

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

ACE COMPANIES' OBJECTION TO  
NATIONWIDE'S MOTION TO INTERVENE

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., respectfully object to the third effort by Nationwide General Insurance Company to intervene into this matter in as many weeks.

Nationwide still has not identified a compelling reason to permit intervention, and fails to articulate why its motion is timely given the late stage of this proceeding. Accordingly, the Motion to Intervene should be denied.<sup>1</sup> ACE Companies further state:

1. ACE Companies received on August 12, 2005 a copy of Nationwide's latest Motion to Intervene requesting yet another hearing before this Court to articulate why it needs to intervene. Nationwide has twice appeared before this Court and was given an opportunity each time to articulate orally why it needed to intervene.<sup>2</sup> It has not raised any new points in the present motion justifying intervention.

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<sup>1</sup> In objecting to the current motion to intervene, ACE Companies incorporate herein the arguments raised in their Objection to Motion to Intervene and Motion to Permit Attorney Michael Cohen to Appear Pro Hac Vice filed July 22, 2005 and their Objection to Motion to Reconsider Court's Denial of Nationwide's Motion to Intervene and Motion to Permit Attorney Michael Cohen to Appear Pro Hac Vice filed July 29, 2005.

<sup>2</sup> Nationwide filed its initial motion to intervene on Friday July 22, 2005 in advance of the Monday July 25, 2005 first day of trial, and was given an opportunity to argue its motion prior to opening statements. Its motion to reconsider was filed on day 4 of the trial (July 28, 2005) and heard on July 29, 2005. Nationwide suggests that it would be a denial of its due process rights to deny the current motion given that ACE Companies and Benjamin Moore were permitted to intervene. Given its prior opportunities to be heard on the subject of intervention, it cannot complain that its due process rights have been infringed. Moreover, the fact that the Court permitted two parties who promptly moved to intervene after articulating direct and apparent interests in the approval of the Agreement does not change this result.

2. Much of Nationwide's Memorandum supporting its Motion to Intervene is taken up with arguments for why ACE Companies' defenses to the previous motion should no longer apply. While clearly Nationwide can no longer hamper the trial, its attempt to intervene is still untimely and prejudices the parties by jeopardizing the orderly conclusion of this litigation. Perhaps more importantly, however, in order to intervene Nationwide still has to satisfy the intervention standard. Its failure to do so compels denial of this Motion even without reaching ACE Companies' defenses.

I. Standard for Intervention.

3. As already set forth in prior pleadings, a party cannot intervene unless it has a right involved in the trial, and a direct and apparent interest therein. Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 446 (2002).<sup>3</sup> Intervention is at the discretion of this Court, and the Court's decision to deny intervention will be upheld unless it is an unsustainable exercise of discretion. Id. The reasons for intervention set forth by Nationwide do not meet this standard. In any event, even if Nationwide could articulate a direct and apparent right being affected, its decision to sit on its rights precludes it from intervening at this stage of the proceedings.

II. Nationwide Still Has Not Articulated a Direct and Apparent Interest Warranting Intervention.

4. Nationwide is seeking to intervene in this action a year and half into the proceeding and after the conclusion of the five-day hearing on the merits. In its motion it asserts only that it is a creditor in the Home liquidation estate and that intervention should be granted to "protect its appellate rights." In the supporting memorandum, it also asserts:

- that it requires "full information as to the pending Agreement,"
- it wishes "to be able to puts its position before the Court for consideration in the future when the Court has before it issues pertaining to the Agreement," and

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<sup>3</sup> Given that this proceeding has not been instituted under RSA 402-C:14, nor is it a disputed claims proceeding, Nationwide's reliance on the intervention standards for such proceedings is irrelevant.

- it wishes to obtain assurances from the Liquidator concerning an agreement he reached with Agrippina.

The only new issue raised in this motion is that Nationwide wishes to preserve its appellate rights.

The other reasons were all considered and rejected by this Court previously.

Nationwide Has No Appellate Rights to Protect.

5. Nationwide claims that it must intervene to protect its appellate rights following the July 25-29, 2005 trial. Supreme Court Rule 7, however, only permits appeal by parties in interest involved in the proceeding from which the decision on the merits is taken. Nationwide has not participated in the proceedings from which this Court's decisions have issued (or in the case of the recent trial, will issue). Hence, it has no standing on appeal.

6. The very fact that Nationwide could not articulate, and still has not articulated, any independent, present direct and apparent interest in this proceeding precludes it from inserting itself into the proceeding for purposes of appeal.

Nationwide Should be Estopped From Claiming that it Requires More Information to Independently Assess the Impact of the Agreement.

7. Nationwide has been aware of the negotiations concerning the Agreement, and as pointed out by the Liquidator in his Opposition to the Motion to Intervene, voted in favor of it at the Scheme Creditors Meeting on September 8, 2004. It fails to articulate what more it needs given that it has already approved the Agreement. In fact, without Nationwide's prior approval of the Scheme, it may not have reached this Court for approval in the first instance.

8. Nationwide concedes that it has had full access to the electronic docket in this matter, monitored the trial, received daily transcript, and has now received copies of all trial exhibits and depositions taken during discovery.

9. Not satisfied, it asserts a need for all discovery exchanged between the parties, and intimates that it might seek additional discovery. See Memorandum of Law in Support of

Nationwide's Motion to Intervene at 6 n.2 and 9 (asserting that its intervention will not require substantial new discovery).

10. As ACE Companies previously noted, Nationwide had an opportunity to intervene and participate in the discovery in this matter in an orderly fashion when ACE Companies served Nationwide with discovery requests in January 2005 as part of the discovery process sanctioned by this Court. See Exhibit A. Nationwide emphatically refused to answer the discovery claiming that it was a non-party.<sup>4</sup> ACE Companies, in reliance on Nationwide's assertion that it was a non-party, did not seek to compel discovery from it.

11. Nationwide cannot have it both ways, asserting it is a nonparty when it does not want to comply with discovery requests, but then asserting it should be allowed to intervene as a party post-trial. This conduct cannot be sanctioned.

12. Accordingly, it should be estopped from now claiming that it should be allowed to become a party at this final stage of the litigation.

An Assertion that Nationwide Might Have Interests to Protect Before this Court in the Future Does Not Create a Present Need to Intervene in the Case

13. Nationwide asserts again that it should be permitted to intervene now because in the future it might have interests it wishes to advance before this Court. The Court has already rejected this argument when denying the motion for Reconsideration on July 29, 2005. Trial Transcript V-A at 6:13 – 7:1.

14. If there is no present right being affected, then Nationwide has no right to participate in this proceeding. Exeter Hosp. Medical Staff v. Trustees of Exeter Health Resources, 148 N.H. 492, 495 (2002); Malnati v. State, 148 N.H. 94, 98 (2002).

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<sup>4</sup> In the same communication addressed to Ronald Snow, Esq. in which Nationwide refuses to answer discovery, Mr. Cohen also asserts on behalf of Nationwide that it may seek to conflict the Lovells firm out of the case if it becomes involved as a party. Exhibit A. To the extent that Nationwide has an ulterior motive of intervening so as to attempt to conflict the Lovells firm out of the case, its pretextual attempt to intervene should be denied given the extreme prejudice ACE Companies would suffer if its chosen national counsel were successfully conflicted out of the case at this point in time.

Nationwide Still Has Not Articulated Why the Agrippina Agreement is Relevant to This Proceeding

15. In support of the current Motion to Intervene, Nationwide again asserts that it seeks intervention because last winter the Liquidator and Agrippina reached an agreement which was filed in redacted form. It wants access to an unredacted version. There is no indication of why access to that agreement has any relevance to the approval of the AFIA Agreement at issue in this proceeding, or why seeking legal redress to obtain a copy of the Agrippina agreement would warrant Nationwide having party status to appeal this Court's decision regarding the AFIA agreement. Accordingly, this asserted reason for intervention should again be rejected.

16. In summary, of the four reasons Nationwide advances in support of intervention, the only new issue raised is an asserted need to protect its appellate rights. Given Nationwide's lack of participation in this matter to date, it has no appellate rights to protect at this point in time. All the other reasons advanced by Nationwide have been considered and rejected by this Court. Because Nationwide has failed to satisfy the intervention standard, the Motion to Intervene must be denied.

III. Nationwide's Untimely Motion for Intervention Should be Barred by the Doctrine of Laches.

17. Even if Nationwide could articulate a present direct and apparent right being affected by the Court's decisions in this proceeding, Nationwide's decision to sleep on its rights in this equity action should be barred under the doctrine of laches. See Nordic Inn Condominium Owners' Assoc. v. Ventullo, 151 N.H. 571, 576 (2004); Appeal of City of Laconia, 150 N.H. 91, 93 (2003). Laches may be affirmatively asserted to preclude the relief requested by the moving party when it has allowed a significant amount of time to pass before seeking relief, and when the “ (1) the knowledge of the [moving party]”; (2) ‘the conduct of the [responding party]’; (3) ‘the interests to be vindicated’; and (4) ‘the resulting prejudice,’” all compel preclusion of the relief being sought. *Id.* This is a fact driving inquiry. *Id.*

18. As already advanced in support of ACE Companies objection to Nationwide's motion to reconsider the denial of its first motion to intervene, Nationwide makes the case itself for why its motion to intervene is untimely, and subject to bar under the doctrine of laches. It admits that it has been regularly monitoring the progress of this matter, including review of the electronic docket, and that it has attended Court proceedings to date deemed necessary to protect its rights. In the year and a half this matter has been pending, Nationwide apparently has been able to protect its rights without ever previously filing for intervention and having counsel appear in the case.

19. Despite admitting that it has been well aware of this proceeding, Nationwide chose to wait until now; when this matter is in its final stages and all evidence has been admitted in support of the parties' positions on the necessity, reasonableness and fairness of the Agreement. Nationwide asserts that intervention is appropriate when the movant has a good reason for waiting to assert its rights. While a correct statement of law, Nationwide never articulates what its good reason for waiting was.

20. For their part, the ACE Companies essentially invited Nationwide to participate in this proceeding by serving it with discovery in January 2005. See Exhibit A. Nationwide rebuked this invitation asserting it was a nonparty. See id. Thus, ACE Companies have not caused Nationwide to delay intervention.

21. Balancing against Nationwide's asserted interests is the fact that ACE Companies will be prejudiced by allowing Nationwide to insert itself into the case at this point. Allowing Nationwide into the proceeding to perhaps demand additional discovery, and potentially causing further delay through attempts to reopen evidence or otherwise prejudices the parties that pursued their interests in a timely manner both in terms of delay, and in resources needed to address Nationwide's actions. Moreover, it is a waste of the Court's time to have to address any additional

issues raised by Nationwide given that the Court has already conducted a week-long evidentiary hearing to complete its review of this Agreement.<sup>5</sup>

22. The prejudice to the ACE Companies should intervention be allowed at this point in the proceedings substantially outweighs any inconvenience advanced by Nationwide. ACE Companies were rebuffed in their efforts to obtain discovery from Nationwide, and Nationwide's refusal to enter the fray last winter prevents its orderly inclusion in the proceeding at this point.

23. In balancing all the factors set forth in the laches standard, including but not limited to the fact that:

- Nationwide has already approved the Agreement when given an opportunity to vote on it at the Scheme Creditor's meeting,
- It had full knowledge of the scheduling of the trial,
- It refused to engage in discovery claiming it was a non-party to the proceeding,
- Its counsel is monitoring the proceeding, and received daily transcript and all the exhibits,
- The substantial prejudice to ACE Companies if Nationwide is allowed to intervene now,
- The wasting of judicial resources by allowing Nationwide to reopen discovery or otherwise assert itself into the Court's decisionmaking in this matter given that the trial is now over, and
- Nationwide's failure to assert its rights earlier,

the Court should preclude Nationwide from asserting itself into the case at this point in the proceeding. See Nordic Inn Condominium Owners' Assoc., 151 N.H. at 576; Appeal of City of Laconia, 150 N.H. at 93.

#### IV. Conclusion:

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<sup>5</sup> To the extent Nationwide asserts that it has no intention of seeking discovery or otherwise inserting itself into this proceeding, it would only be confirming that it has no need to be part of this proceeding.

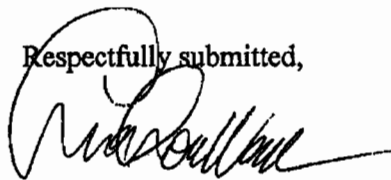
24. Other than asserting a need to preserve appellate rights from a proceeding in which it did not take part, Nationwide offers nothing new in its motion to intervene. Given that Nationwide has no standing to appeal from this Court's decisions when it did not participate in the proceedings before this Court, that ground for intervention must also be rejected. By failing to articulate a present, direct and apparent right in this proceeding, Nationwide cannot meet its burden of establishing a right to intervene. Even if it could, it has waited too long without any rationale for doing so, and in the face of insisting it was a non-party when ACE Companies sought discovery from it. In balancing the equities, Nationwide's motion must be denied.

WHEREFORE, the ACE Companies respectfully request that the Court:

- A. Deny the Motion to Intervene filed by Nationwide;
- B. Grant ACE Companies' costs and attorneys' fees for responding to this motion; and
- C. Grant such further relief as the Court deems just

Dated: August 22, 2005

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing pleading has been served on Roger A. Seigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on August 22, 2005:

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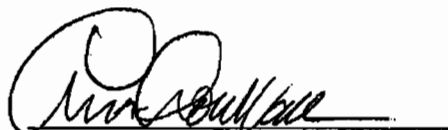
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