

Senate Bill 74 - Section 5

The Department of Insurance submits this memorandum to briefly respond to the written materials submitted for the first time at the February 1, 2005 hearing by the Reinsurance Association of America, the American Insurance Association, and the ACE Companies.

1. The amendment furthers the purpose of the New Hampshire Insurers Rehabilitation and Liquidation Act to protect the interests of policyholders, creditors and the public generally (RSA 402-C:1, IV). It does this by clarifying, not changing, the law to make clear that payments made by a liquidator to collect assets for the benefit of the insolvent insurer's priority creditors are administrative costs within RSA 402-C:44, I, and not precluded merely because the payments go to lower priority creditors. Since the payments are administrative expenses in the first priority class, they do not create subclasses or otherwise violate the priority statute.

2. The amendment confirms the existing law as determined by the Superior Court in the Home liquidation in the attached Order on Remand issued October 8, 2004 (pages 6-10, 14). The amendment is appropriate at this time because the issue is one of legislative intent that may be further contested before the New Hampshire Supreme Court. The Legislature could resolve the question of its intent through the clarifying amendment. The amendment protects consumers without adverse impact on reinsurers as described below.

3. The clarification proposed by the amendment benefits policyholders and other claimants under policies by facilitating the collection of amounts that otherwise would not be available for distribution to these priority creditors. The percentage dividends payable to these claimants will increase. The clarification also benefits the insurance buying public and the insurance industry because the dividends to the state insurance guaranty associations that pay claims under the policies of insolvent insurers will increase. The guaranty associations are policyholder priority creditors (RSA 402-C:44, II), and increased payments to them will decrease the need for assessments against their member insurers which are passed on to the public in increased insurance premiums (RSA 404-B:8, I(c), and RSA 404-B:16).

4. The amendment leaves debtors, such as the ACE Companies (and Benjamin Moore's affiliates), in a neutral position. They will be obligated to pay the same amounts as they would if the insurer had not become insolvent. If the reinsurers' view of the existing law were correct, however, they would receive a windfall from the insolvency because they would escape having to pay under their contracts just because Home became insolvent. As the ACE Companies conceded at the hearing, they did not price their reinsurance contracts in the expectation their reinsured would become insolvent so that they would not have to pay on their obligations.

5. The amendment will not somehow place New Hampshire out of "compliance" with the model act promulgated by the National Association of Insurance Commissioners (the association of the chief insurance regulatory officials of the states). The clarification is new text responding to a new issue, but it is consistent with the present model act and the laws of the various states. This is demonstrated by the NAIC's action in filing an amicus brief with the New

Hampshire Supreme Court supporting the Commissioner's position. Further, while the insurer liquidation statutes of the states generally follow one of the several versions of the model act adopted by the NAIC over the years, there are differences among the state statutes so that small variations are quite acceptable. As noted at the hearing, the NAIC working group passed on this issue because the model act permits the payments, and the matter may still be raised later in the revision process.

6. The amendment does not provide a liquidator with unfettered discretion or allow lower priority creditors to "jump ahead" of higher priority creditors. To fall within the amendment, a payment must assist or result in the collection of assets for the benefit of higher priority creditors. If it does not so advantage the higher priority creditors, it is not permitted. Further, agreements to make such payments are subject to review by the court supervising the liquidation for fairness and reasonableness, as noted in the Order on Remand (pages 11-13).