Order, the ACE Companies filed a Motion for Interlocutory Transfer from Ruling with the Merrimack County Superior Court, and had planned to file a motion to stay the Court's Order with the Superior Court pending its interlocutory appeal.

(6) On May 7, 2004, Benjamin Moore filed a Rule 7 Notice of Mandatory Appeal directly with this Court, divesting the Superior Court of the jurisdiction to rule on a motion to stay.<sup>1</sup> As a result, the ACE Companies are seeking a stay from this Court rather than the Superior Court.

(7) Also on May 7, 2004, the Liquidator filed its Opposition to Motion to Transfer Question of Law For Interlocutory Appeal in the Superior Court 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 Agreement

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<sup>1</sup> Pursuant to Rule 7, the ACE Companies are a party to this appeal by virtue of the Notice of Mandatory Appeal filed by Benjamin Moore. If this Court rules that the Benjamin Moore appeal does not divest the Superior Court of jurisdiction, the ACE Companies will promptly file a stay motion before Judge McGuire.

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) A stay of the Order would preserve the status quo and the ultimate relief that the ACE Companies and Benjamin Moore seek in this appeal, which is a reversal of the Superior 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 Superior Court's conclusion that the Liquidator's plan does not violate New Hampshire law. If, however, this 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.

(9) The ACE Companies will also be filing a motion with this 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, the Court should stay the Order pending appeal.

(10) 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 filing claims in the Home's liquidation, thereby obviating any need to immediately implement the Proposed Agreement.

WHEREFORE, the ACE Companies respectfully request this Court:

- A. To waive pursuant to Supreme Court Rule 7-A the requirement of filing a Motion to Stay in the Superior Court; and
- B. To stay the Superior Court's Order pending appeal; and
- C. To grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

ACE Companies

By Their Attorneys

ORR & RENO, P.A.  
One Eagle Square  
P.O. Box 3550  
Concord, NH 03302-3550  
(603) 224-2381

Dated: May 11, 2004

By: 

Ronald L. Snow

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**THE STATE OF NEW HAMPSHIRE**  
**SUPREME COURT**



**In Case No. 2004-0319, In the Matter of the Liquidation of the Home Insurance Company, the court on May 11, 2004, issued the following order:**

Motion to waive filing of motion to stay in the superior court is denied. To the extent necessary, the case is remanded to the superior court for the limited purpose of ruling upon any motion to stay that may be filed by defendants Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company.

This order is entered by a single justice (Duggan, J.). See Rule 21(7).

**Eileen Fox,  
Clerk**

Distribution:  
Merrimack County Superior Court 03-E-0106  
Honorable Kathleen McGuire  
Andrew D. Bouffard, Esquire  
Eric D. Jones, Esquire  
Peter C. L. Roth, Esquire  
J. David Leslie, Esquire  
Ronald Snow, Esquire  
Mr. Gary Lee  
File



MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of  
The Home Insurance Company

**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.<sup>1</sup>

(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

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<sup>1</sup> 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

ORR & RENO, P.A.  
One Eagle Square  
P.O. Box 3550  
Concord, NH 03302-3550  
(603) 224-2381

Dated: May 14, 2004

By:   
Ronald L. Snow

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In the Matter of the Liquidation of  
The Home Insurance Company

Docket No. 2004-0319

**MOTION TO EXPEDITE CONSIDERATION OF APPEAL  
AND TO SUSPEND RULES**

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 to expedite consideration of the appeal filed pursuant to Supreme Court Rule 7 by Benjamin Moore & Co. and to suspend its Rules to permit the court to expeditiously hear and decide the issues raised by the appeal. Pursuant to Supreme Court Rule 7 (4), the ACE Companies are parties to this appeal, and the ACE Companies also seek relief from the Order ("the Order") of the Merrimack County Superior Court (McGuire, J.) approving the Liquidator's Motion for Approval of an Agreement and Compromise with AFIA Cedents. In support of this Motion, the ACE Companies respectfully state:

(1) Pursuant to Supreme Court Rule 1, this Court, or any single justice of this Court, may suspend the requirements of the Rules in the interest of expediting a decision, or for any other good cause shown.

(2) As set forth in the ACE Companies' Motion to Stay filed with the Merrimack County Superior Court on May 12, 2004, a copy of which is attached, the

Liquidator has indicated that he intends to begin to implement the agreement and compromise approved by the lower court (the "Proposed Agreement"). If the Liquidator begins to implement the Proposed Agreement and related scheme of arrangement in the English courts prior to this Court's decision on the merits of this appeal, the ACE Companies will be irreparably injured and the ultimate relief they seek in this appeal will not be preserved. *See* Motion for Stay at 9.

(3) To aid the Court in expediting this appeal, copies of all pleadings filed by the ACE Companies will be electronically served or hand delivered to counsel of record and hand-delivered to this Court. Counsel for ACE Companies are prepared to brief the critical issues presented by the Notice of Appeal within 5 business days of the granting of this Motion, and respectfully request that oral argument be scheduled as soon as practicable thereafter.

(4) The Liquidator has been consulted with respect to this motion, and the ACE Companies have not been able to obtain the Liquidator's concurrence. Counsel for Benjamin Moore & Company has assented to the relief requested herein.

WHEREFORE, the ACE Companies respectfully request this Court:

- A. To grant this Motion For Expedited Consideration of this Appeal and to Suspend Rules; and
- B. To grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

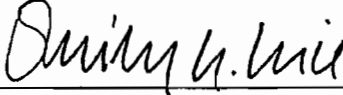
ACE Companies

By Their Attorneys

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(603) 224-2381

Dated: May 13, 2004

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By:   
\_\_\_\_\_  
for Ronald L. Snow



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

Defendants, Century Indemnity Company ("Century"), 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., respectfully submit this reply brief in further support of their motion, pursuant to Rule 7-A of the New Hampshire Supreme Court Rules (the "Supreme Court Rules"), for a stay of the order dated April 29, 2004 (the "April 29 Order") on the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents pending the mandatory appeal by Benjamin Moore & Co. to the New Hampshire Supreme Court.

**I. A Stay Pending Appeal Is Clearly Warranted Under The Circumstances**

**A. The Liquidator Has Misstated The Standard For Stays Pending Appeal**

The Liquidator claims that "[a] party seeking a stay pending appeal must meet all the criteria for the issuance of injunctive relief." (Response at 3.) However, there is no support for this statement in the New Hampshire statutes or case law.

The ACE Companies have moved for a stay pursuant to Rule 7-A of the Supreme Court Rules, which provides the procedural mechanism for stays pending appeal.

According to the New Hampshire Supreme Court, the trial court has the authority to “make such orders and decrees as may be necessary for the protection and preservation of the subject matter of the appeal; and it may do anything that is necessary for the presentation of the case in this Court, or in furtherance of the appeal.” *Rautenberg v. Munnis*, 107 N.H. 446, 447 (1966). This includes the power to “preserve the status quo” pending appeal. *Id.* at 448. In determining whether a stay should be issued, the Supreme Court balanced the merits of the appeal against the “delay and inconvenience” to the opposing party. *Id.* In other cases, the Supreme Court has referred to the potential for irreparable harm to the movant. *See, e.g., In re Larry B.*, 125 N.H. 376, 377 (1984). That is why the ACE Companies, in their motion, discussed the merits of the appeal, the harm they would suffer in the absence of a stay and the lack of prejudice to the Liquidator.

The Liquidator instead argues that the ACE Companies’ request for a stay is governed by a three-part test under New Hampshire law for the granting of injunctions. The whole basis of the Liquidator’s claim is a First Circuit case, *Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13 (1st Cir. 2002), which has nothing to do with New Hampshire law. *Acevedo-Garcia*, moreover, discusses the standard for stays of injunctive orders, which the court notes, are evaluated under the same standard applied to injunctions. *Id.* at 16. From this faulty premise, the Liquidator draws an analogy to New Hampshire case law on injunctions. Those cases do not control, and the Court should exercise its authority under *Rautenberg* and other applicable precedent.

**B. The Merits Of The ACE Companies’ Appeal Outweighs Any Delay Or Inconvenience To The Liquidator**

The Liquidator virtually ignores the merits of the appeal, stating simply that the Court “has already determined the merits of the issue adversely to the moving party.”

(Response at 4; emphasis in original.) The Liquidator's statement is both obvious and beside the point. The issue before the Court on this motion is whether the appeal has merit. The ACE Companies pointed out in their motion that the appeal raises important issues relating to the violation of a New Hampshire statute, and that the resolution of the appeal will have an effect on liquidations in New Hampshire and elsewhere (as many other states have similar provisions). This Court has also recognized (and the Liquidator agrees) that the Proposed Agreement presents a question of first impression in New Hampshire. (See April 29 Order at 1; Liquidator's Response to the Motion to Expedite Appeal at 4.) Thus, the ACE Companies have shown that their appeal has merit (regardless of whether the Liquidator agrees with their position).

Furthermore, the merits of the appeal outweigh any prejudice to the Liquidator. The Liquidator asserts that a stay would "create confusion and uncertainty among the AFIA Cedents over the filing of their claims in the liquidation" and would delay the implementation of the Proposed Agreement for a year (which is what the Liquidator describes as the "likely time required for the appeal"). (Response at 7.) First, the alleged "confusion and uncertainty" cited by the Liquidator would exist even if the stay were denied because the AFIA Cedents cannot be sure whether the Proposed Agreement will survive the appellate process. Indeed, the whole point of the ACE Companies' motion for a stay is to make sure that the parties do not expend significant resources only to find out later that the Liquidator's scheme violates New Hampshire law. The Liquidator could also mitigate the alleged "confusion and uncertainty" by following through with his plan to extend the standstill with the AFIA Cedents to December 31, 2004. (See Liquidator's Response to the Motion to Expedite Appeal at 4.) Such an extension, along

with an extension of the bar date for the AFIA Cedents, would allow time for the Supreme Court to decide the issues on appeal.

Second, the Liquidator's assumption that the appeal would take a year is contrary to his response to the ACE Companies' motion for an expedited appeal. The Liquidator has requested that the Supreme Court give the ACE Companies' appeal a higher priority status. (*See id.*) Thus, even if the Supreme Court does not grant the expedited schedule requested by the ACE Companies, the time for deciding the appeal is likely to be much shorter than the Liquidator anticipates.

The Liquidator also maintains that a delay could affect his ability to collect from Century because of Century's "relatively thin capitalization." (Response at 7.) However, the Liquidator has not shown that the AFIA-related obligations will not be met, nor is there any reason to suggest that the ability of Century to satisfy its obligations will decrease over time.

The Liquidator further contends that the Court should require the ACE Companies to post a bond in the amount of \$231 million in the event that it grants the stay. As an initial matter, the Liquidator has not provided any relevant authority for his request. The Liquidator relies on RSA 491:18 and Superior Court Rules 161 and 163, none of which applies here. RSA 491:18 allows the court to impose "terms and conditions" with respect to orders staying the execution of judgments in a case. "Execution" clearly refers to an attempt to enforce a money judgment, and, therefore, RSA 491:18 does not apply to a situation where, as here, no money judgment was issued. Rules 161 and 163 are similarly inapposite because they relate to injunctions, and refer to the posting of a bond by the movant to cover "such costs and damages as may be incurred

or suffered by any party who is found to have been wrongfully enjoined or restrained.” Super. Ct. R. 161(c). As noted above, a stay pending appeal is not the equivalent of an injunction.

Even if there were any authority for the posting of a bond, the Liquidator has not offered any concrete basis for his request. Rather, the Liquidator claims that a bond of \$231 million is warranted because of the “risk” that a stay “could” cause the AFIA Cedents to withdraw from the Proposed Agreement as well as the “risk” that the Liquidator “may be unable to collect the indemnity obligations of the ACE Companies” at the conclusion of the appeal. (Response at 7-8.) The ACE Companies have already demonstrated above that the granting of a stay will not affect the Liquidator’s ability to collect on any obligations owed by the ACE Companies. Also, the Liquidator has not shown that any of the AFIA Cedents plan to withdraw in the event of a stay. Indeed, it is telling that the filing of the ACE Companies’ appeal — which involves some delay and uncertainty as well — has not caused the AFIA Cedents to withdraw from the scheme. To the contrary, the AFIA Cedents and the Liquidator are negotiating for an extension of the standstill agreement to December 31, 2004.

**C. The ACE Companies Have Shown That They Will Suffer Actual And Imminent Harm If A Stay Is Not Issued**

The Liquidator argues that the ACE Companies have failed to show that they will suffer “actual and imminent” harm in the event the Court denies their motion for a stay. (Response at 4.) If, however, the Court does not preserve the status quo by ordering a stay pending appeal, the harm to the ACE Companies would be clear.

The Liquidator castigates the ACE Companies for stating that they will oppose the scheme of arrangement in England, but the ACE Companies would be derelict if they

were to simply allow the Liquidator to have his way in the U.K. proceeding. By necessity, the ACE Companies must oppose the scheme and they will incur substantial costs in doing so. If the scheme is approved, the ACE Companies will also expend significant resources in the process of determining whether the AFIA Cedents' claims should be paid. Both of these efforts — *i.e.*, the participation in the U.K. proceedings and the claims determination process — would be wasted if the Supreme Court were to find that the Proposed Agreement violates New Hampshire law.<sup>1</sup> Given that the Liquidator's scheme presents novel issues, the ACE Companies respectfully submit that the prudent approach would be for the Court to issue a stay pending a determination of the appeal.

**II. The Liquidator's Objections To The Extension Of The Claims-Filing Deadline Are Meritless And Cannot Be Squared With His Effort To Extend The Standstill Agreement**

The Liquidator asserts a variety of objections to an extension of the claims-filing deadline for the AFIA Cedents. Those objections, however, do not withstand scrutiny.

The Liquidator argues that, pursuant to RSA 402-C:26, the deadline for filing of claims must be within one year of the liquidation order. (Response at 8.) It is ironic that the Liquidator is now insisting on a strict reading of the mandatory language in RSA 402-C:26, but earlier argued that the Court had the power to vary from the mandatory language in the New Hampshire priority statute in order to serve the "best interests" of the estate. The Liquidator has failed to cite any case law from New Hampshire holding that the Court cannot make any adjustments to claims-filing deadline. If, however, the Court is concerned about RSA 402-C:26, it could leave the bar date in place, but toll the

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<sup>1</sup> The Liquidator's efforts in the U.K. proceedings and claims determination process would similarly be wasted in the absence of a stay.

running of the AFIA Cedents' time during the pendency of the appeal (from the date the appeal was filed on May 10, 2004 to June 13, 2004). After the appeal is decided, the AFIA Cedents would then have the same amount of time from the filing of the appeal to the June 13, 2004 bar date (*i.e.*, 34 days) to file their claims in the Home liquidation.

The Liquidator further asserts that any extension of the deadline must apply to all potential claimants, rather than just the AFIA Cedents, and he cites several alleged problems that would result from a global extension (such as cost, an increase in claims and the effect on guaranty funds). (*See* Response at 8-9.) However, there is no reason to extend the deadline for all claimants, and RSA 402-C:26(II) expressly states that "[t]he liquidator may specify different dates for the filing of different kinds of claims." Thus, the supposed impediments cited by the Liquidator pose no real obstacles.

Finally, the Liquidator has already set the stage for an extension of the claims-filing deadline by reporting that he is in discussions with the AFIA Cedents for an extension of the standstill agreement between the parties. In light of those negotiations, the Liquidator should also be willing to extend the claims-filing deadline.

Conclusion

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

Order:

- A. Staying its April 29 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

ORR & RENO, P.A.

One Eagle Square

P.O. Box 3550

Concord, NH 03302-3550

(603) 224-2381

Dated: May 28, 2004

By: *Ronald L. Snow*  
Ronald L. Snow



THE STATE OF NEW HAMPSHIRE SUPREME COURT

In the Matter of the Liquidation of The Home Insurance Company

No. 2004-0319

**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 to stay the order of the Merrimack County Superior Court (McGuire, J.), dated April 29, 2004 (the "Order"), on the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents in *In the Matter of the Liquidation of the Home Insurance Company*, Superior Court No. 03-E-0106, pending the mandatory appeal by Benjamin Moore & Co. ("Benjamin Moore") to this Court.<sup>1</sup> This motion is made pursuant to Rule 7-A of the New Hampshire Supreme Court Rules (the "Supreme Court Rules") as the ACE Companies have unsuccessfully sought similar relief from the Superior Court. In support of this Motion, the ACE Companies respectfully state as follows:

**I. Background**

(1) In the Order, the Superior 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")),

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<sup>1</sup> 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.

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 Superior 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 Superior 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.<sup>2</sup>

(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

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<sup>2</sup> 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.

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 the Superior Court of jurisdiction, on May 11, 2004, the ACE Companies filed a motion to stay with this Court and a motion to waive the requirement, in Rule 7-A of the Supreme Court Rules, that motions for a stay be filed with the Superior Court in the first instance. That same day, the Supreme Court informed counsel for the ACE Companies that the motion to waive filing of the motion to stay had been denied, and that the case was remanded to the Superior Court for the limited purpose of ruling on any motion to stay filed by the ACE Companies.

(9) On May 12, 2004, immediately after this Court's order, the ACE Companies filed a Motion to Stay with the Superior Court.<sup>3</sup>

(10) By order dated June 1, 2004, the Superior Court denied the ACE Companies' motion for stay and found that the ACE Companies had not "met their burden in z demonstrating irreparable harm" and that a stay was "likely to create uncertainty and unnecessary delay." (See Order Relative to Stay of April 29, 2004 Order ("June 1 Order"), a copy of which is attached hereto as Exhibit C, at 3.) With respect to the ACE Companies' argument that a stay will preserve the status quo pending appeal, the Superior Court stated that it was "unlikely that the ACE Companies will be at actual risk for performance of their obligations in the near future." (Id. at 3.) The Superior Court further

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<sup>3</sup> On May 13, 2004, the ACE Companies also filed with this Court a Motion to Expedite Consideration of Appeal and to Suspend Rules. The Liquidator filed his response to the motion to expedite on May 21, 2004. The Liquidator opposed the expedited schedule proposed by the ACE Companies, but recognized the need for a speedy appeal and asked the Court to grant the appeal high priority status.

found the ACE Companies' "Motion to Transfer Question of Law for Interlocutory Appeal is moot and/or denied." (Id.)

(11) Also on June 1, 2004, the Superior Court issued an Addendum to its Order rejecting the ACE Companies request for further evidentiary hearing, stating such a hearing "would not be helpful." (See Addendum to Order of April 29, 2004, a copy of which is attached hereto as Exhibit D, at 2.)<sup>4</sup>

## II. Basis For Relief

(12) The ACE Companies have moved for a stay pursuant to Rule 7-A of the Supreme Court Rules, which provides the procedural mechanism for stays pending appeal. The courts may "make such orders and decrees as may be necessary for the protection and preservation of the subject matter of the appeal; and [they] may do anything that is necessary for the presentation of the case in [the Supreme Court], or in furtherance of the appeal." *Rautenberg v. Munnis*, 107 N.H. 446, 447 (1966). This includes the power to "preserve the status quo" pending appeal. *Id.* at 448. In determining whether a stay should be issued, this Court balanced the merits of the appeal against the "delay and inconvenience" to the opposing party. *Id.* In other cases, the Supreme Court has referred to the potential for irreparable harm to the movant. *See, e.g., In re Larry B.*, 125 N.H. 376, 377 (1984).

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<sup>4</sup> The ACE Companies believe that the after-the-fact reasons given by the Superior Court for the denial of due process do not withstand scrutiny. Even more fundamentally, the ACE Companies respectfully suggest that the Superior Court lacked any jurisdiction to issue an "addendum" to the Order. The filing of an appeal divests the trial court of general jurisdiction and, indeed, this Court recognized the limitation on the Superior Court's jurisdiction when it remanded the case to the Superior Court solely for a decision on the motion to stay. In the June 1 Order, the Superior Court recognized that "the case was remanded for the limited purpose of ruling upon any motion to stay filed by ACE Companies." (June 1 Order at 1.) Moreover, no party had asked the Superior Court to clarify, amend or supplement the Order prior to the filing of the appeal. The "addendum," therefore, is a nullity.

(13) It cannot be disputed that the ACE Companies' appeal has merit. The Superior Court recognized (and the Liquidator agrees) that the Proposed Agreement presents a question of "first impression" in New Hampshire. (See Order at 1; Liquidator's Response to the Motion to Expedite Appeal at 4.) The appeal raises important issues relating to the violation of a New Hampshire statute, and the resolution of the appeal will have an effect on liquidations in New Hampshire and elsewhere (as many other states have similar provisions). Moreover, the ACE Companies were not given the opportunity to take discovery or present evidence to the Superior Court on the myriad factual issues surrounding the Proposed Agreement. Instead, the Superior Court accepted as true the affidavits submitted by the Liquidator, even though the affiants were individuals with an interest in the outcome and their statements were never tested by cross-examination. Thus, the ACE Companies' appeal involves fundamental issues of statutory construction and due process rights.

(14) The merits of the ACE Companies' appeal far outweigh any prejudice to the Liquidator. The Liquidator has argued that the granting of a stay would create confusion and uncertainty among the AFIA Cedents about the ultimate outcome. The confusion and uncertainty cited by the Liquidator already exists because the AFIA Cedents will not conclusively know, until the appeal is determined, whether the Proposed Agreement is permitted under New Hampshire law. Indeed, the Liquidator has recognized (and addressed) the lack of certainty by amending its agreement with the AFIA Cedents to allow (i) an extension of the standstill from June 1, 2004 to December 31, 2004; and (ii) AFIA Cedents to withdraw without prejudice any proof of claim filed in the Home liquidation in the event that this Court rules against the Liquidator. (See May

25, 2004 letter from Gareth Hughes and other related letters, attached as Exhibit E.) Thus, the Liquidator cannot show that any of the AFIA Cedents would pursue a different course of action if the stay were granted. The AFIA Cedents now have an incentive to file a proof of claim, whether or not there is a stay, because they may always withdraw the proof of claim later.

(15) The Liquidator has also asserted that a stay would delay the implementation of the scheme by at least a year. The ACE Companies, however, filed a motion for expedited consideration and, in response, the Liquidator agreed that the appeal should be given a higher priority (although he disagreed with the schedule proposed by the ACE Companies). Thus, the time for deciding the appeal is likely to be much shorter than the Liquidator anticipates, and such a short delay pales in comparison to the harm that will be caused if the Liquidator proceeds with the Proposed Agreement and scheme only to have this Court reverse the Order that allowed the Liquidator to go forward.

(16) It is clear that both parties would suffer if they were to participate in a scheme that this Court later finds to be contrary to New Hampshire law. The Liquidator has stated that he will take steps in England to implement the scheme and then will begin adjusting and determining the AFIA Cedents' claims. These actions are all at great expense to the Home liquidation. The ACE Companies would also incur substantial costs in opposing the scheme in England. If the scheme is approved, the ACE Companies will also expend significant resources in the process of determining whether the AFIA Cedents' claims should be paid. All of these efforts by the parties - *i.e.*, the participation in the U.K. proceedings and the claims determination process - would be wasted if the Supreme Court were to find that the Proposed Agreement violates New Hampshire law.

(17) In sum, the ACE Companies' appeal raises several meritorious issues concerning the complex and novel scheme proposed by the Liquidator, as well as the manner in which the Superior Court approved the Proposed Agreement. Given that any potential prejudice to the Liquidator is far outweighed by the merits and that a denial of the stay could cause harm to both parties, the ACE Companies respectfully submit that the prudent approach would be for the Court to preserve the status quo by issuing a stay pending a determination of the appeal.

(18) The ACE Companies also respectfully submit that this Court should not be swayed by the Superior Court's denial of the earlier motion for a stay. The June 1 Order is flawed in several ways, as outlined below.

(19) First, the Superior Court applied the wrong legal standard, citing a bankruptcy case, *In re Public Service Co. of N.H.*, 116 B.R. 347 (Bankr. N.H. 1990), which involved a motion for a stay pursuant to Rule 8005 of the Federal Rules of Bankruptcy. The First Circuit has held that a party seeking a stay of an order of a bankruptcy judge must meet the same four-prong test used to determine whether a preliminary injunction should issue.<sup>5</sup> This Court, however, has established a more straightforward test that balances the merit so the appeal against the potential harm if a stay is not granted. (*See supra.*)

(20) Second, the only harm that the Superior Court found was that a stay would likely "create uncertainty and unnecessary delay." (June 1 Order at 2.) As discussed

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<sup>5</sup> The movant must show (1) a likelihood of success on the merits on appeal; (2) irreparable harm to the movant if relief is not granted; (3) that the harm to the movant if the stay is denied is greater than the injury the opposing party will suffer if the stay is granted; and (4) the stay would not harm the public interest. *Public Service*, 116 B.R. at 348. The Superior Court did not even apply the four-prong test from *Public Service* (which would have required some consideration of the merits), and instead held that the "ACE Companies must demonstrate that absent a stay they will suffer irreparable harm and that harm to them will be greater than any harm imposed on the liquidation by a stay." (June 1 Order at 2.)



above, the Liquidator has mitigated any such uncertainty in its agreement with the AFIA Cedents and the appeal should cause only minimal delay (which is outweighed by the merits of the appeal and the fact that the efforts of both parties would be wasted in the event of a reversal).

(21) Third, the Superior Court stated that the ACE Companies would not be harmed because it is "unlikely" they "will be at actual risk for the performance of their obligations in the near future." (Id. at 3.) Even if the Superior Court were correct, the harm to the ACE Companies is not that they might have to perform under their agreements in the future. The harm, which could be eliminated by the issuance of a stay, is that the ACE Companies will be forced to participate in the claims determination process, only to find that such participation is for naught because this Court reversed the Order.

(22) Accordingly, this Court should make its own determination and find that the ACE Companies have met the standards for the issuance of a stay pending appeal.

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

- A. To stay the Superior Court's Order pending appeal; and
- B. To grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

ACE Companies

By Their Attorneys

ORR & RENO, P.A.

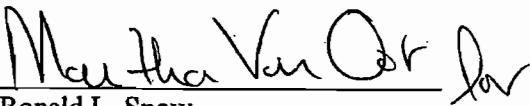
One Eagle Square

P.O. Box 3550

Concord, NH 03302-3550

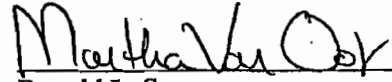
(603) 224-2381

Dated: June 9, 2004

By:   
Ronald L. Snow

CERTIFICATE OF SERVICE

I, Ronald L. Snow, certify that I served by first-class mail a copy of the foregoing Motion for Stay of Order Pending Mandatory Appeal Pursuant to Rule 7 on June 9, 2004 to the attached service list.

  
\_\_\_\_\_  
Ronald L. Snow

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**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2004-0319, In the Matter of the Liquidation of the Home Insurance Company, the court on June 11, 2004, issued the following order:**

Motion for stay of order pending mandatory appeal pursuant to Rule 7 is denied. Ruling upon the State's motion to dismiss is deferred; the parties may brief the issues raised in the motion and address them at oral argument.

The motion to expedite consideration of appeal and to suspend rules, to which the Ace Companies represent that appellant Benjamin Moore & Company assents, is granted in part.

Case is accepted. Appellant's brief must be filed on or before June 24, 2004. On or before June 16, 2004, appellant shall designate in a letter any exhibits and pleadings to be transferred from the trial court. Cf. Rule 13.

Appellee's brief or memorandum of law must be filed on or before July 7, 2004. On or before July 1, 2004, appellee shall designate in a letter any exhibits and pleadings to be transferred from the trial court. Cf. Rule 13.

No reply briefs shall be filed. Oral argument shall be held on July 15, 2004.

Upon the filing of all parties' exhibits and pleadings lists to be transferred, the supreme court shall issue an order directing the trial court to transfer the exhibits and pleadings designated.

**NOTE:** Your brief must not exceed 35 pages. See Rule 16(11). If you are not the appealing party and you choose to file a memorandum in lieu of a brief, it must not exceed 15 pages in length. If you include an appendix to your brief, see Rule 17, include only those portions of the record that you believe the court must consult while reviewing the brief.

**In Case No. 2004-0319, In the Matter of the Liquidation of the Home Insurance Company, the court on June 11, 2004, issued the following order:**

This order is entered by a single justice (Duggan, J.). See Rule 21(7).

**Eileen Fox,  
Clerk**

Distribution:

Merrimack County Superior Court 03-E-0106

Honorable Kathleen McGuire

Andrew D. Bouffard, Esquire

Eric D. Jones, Esquire

Peter C. L. Roth, Esquire

J. David Leslie, Esquire

Ronald Snow, Esquire

Mr. Gary Lee

File

**THE STATE OF NEW HAMPSHIRE**  
**SUPREME COURT**

**In Case No. 2005-0170, Venise Theresa Gonya & a. v. Roger A. Sevigny, the clerk of court on April 7, 2005, issued the following order:**

Applications of Stephen Blackburn and Alan B. Rich to appear *pro hac vice* pursuant to Supreme Court Rule 33 are granted.

Case is accepted. On or before April 22, 2005, plaintiffs shall pay to the clerk of the Merrimack County Superior Court the deposit for preparing the transcript in the amount of \$175.00, or the appeal will be dismissed. Refer to Rule 15.

Upon receipt of the required deposit, the clerk of the trial court shall arrange for the preparation of the transcript as outlined on the transcript order form and shall notify the clerk of the supreme court in writing that the arrangement has been made. If the clerk of the trial court does not timely receive the required deposit, he or she shall so notify the clerk of the supreme court in writing.

This order is entered pursuant to Rule 21(8).

**Eileen Fox,**  
**Clerk**

Distribution:

✓ Clerk, Merrimack County Superior Court 04-E-0208  
Honorable Kathleen A. McGuire  
Holly Aquizip, Superior Court Center  
Court Reporter  
Thomas R. Watson, Esquire  
Jennifer A. Lemire, Esquire  
Stephen Blackburn, Esquire  
Alan B. Rich, Esquire  
Suzanne M. Gorman, Esquire  
Tania LaCroix, Supreme Court  
Marcia McCormack, Supreme Court  
File

2005 APR 11 A 8 51



**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2005-0740, In the Matter of the Liquidation of  
The Home Insurance Company, the court on November 2, 2005,  
issued the following order:**

Motion to waive filing of motion to stay in superior court is denied.  
Expedited motion for stay of order pending mandatory appeal pursuant to Rule 7  
is, therefore, moot.

This order is entered by a single justice (Duggan, J.). See Rule 21(7).

**Eileen Fox,  
Clerk**

Distribution:

Clerk, Merrimack County Superior Court 03-E-0106

Honorable Kathleen A. McGuire

Lisa S. Wade, Esquire

Ronald L. Snow, Esquire

Eric D. Jones, Esquire

J. Christopher Marshall, Esquire

File